

Susan A. Lueger
Vice President – Human Resources

720 East Wisconsin Avenue
Milwaukee, WI 53202-4797
414-665-7197 office
414-665-5492 fax
suelueger@northwesternmutual.com

Dear Senators Collins, Crapo, Dodd, Kohl, Lincoln, and Voinovich:

As the Chairman of the HR Policy Association's Employment Rights Committee, I am pleased to respond to your request regarding the Association's views on family and work-life balance issues. We appreciate your reaching out to us and others in the business community to achieve consensus-based, bipartisan solutions that work for employers and employees.

HR Policy Association represents the senior human resource executives from more than 275 of the largest employers operating in the United States and globally. Collectively, these companies employ more than 18 million people worldwide, including more than 12 million in the United States. Northwestern Mutual and the other HR Policy member companies are committed to creating a dynamic workplace, which requires sufficient flexibility for employees to balance work and family needs while at the same time ensuring the ability of the company to maintain functionality, productivity and competitiveness. We believe that workplace flexibility can, in many instances, provide win-win solutions for both employers and employees, provided great care is taken to avoid unintended consequences.

As Congress considers measures in this area, our primary concerns are two-fold. First, a legislated approach to flexibility should allow companies to preserve existing, equivalent mechanisms that fit their workplaces. While many companies are committed to workplace flexibility approaches that often include generous and progressive leave and scheduling policies, these policies are a part of a much larger framework that includes compensation, benefits, corporate culture and other elements that may be unique to each sector or industry, company, division, plant, store and each job position. Most companies learned after the enactment of the Family and Medical Leave Act that even if they previously had been providing benefits equivalent to those mandated, *how* the companies provided those benefits differed substantially from the means required by the FMLA. These mandated differences added significant costs, administrative burdens, and other hardships by requiring them to provide essentially the same benefits, but in a different way.

Second, we are concerned about any new mandates that threaten to undermine the economic recovery that is so critical to our nation's future. Enacting any new legislation at this time, especially legislation that will increase operating costs to companies is not prudent.

For these reasons, we strongly advise against enacting new "one size fits all" prescriptions in this area. Rather, a more productive approach would be to examine the existing laws to determine which statutes now in place are hampering the ability of employers to provide flexibility. For example, in caregiver situations employers often allow employees to take laptops home if an employee needs to leave the workplace early to provide care for a sick child. That way, the employee can continue to work at home without significant interruption or loss of pay. However, if the employee checks and responds to work email from home for a couple of minutes the next morning before leaving for work, the employer may be obligated to pay the employee for that time *plus* the time of the employee's commute because the Fair

Labor Standards Act of 1938 requires employers to compensate non-exempt employees for all work time regardless of whether the time is recorded or where it is performed. It is not clear under the FLSA whether the employee's workday began when he or she checked emails making the commute "working time" as well. Such uncertainties, which could be clarified, discourage employers from providing more flexibility.

Along those lines, our Employment Rights Committee has adopted a set of principles to guide the Association in evaluating current laws as well as pending measures. What follows is a discussion of these principles. In addition, I have attached the Association's analysis of a key pending measure—the Healthy Families Act—in which these various principles were applied in assessing the legislation.

1. *Clarity*

- Leave laws and regulations must be easy to understand and apply (not necessarily simple)
- Leave laws and regulations must be practical to administer and practical in terms of costs to administer
- Regulations must stay true to the letter and intent of the statute

2. *Flexibility*

- Not all companies are the same and they must have discretion to develop leave policies and benefits to suit their business needs and the needs of their workers
- Leave laws and regulations must not stifle companies' creativity in responding to changing domestic and global circumstances
- Mandated minimums result in disparate impact on companies, due to their size or other factors

3. *Fair & Balanced*

- Leave policies and benefits must balance companies' business and personnel needs with employees' personal and family leave needs
- Those exploiting leave entitlements create an undue hardship in the workplace for employees and employers

4. *Efficiency:*

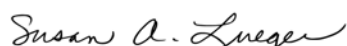
- Leave laws and regulations should be minimal
- Leave laws and regulations should be coordinated in content and modified to eliminate any conflicts
- Patchworks of leave laws and regulations impose hardships in designing and administering workplace leave policies and benefits

5. *Consistency:*

- There must be nationwide uniformity for leave laws, regulations and administrative procedures

We appreciate your consideration of our views. If you have any further questions, please do not hesitate to contact me or Mike Peterson, Director of Labor and Employment Policy at HR Policy Association (202-789-8659; mpeterson@hrpolicy.org).

Sincerely,



Sue Lueger

MEMORANDUM 09-67

JUNE 1, 2009

TO: HR Policy Prime Representative
Washington Representatives
Employment Rights Committee

FR: Jeffrey C. McGuiness

RE: **Healthy Families Act Mandates 56 Hours of Paid Sick Leave Annually to All Employees, Including Part-Timers**

H.R. 2460/S.1152 Would Allow Paid Sick Leave to be Taken Intermittently

An important item in the Democratic Congress' "family friendly" agenda is the move to mandate employers to have certain leave policies. A major focal point of this debate is the "Healthy Families Act" (HFA) (H.R. 2460 / S. 1152) introduced by Rep. Rosa DeLauro (D-CT) and Sen. Edward Kennedy (D-MA), which would require employers to provide 56 hours of job-protected paid sick leave per year.

There has never been a general federal mandate that employers provide any type of paid leave. Many employers, including almost all large employers, offer paid sick leave to most, if not all, of their employees as an integral method of attracting and retaining the best possible workforce; however, these benefits vary by employer.

The HFA, however, would significantly limit an employer's flexibility in designing and administering leave programs and benefits. In addition, some other problems with the HFA include:

- Permitting the creation of a complex patchwork of different federal, state and local mandates;
- Including part-time employees, temporary or seasonal employees who work at least 60 days to accrue paid sick leave;
- Letting HFA leave to be taken in increments of one hour or less;
- Enforcing claims for paid sick leave—a few days or even hours of leave—through disproportionately expensive litigation instead of a more efficient, cost effective administrative procedure;
- Permitting employees who carry over leave to take up to 112 hours of paid sick leave per year.

The bill also retains its fundamental flaw of imposing new mandated costs on employers at a time when the economic recovery is uncertain at best. Moreover, it would impose new administrative burdens on employers who are already providing benefits at least as generous as those required by the bill. This memorandum analyzes the HFA and examines the concerns employers would have in seeking to implement it.

