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SUBMITTED TO
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Introduction

Chairwoman Woolsey, Ranking Member Price and distinguished members of the Subcommittee, my name is China Miner Gorman. I am the Chief Operating Officer of the Society for Human Resource Management (SHRM), the world's largest association devoted to serving the needs of human resource professionals and to advancing the HR profession. On behalf of our more than 250,000 members, I thank you for the opportunity to appear before the Subcommittee to examine proposals for expanding workers' access to paid family and sick leave.

SHRM and its members believe the United States must have a 21st Century workplace flexibility policy that reflects the nature of today's workforce, and that meets the needs of *both* employees and employers. It should enable employees to balance their work and personal needs while providing predictability and stability to employers. Most importantly, such an approach must encourage employers to offer greater flexibility, creativity and innovation to meet the needs of their employees and their families.

The collective membership of SHRM represents the professionals who develop and implement human resource policies in organizations throughout the country and, as such, are responsible for administering employee benefit plans, including paid time-off programs. Our members are also constantly looking for ways to adapt and design workplace policies that improve employee morale and retention – two essential elements in developing and maintaining a productive workforce. It just makes sense that offering a solid benefits program makes it easier for organizations to attract and retain great employees. Given the practical experience SHRM and its members possess, we believe we are uniquely positioned to provide insight on a sensible federal leave policy that ensures fairness and balance for employees and employers.

For instance, while the Family and Medical Leave Act (FMLA) has helped millions of employees and their families since its enactment in 1993, key aspects of the regulations governing the statute's medical leave provisions have drifted far from the original intent of the Act, creating challenges for both employers and employees.

Family and Medical Leave Act

The FMLA 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.

From the beginning, HR professionals have struggled to interpret various provisions of the FMLA. What began as a fairly simple 12-page document has become 200 pages of regulations governing how the law is to be implemented.

This is the result of a well-intentioned, but counter-productive attempt to anticipate and micro-manage every situation in every workplace in every industry – without regard for the evolving and diverse needs of today's workforce or the new operations and technologies that organizations employ to stay competitive.

Among the problems associated with implementing the FMLA are the definitions of a serious health condition, intermittent leave, and medical certifications. In fact, 47 percent of SHRM members responding to the *2007 SHRM FMLA and Its Impact on Organizations Survey* reported that they have experienced challenges in granting leave for an employee's serious health condition as a result of a chronic condition (ongoing injuries, ongoing illnesses, and/or non-life threatening conditions). Vague FMLA rules mean that practically any ailment lasting three calendar days and including a doctor's visit, now qualifies as a serious medical condition. Although we believe Congress intended medical leave under the FMLA to be taken only for truly serious health conditions, SHRM members regularly report that individuals use this leave to avoid coming to work even when they are not experiencing serious symptoms. This behavior is damaging to employers and fellow employees alike.

For example, during the Department of Labor's request for information on organizations' experiences with the FMLA in 2007, a major airline carrier described how its employees are able to misuse FMLA leave. One of the airline divisions has historically high FMLA usage during the month of December, with peak usage the day before Christmas and the day after. However, FMLA

absences plummet on Christmas Day when employees in this division are eligible for triple overtime.

In addition to problems interpreting the federal statute equitably, states and cities are also passing laws with additional (and sometimes contradictory) employer mandates. In 2002, California became the first state to provide up to six weeks of 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, Washington, D.C. and Milwaukee enacted laws to provide paid leave to employees for similar situations. Several states have either considered or are currently considering enacting their own paid leave laws. In Ohio, a paid sick leave mandate similar to the Healthy Families Act was slated for consideration on the 2008 ballot, but was ultimately pulled after Democratic Governor Strickland opposed the proposal, saying: “We believe that this initiative is unworkable, unwieldy and would be detrimental to Ohio's economy, and we will be opposing it and asking Ohioans to oppose it as a result.”

However well-intended the original FMLA legislation was, our experience shows that while a federal policy is far preferable to a patchwork of city and state regulations – proscriptive attempts to micro-manage how, when and under what circumstances leave must be requested, granted, documented and used are counter-productive to encouraging flexibility and innovation. This is an especially important lesson when attempting to meet the evolving needs and desires of today’s diverse, flexible and mobile workforce. We therefore urge this Subcommittee not to impose additional mandates and regulations on organizations.