IN BRIEF

Part-time employees would be included and, in certain instances, employees could use more than 56 hours of leave in a year.

Paid leave could be taken intermittently for numerous reasons.

The bill does not preempt state and local laws, precluding employers from having uniform, nationwide benefits.

On HRPolicy.org

View the Healthy Families Act at
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2460ih.txt.pdf

Policy Staff Contact

The HR Policy Association staff member responsible for this is Mike Peterson
mpeterson@hrpolicy.org.

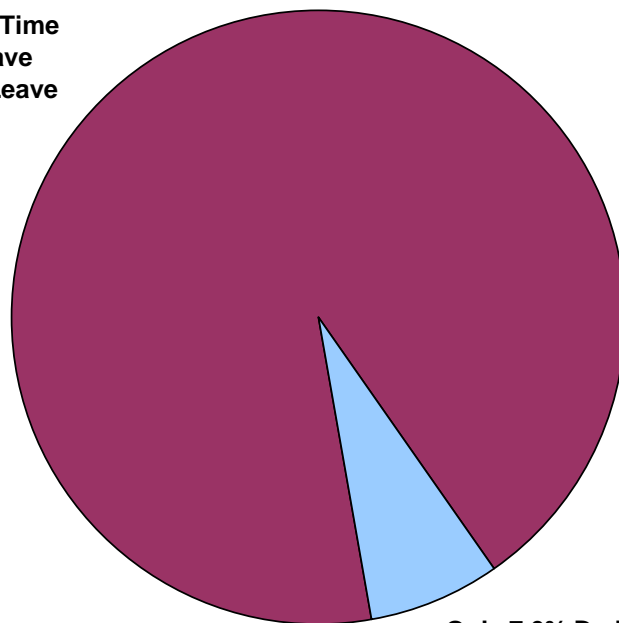
I. Data on All Leave Benefits Puts Sick Leave in Perspective

Proponents of the Healthy Families Act claim that “nearly half (48%) of private sector workers—and nearly 80% of low-wage workers—do not have paid sick leave to care for their own health.”¹ Paid sick leave, however, is only part of the equation. In fact, most employees have access to paid leave that can be used for, among other reasons, sick leave. According to the U.S. Bureau of Labor Statistics (BLS), 83 percent of all workers in private industry have access to paid illness leave, far more than proponents of the HFA recognize.² The BLS defines illness leave as any combination of paid leave benefits that can be used to attend to illness or injury.³ As noted by the BLS, focusing on paid sick leave alone does not tell the whole story. “A complete picture of access to benefits should present not just benefits in isolation, but benefits in combination.”⁴

In 2008, 93 percent—nearly all—of full-time employees had access to paid illness leave.⁵ (See Chart 1). Moreover, a majority of part-time workers, 51 percent, have paid illness leave even though most—82 percent⁶—voluntarily work part-time to better manage work and family. Further, the vast majority, 79 percent, of low-wage workers (\$7.25 to \$14.99 per hour) have paid illness leave.⁷ (See Chart 2). Moreover, 94 percent of large employers—defined as employing 500 or more workers—provide illness leave and even 76 percent of all workers in small businesses (1 to 49 workers) have paid illness leave⁸ and “other employers offer informal plans. (See Chart 3). For example, those in which paid time off due to health-related concerns is granted by the employer on a case-by-case basis.”⁹

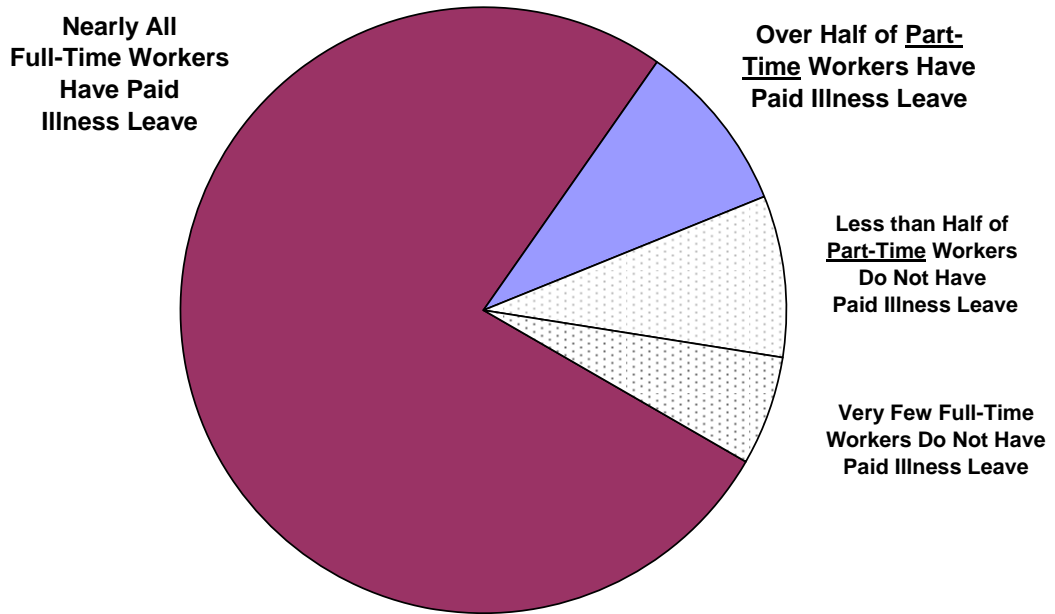
Chart 1: Nearly All Full-Time Workers Have Access to Paid Illness Leave

**93.0% of Full-Time
Workers Have
Paid Illness Leave**



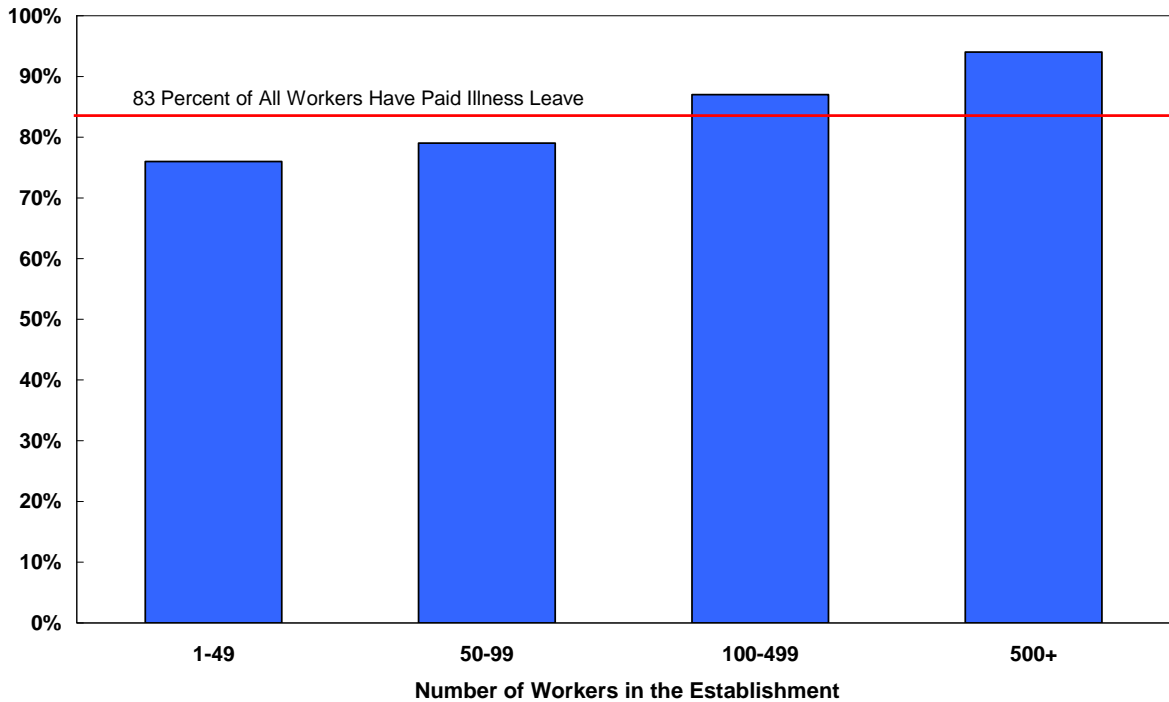
Only 7.0% Do Not

Chart 2: Most Workers, Including Many Part-time Employees Have Access to Paid Illness Leave



Source: Bureau of Labor Statistics, available at: www.bls.gov/opub/mlr/2009/02/art3full.pdf.

Chart 3: Most Workers in Small Businesses Have Access to Paid Illness Leave



Source: Bureau of Labor Statistics, available at: www.bls.gov/opub/mlr/2009/02/art3full.pdf.

Employers, and particularly large multi-state employers, are already providing substantial paid leave benefits for employees. Yet, the HFA would impose an additional layer of workplace regulation and create an administrative quagmire and numerous potential pitfalls for well-intentioned employers. This problem could be compounded exponentially because the HFA refuses to incorporate one federal standard by preempting State or local paid leave laws. Moreover, the legislation would also substantially increase indirect administrative costs and open employers to significant litigation costs for a simple dispute over a couple of days (or hours) of paid sick leave.

There is a consensus among most economists that the costs of employer mandates are passed on to workers in the form of lower wages and reduced job opportunities.¹⁰ With so many workers already having access to paid illness leave benefits, the focus should be on ways to increase job opportunities and not on well-intended legislation that has destructive unintended consequences.

II. The Requirements of the Healthy Families Act

The HFA would mandate that employers provide 56 hours of job-protected paid sick leave. The expansive paid sick leave provisions would be available to all employees. The paid sick leave could be used for an illness or doctor's appointment of the employee, a family member, or others "in the equivalent of a family relationship." Paid sick leave could be taken intermittently as under the Family and Medical Leave Act (FMLA), and unused leave would be carried over to subsequent years.

The HFA is stand-alone legislation but it adopts many of the concepts and definitions found in the FMLA. This legislation is intended by its strongest supporters to lay the groundwork for paid FMLA leave. The Multi-State Working Families Consortium along with the National Partnership for Women and Families as well as nine other national groups¹¹ have identified the HFA as merely the first step in bringing the American workplace in line with Europe and other nations of the "advanced world."¹² Other proposals by the Consortium that are in line with this Europeanization of the American workplace include¹³ providing paid FMLA leave,¹⁴ restricting employers from using "mandatory overtime,"¹⁵ and replacing the "at-will employment" standard with the "just cause" standard for job dismissal.¹⁶

Eligibility for Leave Under the Healthy Families Act

Under the HFA, employees working for an employer with 15 or more employees would "earn" one hour of paid sick leave for every 30 hours worked.¹⁷ This would apply to all employees.¹⁸ Unlike the previous version of the legislation, there is no exclusion of part-time employees or employees working fewer than 20 hours per week or 1,000 hours per year.¹⁹ In contrast, the FMLA requires that an employee work for an employer for 12 months and 1,250 hours to be eligible for leave. However, under the HFA employees immediately begin accruing paid sick leave and can use accrued leave after 60 calendar days of employment.²⁰ Besides this initial waiting period, employees may "use the paid sick leave as the time is accrued."²¹ Moreover, unlike the previous version of the HFA, if an employee is separated from employment but is rehired within 12 months, the employer must restore the "employee's previously earned paid sick time" and the employee may use and accrue additional paid sick time upon reemployment.²² However, an employer is

not required to “reimburse” an employee for unused paid sick time upon his or her termination, resignation, retirement, or other separation from employment.²³

Carry-over of Accumulated Leave. The HFA would provide that an employee’s unused sick leave may accumulate and be carried forward to the next year, although an employer is not required “to permit an employee to accrue more than 56 hours of earned paid sick leave at a given time.”²⁴ For example, an employee who only uses 16 hours of paid sick leave in 2010 would carry over 40 hours of paid sick leave to 2011. The problem, as will be discussed below, is that an employee can arguably continue to bank paid sick leave from year to year and use more than 56 hours of paid sick leave in any calendar year.

Definition of Employer. The HFA defines an “employer” as “any person who employs 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”²⁵ This definition is similar to the FMLA with the exception that it applies to persons who employ 15 or more employees as opposed to 50 or more employees under the FMLA definition.²⁶

Other elements of the definition of “employer” are also identical to similar provisions under the FMLA. For example, an employer would also include “persons who act, directly or indirectly, in the interest of an employer to any of the employees of such employer.”²⁷ This definition is inclusive enough to impute personal liability to corporate officers and managers for violations of the HFA. Indeed, a majority of courts have concluded that such individuals have potential personal liability under the same definition in the FMLA.²⁸

Use of Leave Under the Healthy Families Act

Purpose of the Leave. Eligible employees could use paid sick leave for absences due to their own “physical or mental illness, injury, medical condition” or to obtain a “medical diagnosis or care, or preventative medical care.”²⁹ This standard is broader than the FMLA’s “serious health condition” standard. The HFA also provides that employees may take paid leave for the reasons listed above to care for a “child,³⁰ parent,³¹ spouse,³² or any other person related by blood or affinity whose close association with the employee is the equivalent of a family relationship.”³³ This standard is likely to include siblings, aunts, uncles, domestic partners, or even close friends, making it more expansive than the FMLA, which provides employees job-protected leave to care for a spouse, children, or parents.