Healthy Families Act

Specifically, SHRM has strong concerns with the one-size-fits-all mandate encompassed in H.R. 2460, the “Healthy Families Act” (HFA). As others have noted, this bill would require public and private employers with 15 or more employees for 20 or more calendar workweeks in the current or preceding year to accrue one hour of paid sick leave for every 30 hours worked. Under the HFA, an employee begins accruing the sick time upon commencement of employment and is able to begin using the leave after 60 days. The paid sick time could be used for the employee’s own medical

needs or to care for a child, parent, spouse, or any other blood relative, or for an absence resulting from domestic violence, sexual assault or stalking.

We share the goal that employees should have the ability to take time off to attend to their own or a close family member's health, and that the leave should be paid. However, at a time when employers are facing unprecedented challenges, imposing a costly paid leave mandate on employers could easily result in additional job loss or cuts in other important employee benefits. While the HFA presents a host of practical concerns, I would note four significant challenges with this bill from an HR professional's perspective.

First, the HFA, like the current FMLA, prescribes a series of vague and ill-defined qualifying events that may trigger leave eligibility for the employee. Under the current FMLA, employers and employees alike must make a determination if the requested leave is eligible for coverage as a qualifying event. While in many instances this determination of leave eligibility under the FMLA can be made easily, in others it requires the employer and employee to make a rather subjective, sometimes intrusive determination to determine leave eligibility – often leaving both parties frustrated and distrustful of each other. Unfortunately, we anticipate that employers and employees will have a similar experience under the HFA in trying to determine leave eligibility.

Second, although it may not be the intention of the bill sponsors, the HFA would disrupt current employer paid leave offerings. For example, if an employer's existing paid leave policy fails to meet all the requirements of the Act, the employer's plan would need to be amended to comply with the HFA requirements. HR professionals are best situated to understand the benefit preferences of their workforce, not the federal government.

Third, the HFA specifically states that the Act does not supersede any state or local law that provides greater paid sick time or leave rights, thus forcing employers to comply with a patchwork of varying federal, state and/or local leave laws – as well as their own leave policies. As it stands now, employers consistently report challenges in navigating the various conflicting requirements of overlapping state and federal leave and disability laws. The HFA would only add to the already complex web of inconsistent but overlapping leave obligations under federal and state laws.

Finally, the HFA's inflexible approach could cause employers to reduce wages or other benefits to pay for the leave mandate and associated compliance costs, thereby limiting employees' benefit and compensation options. This is because employers have a finite pool of resources for total compensation. If organizations are required to offer paid sick leave, they will likely "absorb" this added cost by cutting back or eliminating other employee benefits, such as health or retirement benefits, or forgo wage increases, a potential loss to employees who prefer other benefits rather than paid sick leave.

SHRM believes the federal government should encourage paid leave – without creating new mandates on employers and employees. As has been our experience under the FMLA, these proscriptive attempts to micro-manage how, when and under what circumstances leave must be requested, granted, documented and used are counter-productive to encouraging flexibility and innovation. 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 personal life. Another rigid federal mandate would be more of the same.

Family Income to Respond to Significant Transitions Act

The Subcommittee is also considering H.R. 2339, the "Family Income to Respond to Significant Transitions (FIRST) Act." This legislation provides grants to states to implement programs that provide partial or full wage replacement for those taking leave for birth or adoption, or those who are taking leave to care for themselves, their child(ren), spouse or parent with a serious health condition, as defined by the FMLA.

Under H.R. 2339, states could provide wage replacement for employees out on FMLA leave through a state unemployment compensation benefit program. As you may know, the federal-state unemployment insurance (UI) system is a form of social insurance that was created in 1935 as part of the Social Security Act and was intended to provide a temporary source of income to *unemployed* individuals. Unemployment insurance is administered by each state and is funded through employer taxes.

While SHRM would welcome dialogue on positive ways to encourage financial support for parents who take leave following the birth or adoption of a child, we believe the FIRST Act is the wrong approach. HR professionals are particularly concerned with policy proposals that would further spend down unemployment insurance reserves for the entirely unrelated purpose of compensating leave takers – ultimately risking the safety net for unemployed workers.