Meanwhile, the new legislation expands the previous bill by creating paid leave rights for activities associated with “domestic violence, sexual assault, or stalking” including taking legal action, seeking medical attention, relocating, or recovering.³⁴

Existing Policies. In a new provision that was not included in the previous bill, employers with paid leave policies that provide an equivalent amount of leave to employees as that mandated by the HFA are not “required to permit employees to earn additional paid sick time” so long as the paid leave may be used “for the same purposes and under the same conditions” as required by the legislation.³⁵ This provision apparently seeks to cure two significant problems in the previous version of the HFA. First, it does

not lock in an employer's existing benefits and require an employer to add an additional seven days of paid sick leave if an employer's leave policy did not match up exactly with the dictates of the Act,³⁶ which would have penalized employers who already provided paid leave to their employees. Second, the current version of the HFA would allow employers to use PTO banks, which combine traditional paid sick leave days, vacation days and other paid leave time into one consolidated paid leave program so long as the paid leave can be taken for the same reasons and under the same conditions as set forth in the HFA.

These programs, which are very popular among employees, would have effectively become obsolete under the previous version of the HFA because it would have required employers to specifically identify seven days, which are solely for "sick leave," thus negating the very purpose of a PTO program. If an employer failed to segregate sick leave under the PTO bank and the employee exhausted his or her bank for personal reasons, the employer would be required under the law to provide paid sick leave anyway. Proponents of the HFA, however, apparently recognized and attempted to correct this problem. In introducing the legislation, Rep. DeLauro declared that "employers that already provide this leave will not have to change their current policies at all, as long as their existing leave can be used for the same purposes described in the bill" and that she "does not want to upset existing leave programs."³⁷ It remains unclear, however, whether this provision would be interpreted so that most employer-provided paid leave programs would be considered to satisfy the demands of the Act or whether such paid leave programs would have to meet a high threshold of hyper-technical requirements.

Intermittent Leave. The legislation would allow employees to use paid sick leave on an intermittent basis. Employees could use paid sick leave for periods of less than a full workday and at least on an hourly basis, but employees could also likely use the paid leave in fractions of an hour. While the text of the legislation regarding intermittent leave has changed, the practical result does not appear to have changed. Under the previous version of the HFA, an employee could use paid sick leave on the lesser of an hourly basis or the "smallest increment that the employer's payroll system uses to account for absences or use of leave."³⁸ The current version of the HFA, however, permits employees to "use the paid sick time as the time is earned"³⁹ and employers must "permit each employee" to earn one hour of paid sick leave for every 30 hours worked.⁴⁰

The HFA, however, is silent regarding whether paid time is accrued or "earned" in fractions of an hour. Because most employers track work time in fractions of an hour, paid sick leave would likely be determined to accrue in fractions of an hour. Accordingly, employees would likely be permitted to take HFA leave in less than one-hour increments. Moreover, if it was the intent of the legislation to limit HFA leave to be taken in no less than one-hour increments, the drafters could have simply added the provision found in the City of Milwaukee's recently enacted sick leave ordinance, which states that "paid sick leave shall accrue in hour unit increments."⁴¹ That provision has been interpreted in a manner that "paid sick leave must be used in increments of one hour, not in fractions of an hour."⁴² Thus, the HFA's intermittent leave standard is similar to that in use under the FMLA and such an intermittent leave standard would be subject to the same administrative difficulties which plague the FMLA. Moreover,

because the permitted reasons for leave are much broader than the “serious health condition” standard under the FMLA, the problem would be even more pervasive.

Notice of Leave and Certification. The HFA provides that employees must, either orally or in writing, request the paid sick leave, explaining the expected duration of the leave.⁴³ Under this version of the HFA, employees would no longer be required to explain “reason for the absence.”⁴⁴ Employees would be required to provide seven days notice if the leave is foreseeable or, if not, as soon as the employee is aware of the need for the leave.⁴⁵ An employer may require that a health care provider⁴⁶ certify the leave if it extends for more than three consecutive workdays. In that case, employees must provide the employer the certification no later than 30 days after the first day of leave.⁴⁷ Importantly, however, employers cannot deny or delay the leave on the grounds that they have not received the certification.⁴⁸ Thus, employers would have already paid the employee for the sick leave but may have to wait as long as 30 days to determine whether the reason for the leave and certification are legitimate.

If the absence is related to domestic violence, sexual assault, or stalking, an employer can request that the absence be supported by a police report indicating the employee or family member was a victim, a court order protecting the employee or family member from an alleged perpetrator, or “other evidence from the court or prosecuting attorney” that the employee or family member has or is scheduled to appear in court.⁴⁹ Alternatively, a document signed by, among others, an employee or volunteer of a victim services organization, an attorney, police officer, social worker, or clergy affirming that the employee or family member was a victim of domestic violence, sexual assault, or stalking will suffice as a proper certification.⁵⁰

Enforcement and Damages For Alleged Violations of The Healthy Families Act

Who May Sue. The HFA, in comparison with other federal employment laws, drastically expands the number of people who may sue an employer for an alleged violation of the Act. The legislation provides that *any* individual, employee, or other similarly situated individual may sue an employer for damages.⁵¹ Thus, the plaintiff need not have an employment relationship with the employer being sued.

Damage Claims. Two general claims may be brought under the HFA. First, aggrieved individuals may recover an amount equal to 56 hours of wages or salary if an employer fails to provide paid sick leave.⁵² Second, the Act provides that individuals may sue employers for damages equal to the amount of any wages or benefits lost as a result of interference or discrimination under the HFA, up to 56 hours of pay.⁵³ Interference and discrimination includes taking any negative action that would impede or negatively impact an employee’s exercise of any right under the HFA.⁵⁴ For example, if an employee was terminated or suspended for attempting to take paid sick leave or engaging in protected activity, the employee could be reinstated and would be entitled to lost wages and benefits damages. This would also apply, for example, if an employer counts “the sick leave under a no-fault attendance policy.”⁵⁵ As under the FMLA, prevailing plaintiffs would be entitled to liquidated damages (*i.e.*, double damages), interest, and attorney’s fees and costs. However, unlike the FMLA, the HFA contains no provision giving courts authority to eliminate or reduce the amount of liquidated damages

if an employer can show that the action was in good faith and had legitimate grounds to believe that it was complying with the Act.⁵⁶

Statute of Limitations. The statute of limitations under the HFA is also nearly identical to that in use under the FMLA. It provides that employees may bring suit within two years after the last event constituting an alleged employer violation of the Act,⁵⁷ and the time period is extended to three years if it is determined that the violation was “willful.”⁵⁸

III. The Healthy Families Act Is Unacceptably Vague And Is Inconsistent With Other Federal Employment Laws And Policies

No Preemption Will Result in a Patchwork of Paid Sick Leave Requirements

Several localities—including San Francisco, Milwaukee, and the District of Columbia—have passed paid sick leave mandates that vary in their provisions and numerous other jurisdictions are considering following suit. The result would be a patchwork of varying (and even conflicting) requirements straining the ability of multi-state employers to have nationwide uniform benefits, as is guaranteed their retirement and health plans by the preemption provisions of the Employee Retirement Income Security Act (ERISA). Yet the HFA expressly states that it would not “supersede (including preempting) any provision of State or local law” that provides more generous paid sick leave rights. This would create the very real problem of employers trying to comply with different paid sick leave standards throughout numerous cities and states. Not only could the number of hours differ, but also, multi-state employers would be required to deal with dozens (or more) notice, certification, recordkeeping, and other administrative mandates. Such administrative difficulties would substantially increase indirect personnel administrative costs. If Congress were to decide that employers must provide paid leave to employees, there is no good reason why there shouldn’t be one federal standard in order to at least minimize significant indirect costs associated with the administrative quagmire and pitfalls—particularly in light of the fact that large (*i.e.*, multi-state) employers overwhelmingly provide paid leave to their employees.⁵⁹

“Earning” Paid Sick Time Could Create a New Property Right

The HFA requires an employer to permit employees to “earn” paid sick time, whereas the previous version simply required an employer to “provide” employees paid sick leave.⁶⁰ Moreover, under the previous version it was reasonably clear that employees were not entitled to receive compensation for or could not “cash-out” unused paid sick leave. By using the term “earn,” the new version of the legislation appears to convey the sense that unused paid sick leave may become a vested property right. While the HFA provides that it shall not be “construed as requiring financial or other reimbursement to an employee ... upon the employee’s termination, resignation, retirement, or other separation from employment for earned paid sick time that has not been used,” there is no language in the legislation that would prohibit earned paid sick time to be considered earned but unpaid wages under state wage laws. Accordingly, employees leaving an employer may pursue earned but unused HFA paid sick leave under state wage laws.

Potential Entitlement to More than 56 Hours Per Year

The way the provisions of the HFA regarding “earning,” “accrual and use,” and “carryover” work together would allow for employees to use more than 56 hours (and up to 112 hours) of paid sick leave in a calendar year. Under the HFA, an employee “earns” one hour of paid sick leave for every 30 hours worked although “an employer shall not be required to permit an employee to earn ... more than 56 hours of paid sick time in a calendar year.”⁶¹ And any “earned” but unused HFA leave shall “be carried forward from one calendar year to the next.”⁶² Yet an employer is not required “to permit an employee to accrue more than 56 hours of earned paid sick leave at a given time.”⁶³ Thus, while the HFA would prohibit an employee from “earning” more than 56 hours of paid sick leave in a calendar year, it would not prohibit the “accrual” or “use” of more than 56 hours in the same year if unused sick leave from the previous year were carried over.

The following hypothetical is illustrative of this problem. Employee X only uses eight hours of paid sick leave in 2010, and carries over 48 hours of paid sick leave to 2011. Because X does not have a total of 56 hours of paid sick leave at the beginning of 2011, employer Y must permit X to “earn” sick leave up to a maximum of 56 hours. During the first week of February 2011, X uses all 48 hours which had been carried over plus those paid sick leave hours which he or she accrued in January 2011 (approximately 5 hours of paid sick leave for a full time employee). Upon returning to work for the second week of February 2011, X immediately begins to “earn” paid sick leave under the HFA because, while employer Y does not need to allow X to “accrue more than 56 hours of earned paid sick leave at a given time,”⁶⁴ X no longer has any paid sick leave hours, and according to the HFA X is entitled to earn up to 56 hours in a calendar year (i.e., 2011).⁶⁵ In fact, X could accrue enough paid sick leave in the remainder of 2011 to take an additional 51 hours (X already used 5 hours earned in January) of paid leave by mid November of 2011.⁶⁶ If X took the 51 hours of paid sick leave in 2011, X would have taken a total of 104 hours of paid sick leave in the 2011 calendar year. Indeed, if an employee carried over a full 56 hours of paid sick leave from one year to the next, the HFA would provide that he or she could take up to 112 hours of paid sick leave in a calendar year.

Enforcement Through Litigation Would be Expensive and Inefficient

Claims for paid sick leave or violations of the HFA would almost exclusively be enforced through private lawsuits. But the HFA’s enforcement mechanism is grossly disproportionate to the monetary amount that would be in dispute. At issue in the vast majority of HFA lawsuits would be a few days or possibly even hours of paid sick leave to which an employee alleges he or she is entitled. Indeed, the upper limit of monetary damages would be 56 hours of an employee’s pay, and in some instances this amount could be doubled. In other words, a relatively small amount of money would be at issue. Yet the HFA would require employees and employers to engage in costly litigation to resolve a dispute over a few days’ or hours’ worth of pay.

A more responsible approach would be to adopt an administrative enforcement scheme in which an employee files a complaint with a federal government agency, such as the Department of Labor (DOL), which would in turn resolve the dispute.⁶⁷ Such a procedure is not without precedent. For example, when an employee seeks

unemployment insurance compensation he or she files a claim with the respective state agency and the matter is determined at an administrative level. The decision is generally made on the documents submitted or through telephone hearings. And the monetary value at issue in unemployment compensation claims far exceeds that of HFA claims—generally a percentage of multiple months’ worth of pay compared to a maximum of 56 hours of paid leave under the HFA.