During the present economic recession, with elevated levels of unemployment claims, it is critical that unemployment funds are available for the unemployed in order to fulfill the original purpose of the UI program. Therefore, we would encourage policymakers not to use unemployment compensation programs to provide paid leave. With UI funds severely strained, an expansion of the UI program at this time would likely lead to increases in employer payroll taxes at a time when employers can least afford it.

New Approach

SHRM and the 250,000 human resource professionals it represents believe it's time to give employees choices and give employers more predictability when it comes to a federal leave policy. We believe employers should be encouraged to provide the paid leave their workforces need – and let *employees* decide how to use it.

From our perspective, a government-mandated approach to providing leave is a clear example of what won't work – particularly during a time of economic crisis. Congress should refrain from pursuing additional employer mandates – rather, employers need to be unencumbered from proscriptive government rules, so that they can create innovative and more flexible ways to meet the needs of their employees. SHRM advocates an alternative approach – a 21st Century workplace flexibility policy – that for the first time reflects different workers' needs and different work environments, union representation, industries and organizational size.

In fact, many employers are already voluntarily providing paid sick, personal, vacation and maternity leave for employees. According to the *SHRM 2009 Examining Paid Leave in the Workplace Survey*, 81 percent of responding SHRM members reported that their organization offered some form of paid sick leave while 88 percent offered paid vacation leave. In the 2008

SHRM Employee Benefits Survey, 15 percent of respondents indicated their organization offered paid maternity leave outside of what is covered by a short-term disability benefit.

More employers have begun to offer Paid Time Off (PTO) plans in lieu of other employer-sponsored paid leave programs because these types of plans are preferred by employees and employers. 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 2009 Examining Paid Leave in the Workplace Survey*, 42 percent of employers offer PTO plans to their employees. Congress should build on the progress that is already being made by offering incentives for employers to do more – not risk the unintended consequences of an onerous government mandate that could very well result in decreased benefits and fewer new jobs.

SHRM has developed a set of five principles to help guide the creation of a new workplace flexibility statute. In essence, SHRM believes that all employers should be encouraged to provide paid leave for illness, vacation and personal days to accommodate the needs of employees and their family members. In return for meeting a minimum eligibility requirement, employers who choose to provide paid leave would be considered to have satisfied federal, state and local requirements and would qualify for a statutorily defined “safe harbor.” I have outlined our principles below:

SHRM’s Principles for a 21st Century Workplace Flexibility Policy

Shared Needs – SHRM envisions a “safe harbor” standard where employers voluntarily provide a specified number of paid leave days for employees to use for any purpose, consistent with the employer’s policies or collective bargaining agreements. A federal policy should:

- Provide certainty, predictability and accountability for employees and employers.
- Encourage employers to offer paid leave under a uniform and coordinated set of rules that would replace and simplify the confusing – and often conflicting – existing patchwork of regulations.

- Create administrative and compliance incentives for employers who offer paid leave by offering them a safe-harbor standard that would facilitate compliance and save on administrative costs.
- Allow for different work environments, union representation, industries and organizational size.
- Permit employers that voluntarily meet safe harbor leave standards to satisfy federal, state and local leave requirements.

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

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

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

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

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

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

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

- Amend federal law to allow employees to balance work and family needs through flexible work options such as telecommuting, flextime, part-time, job sharing and compressed or reduced schedules.
- Permit employees to choose either earning compensatory time off for work hours beyond the established work week, or overtime wages.
- Clarify federal law to strengthen existing leave statutes to ensure they work for both employees and employers.

Conclusion

SHRM is committed to working with this subcommittee and other Members of Congress to craft a workplace leave policy that provides flexible paid leave for employees in a manner that does not threaten existing benefits or create unnecessary and counterproductive regulations. It's time to pursue a new approach to this issue absent of rigid, unworkable mandates. It's time to give employees greater flexibility and to give employers more predictability. It's time to *encourage* paid leave – *without* stifling existing innovative benefits or hindering job creation.

Thank you.