Moreover, an administrative enforcement mechanism would also likely be much more efficient than litigating a low-cost case in the clogged court dockets of the federal and state judiciaries. DOL decisions would be much faster than protracted litigation and result in the employee receiving his or her paid leave or in the employer prevailing. An administrative scheme would also likely lead to high settlement rates because an employer would be alerted of the claim and could settle it (if meritorious) before a lawsuit would be filed. In sum, the HFA’s enforcement scheme could be much more simple, efficient, and cost effective. Indeed, the current scheme would only stand to benefit attorneys litigating these matters.

The Scope of Individuals Who Can Sue Under the Healthy Families Act is Too Broad

The HFA is inconsistent with federal employment law and policy because it does not require that a plaintiff have an employment relationship with an employer to bring suit. For example, the legislation not only provides that “employees” may file claims, but it also permits “any individual” or “others similarly situated” to sue employers for alleged violations of the Act.⁶⁸ By contrast, the other federal nondiscrimination statutes, as well as the FMLA,⁶⁹ require an employment relationship between a plaintiff and employer. Under the HFA, an independent contractor—or even employee of the independent contractor—could bring suit against an employer seeking paid sick leave. Eliminating the requirement of an employment relationship and permitting an over-broad group of plaintiffs to sue employers is inconsistent with federal law and policy and will result in increased litigation.

In addition, the HFA would allow “job applicants” to sue for violations.⁷⁰ Though applicants would not be entitled to paid sick leave, because they are not employees who have worked any hours to accrue paid sick leave, such individuals could bring suit if they simply asked “what kind of benefits are available” and then did not get the desired job. Benefit issues, such as leave, are often the subject of discussion during job interviews and permitting lawsuits based on legitimate, routine interview discussions is overreaching. Including job applicants as potential plaintiffs may lead to the unintended consequences of making discussions about benefits or leave a subject that is off-limits during job interviews.

Leave for Almost Any Reason Could be Considered Sick Leave

The types of “sick leave” covered by the legislation are overly broad and go well beyond the kinds of leave permitted under most policies. As noted above, the bills provide that employees may use paid sick leave for absences due to their own “physical or mental illness, injury, medical condition” or to obtain a “medical diagnosis or care, or preventative medical care” or use paid sick leave for the same reasons to care for others. These terms are expansive and may prompt eligible employees to use their sick leave for other reasons. For example, the phrase “preventative medical care” could be interpreted

to apply to anything that may be “just what the doctor ordered.” Indeed, a strong case could be made that an employee could take sick leave to go jogging if a health care provider instructed the employee to exercise as a means to better the employee’s health. In addition, it could include taking days off to rest at home or enjoy a picnic in the park to reduce an employee’s stress, which could be interpreted as “preventative medical care.” As with many of the important terms or phrases in the HFA, “preventative medical care” lacks clarity and is undefined and could be the source of considerable abuse.

Mandated Paid Sick Leave Will Decrease Wages and Affect Other Employees

One of the unintended consequences of the HFA would be to depress other areas of employee compensation, such as wages. As a Congressional Research Service study recently noted, “If Congress were to pass [the HFA] . . . one would expect the compensation costs of employees to increase. . . . Because employees generally are no more valuable (*i.e.*, productive) to businesses after imposition of a benefit . . . they have no economically sound reason to raise their workforce’s overall total compensation as a result. . . . Economists therefore theorize that firms will try to finance the added benefit cost by reducing or slowing the growth of other components of compensation.”⁷¹

The HFA Lacks Sufficient Clarity for Employers to Comply With Leave Requirements

At first glance, the HFA may appear to be a rather straightforward attempt to grant paid sick leave to all employees, but a closer look at the legislation reveals a significant lack of *clarity*.

Perpetrators of Domestic Violence, Sexual Assault, and Stalking Could Use Paid Leave. While it is unlikely that it was intended by the drafters, one of the most troubling aspects of the legislation is that it would permit perpetrators of domestic violence, rapists, or stalkers to use paid sick leave to attend court proceedings. Under the certification provisions for absences in the case of domestic violence, sexual assault, or stalking, an employer can require certification for absences for victims of the above-mentioned crimes. However, the HFA also provides that an employee can provide “other evidence from the court or prosecuting attorney that the employee . . . has appeared in court or is scheduled to appear in court in a proceeding related to domestic violence, sexual assault, or stalking.”⁷² There is no requirement that the employee or the employee’s family member be the victim. Indeed, the requirement is that the employee or employee’s family member is scheduled for or attended a court proceeding that is “related to” the aforementioned crimes and that he or she produce a court document reflecting the appearance. Consequently, an employee could simply produce his or her own indictment (*i.e.*, court document) as a certification and the employer would have to provide paid leave for such an appearance. Assuming this was not the intent of the sponsors of the legislation, the provision needs to be redrafted to ensure that its protections only apply to victims.

Weak & Ambiguous Certification Requirements. Even though the HFA provides that an employer may require a certification from an employee who takes three consecutive workdays of paid sick leave, the legislation undercuts the requirement by mandating that the certifying health care provider make “reasonable efforts” to limit the medical facts that are disclosed in a medical certification.⁷³ No explanation of how health care providers are to limit the information contained in the certification is provided.⁷⁴ In fact,

the limitation on the “medical facts” a health care provider may disclose would seem to make any medical certification of little use.⁷⁵ In addition, under the HFA it is unclear what, if any, recourse an employer would have if a medical provider failed to submit the certification. The HFA also fails to describe what recourse an employer has if an employee fails to produce a sufficient certification and the employee has already been paid for the sick time.

Moreover, many employers currently require that employees taking sick leave provide some kind of certification from the medical or dental provider even if the employee is simply going to a routine doctor’s appointment that only lasts a couple of hours. It would appear that the HFA’s limit that a certification only needs to be provided after taking three consecutive days of sick leave prohibits employers from requiring such certification for any paid sick leave of fewer than three days. However, it is unclear whether the HFA’s three-day certification requirement would prevent employers from utilizing such a policy if the employee had exhausted all his or her HFA paid sick leave and the employer provided more generous leave.

The Term “Paid” Is Not Defined. A problem exists in that the HFA fails to define the term “pay.” In requiring an employer to provide paid leave, it is unclear whether this applies to all forms of compensation or just for regular hours worked. Would eligible employees be entitled to have incentive, differential, or bonus pay calculated into the paid leave amount? Take, for example, an employee who rotates between day and night shift every six months. It is not uncommon for some employers to pay a shift differential. Consequently, he or she could make \$15 per hour for the day shift and \$20 per hour for the night shift. It is unclear how such an employee’s “paid sick leave” would be calculated. The term “pay” should be defined. Otherwise, the statute would be difficult for employers and courts to understand and impossible to administer.

Confidential Medical Information. The HFA would prohibit an employer from disclosing any “health information” about “an employee or an employee’s child, parent, spouse, or other individual” without the affected employee’s permission.⁷⁶ Importantly, however, the term “health information” is not defined and the statutory limitation is not confined to “health information” related to paid sick leave. Therefore, without an employee’s permission, it is likely that a supervisor could violate this prohibition by telling his or her co-workers that he or she is home sick or not feeling well. It would also preclude an employer from explaining to co-workers that an employee is not at work because of a serious tragedy in the employee’s family, such as a death in the family. The confidentiality requirement would lead to some bizarre results. For example, if two siblings worked for the same employer and one of the siblings suffered an injury at work, the employer could disclose to the other sibling that someone had been injured at work but could not disclose who was injured. Perversely, the employer would likewise also be prohibited from informing the injured employee’s spouse of the injury without the employee’s express consent.

Joint Employment Raises Issues of Double Leave. Another problem is the issue of who pays an employee in “joint employment” circumstances.⁷⁷ “Joint employment” occurs when a client employer uses temporary employees supplied by a temporary employment agency and both the client and temporary employment agency are deemed employers of the temporary employee. Courts have held that “joint employment” exists

under the FMLA,⁷⁸ so it would likely be found to exist under the HFA, despite the absence of any specific provision dealing with the issue.

The HFA does not designate which employer must provide paid sick leave to the temporary employee. In fact, the legislation as drafted would require both employers to provide paid sick leave to the temporary employee. Assuming the temporary employee works 30 or more hours per week, he or she would be entitled to seven days of paid sick leave from both the client and the temporary employment agency. Consequently, an employee with joint employers has a windfall and would be eligible for 14 days of paid sick leave for performing the same amount of work.

IV. Conclusion

The Healthy Families Act would severely limit an employer's flexibility in designing and administering leave programs and benefits. It is riddled with ambiguities that render it virtually impossible for employers to successfully administer the new mandates. In addition, the proposed legislation seeks to provide leave for employees to have greater personal and family balance, yet the notice and certification requirements are so minimal and ineffective that there is little protection against gaming of the system by employees simply seeking more time off, which would detrimentally affect other employees and an employer's personnel scheduling and decisions. In sum, the HFA's ambiguous, unworkable, counterproductive, and unbalanced provisions go far beyond providing the minimum standards sought by the legislation.

¹ http://www.nationalpartnership.org/site/PageServer?pagename=psd_index (last visited June 1, 2009).

² Iris S. Diaz and Richard Wallick, *Leisure and Illness Leave: Estimating Benefits in Combination*, Monthly Labor Review, February 2009.

³ Specifically it includes any combination of one or more of the following: paid sick leave, paid family leave, paid personal leave, and paid vacation leave – as long as that leave can be taken for illness reasons.

⁴ Iris S. Diaz and Richard Wallick, *Leisure and Illness Leave: Estimating Benefits in Combination*.

⁵ *Id.*

⁶ 2008 Annual data from the U.S. Bureau of Labor Statistics. Available at: www.bls.gov/webapps/legacy/cpsatab5.htm.

⁷ Iris S. Diaz and Richard Wallick, *Leisure and Illness Leave: Estimating Benefits in Combination*.

⁸ *Id.*

⁹ Natalie Kramer and Alan Zilberman, New Definitions of Employee Access to Paid Sick Leave and Retirement Benefits in the National Compensation Survey, Bureau of Labor Statistics, December 23, 2008, available at: www.bls.gov/opub/cwc/print/cm20081219ar01p1.htm.

¹⁰ Katherine Baicker and Helen Levy, *Employer Health Insurance Mandates and the Risk of Unemployment*, NBER, Working Paper 13528, October 2007; Craig Olsen, *Do Workers Accept Lower Wages in Exchange for Health Benefits?*, Journal of Labor Economics, Vol. 20, No. 2, Pt. 2, 2002; Norman Thruston, *Labor Market Effects of Hawaii's Mandatory Employer-Provided Insurance*, Industrial and Labor Relations Review, October 1997; Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, American Economic Review, June 1994; Jonathan Gruber and Alan Kruger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance*, Tax Policy and the Economy, Vol. 5, 1991.

¹¹ The other nine groups include ACORN, ALF-CIO, A Better Balance, Center for Law and Social Policy, Moms Rising, 9 to 5, National Employment Law Project, SEIU, and Take Care Net.

¹² MultiState Working Families Consortium, FAMILY VALUES AT WORK: IT'S ABOUT TIME! 31 (2007).

¹³ MultiState Working Families Consortium, FAMILY VALUES AT WORK: IT'S ABOUT TIME! 32 (2007).

¹⁴ *Id.*

¹⁵ *Id.* at 34.

¹⁶ *Id.*

¹⁷ Healthy Families Act, H.R. 2460, 111th Cong. § 5(a)(1) (2009). "Paid sick time" means an increment of compensated leave that can be earned by an employee for use during an absence from employment for any of the reasons described in paragraphs (1) through (4) of section 5(b)." H.R. 2460, § 4(7).

¹⁸ Exempt employees are assumed to work 40 hours a week. *Id.* at § 5(a)(2).

¹⁹ *Id.* at § 4(7).

²⁰ *Id.* at § 5(a)(3).

²¹ *Id.*

²² *Id.* at § 5(a)(7).

²³ *Id.* at § 5(a)(6).

²⁴ *Id.* at § 5(a)(4)(B).

²⁵ The legislation provides that the term "person" would have the same broad meaning as under the FLSA and FMLA. H.R. 2460, § 4(B)(iii)(III). Indeed, the term "person" would include an "individual, partnership, association, corporation, business trust, legal representative, and any organized group of persons." 29 U.S.C. § 203(a). If the term is interpreted in a consistent manner as it has been under the FLSA and FMLA, even legally separate business entities may be part of a single employer for the purposes of the HFA if they qualify as an "integrated employer." The "integrated employer" test considers whether the entities have (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) common ownership and/or financial control. 29 C.F.R. § 825.14. However, centralized control over labor relations is likely the most important factor. *See Schweitzer v. Advanced Telemarketing Corp.*, 104 F. 3d 761 (5th Cir. 1997).

²⁶ The low number of employees needed to be a "covered employer" under the HFA will have a significant impact on small businesses, particularly ones experiencing financial difficulties. Because the definition of "employer" includes persons who employed 15 or more employees in the previous calendar year, a small employer suffering financial problems would have to provide paid sick leave even if it did not have 15 or more employees in the current calendar year. For example, a person who employed at least 15 employees in 2009 must provide paid sick leave to all eligible employees in 2010 even if the business suffered severe financial setbacks and had to lay off 10 of its employees on January 1, 2010. Thus, under the Act, an employer may have to continue to provide paid sick leave even if it does not have 15 or more employees.

²⁷ H.R. 2460, § 4(3)(B)(i)(I).

²⁸ *See, e.g., Carter v. United States Postal Service*, 157 F. Supp. 2d 726 (W.D. Ky. 2001); *Boriski v. City of College Station*, 65 F. Supp. 2d 493 (S.D. Tex. 1999); *Buser v. Southern Food Service, Inc.*, 73 F. Supp. 2d 556 (M.D.N.C. 1999); *Meara v. Bennett*, 27 F. Supp. 2d (D. Mass. 1998).

²⁹ H.R. 2460, § 5(b).

³⁰ "Child" is defined as "a biological, foster, or adopted child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." H.R. 2460, § 4(1).

³¹ "Parent" means "a biological, foster, or adoptive parent of an employee, a step parent of an employee, or a legal guardian or other person who stood in *loco parentis* to an employee when the employee was a child." H.R. 2460, § 4(8).

³² The term "Spouse" with respect "to an employee, has the same meaning given such term by the marriage laws of the State in which the employee resides." H.R. 2460, § 4(11).

³³ H.R. 2460, § 5(b)(3).

³⁴ *Id.* at § 5(b)(4).

³⁵ *Id.* at § 5(a)(5).

³⁶ S. 910, § 5(g).

³⁷ Mark Schoeff, Jr., DeLauro Says Paid Sick Days Bill Won't Disrupt PTO Plans, *Workforce Management* (May 19, 2009).

³⁸ S. 910, § 5(c)(B).

³⁹ H.R. 2460, §5(a)(3).

⁴⁰ *Id.* at § 5(a)(1).

⁴¹ Milwaukee Paid Sick Leave Ordinance, §112-3(5).

⁴² Milwaukee Equal Rights Commission, Rules Implementing the Milwaukee Paid Sick Leave Ordinance (Draft), Rule 3.2 (April 1, 2009).

⁴³ H.R. 2460, § 5(d)(1)

⁴⁴ *Cf.* S. 910, § 5(f)(1)(A).

⁴⁵ H.R. 2460, § 5(d)(1)(B-C).

⁴⁶ “Health care provider” is defined as a “provider who (A)(i) is a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or (ii) is any other person determined by the Secretary to be capable of providing health care services; and (B) is not employed by an employer for whom the provider issues certification under this Act.” H.R. 2460, § 4(6). The definition of “health care provider” in the HFA is an exact duplicate of the same definition in the FMLA. *Cf.* H.R. 2460, § 4(6) and 29 U.S.C. § 2611(6).

⁴⁷ H.R. 2460, § 5(d)(2)(A)(ii).

⁴⁸ *Id.*

⁴⁹ *Id.* at § 5(d)(4)(A).

⁵⁰ *Id.* at § 5(d)(4)(A).

⁵¹ *Id.* at § 8(a)(3)(A)(i-ii).

⁵² *Id.* at § 8(a)(3)(B)(i)(I)(bb).

⁵³ *Id.* at § 8(a)(3)(B)(i)(I)(aa).

⁵⁴ *Id.* at § 7(a)(1-2).

⁵⁵ *Id.* at § 7(a)(1)(c).

⁵⁶ *See* Family and Medical Leave Act, § 2617(a)(1)(A)(iii).

⁵⁷ H.R. 2460, § 8(a)(5)(A).

⁵⁸ *Id.* at § 8 (a)(5)(B).

⁵⁹ Iris S. Diaz and Richard Wallick, *Leisure and Illness Leave: Estimating Benefits in Combination*.

⁶⁰ The previous HFA defined paid sick leave as an “increment of compensated leave provided by an employer to an employee as a benefit of employment for use by the employee during an absence from employment for any of the reasons described in paragraphs (1) through (3) of sections 5 (d).” S. 910, § 4(9). “Paid sick time” means an increment of compensated leave that can be earned by an employee for use during an absence from employment for any of the reasons described in paragraphs (1) through (4) of section 5(b).” H.R. 2460, § 4(7).

⁶¹ H.R. 2460, § 5(a)(1).

⁶² *Id.* at § 5(a)(4)(A).

⁶³ *Id.* at § 5(a)(4)(B).

⁶⁴ *Id.*

⁶⁵ *Id.* § 5(a)(1).

⁶⁶ It would take 1,680 hours, or 42 weeks, or 10.5 months working 40 hours per week for an employee to accrue 56 hours of paid sick leave under the HFA § 5(a).

⁶⁷ The DOL could also decide issues of “equity,” such as reinstatement, if an employee claimed to have been terminated for using paid sick leave.

⁶⁸ *Id.* at § (7)(a)(1)(A).

⁶⁹ *See* Family and Medical Leave Act, § 2617(a)(2)(B) (permitting a claim to be brought on behalf of “employees similarly situated”).

⁷⁰ HR. 2460 § (7)(a)(1)(A).

⁷¹ Linda Levine, *Leave Benefits in the United States*, CRS Report for Congress, May 7, 2008, 22.

⁷² *Id.* at § 5(d)(3)(A)(ii).

⁷³ *Id.* at § 5(d)(2)(B)(ii). Indeed, the HFA specifically provides that “[n]othing in this Act shall be construed to require a health care provider to disclose information in violation of § 1177 of the Social Security Act (42 U.S.C. 1320d-6) or the regulations promulgated pursuant to §264(c) of the Health Insurance Portability and Accountability Act (42 U.S.C. 1320d-2 note).”

⁷⁴ H.R. 2460, § 5(d)(2)(B)(i).

⁷⁵ *Id.* at § 5(f)(2)(B)(ii).

⁷⁶ *Id.* at § 5(d)(2)(D)(ii).

⁷⁷ In addition, a temporary employee would likely count as an employee toward the 15-employee threshold for both the employer and the temporary employment agency, which is the case under the FMLA. *See, e.g., Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997).

⁷⁸ *See, e.g., Sherry v. Protection, Inc.*, 981 F. Supp. 1133 (N.D. Ill. 1997).