WRITTEN STATEMENT OF HR POLICY ASSOCIATION
"Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages"

Hearing Before the Workforce Protections Subcommittee

HR Policy ("HRPA" or "Association") is the leading organization representing chief human resource officers of more than 400 of the largest employers in the United States, and globally. Collectively, our member companies employ more than 11 million employees in the United States, over nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The Association submits this written testimony to provide its members a voice in the debate that is the subject of this hearing, and specifically to voice its opposition to H.R. 7701, the Wage Theft Prevention and Wage Recovery Act, that was introduced in conjunction with this hearing. To the extent that the Fair Labor Standards Act ("FLSA" or "Act") needs reform or amendment to increase compliance, the Association submits that H.R. 7701 would not achieve this goal, would make an already complex statute even more difficult, and would substantially increase unnecessary litigation. Instead, the law's purposes would be better served by adding greater clarity and predictability in line with the realities of the 21st century workplace which this 20th century law regulates.

Increased compliance with the FLSA is in the interest of all stakeholders. The nature of the problem, however, is significantly more nuanced than as characterized by this hearing, and therefore requires similarly nuanced and targeted solutions. The idea, presented during this hearing, that most employers regularly and intentionally violate the FLSA and engage in wage theft is simply false. FLSA compliance is not as simple as merely calculating overtime pay, and in practice can be extremely

complex. The threshold question of who is in fact an employee under the Act is itself complicated, inconsistently applied, and subject to changes in interpretation from administration to administration. The test for employee status under the Act has not been updated in decades,[1] and judicial interpretation and application of the test over the years has been anything but uniform.[2] The regulations and associated tests related to overtime pay and exempt and non-exempt employees under the FLSA offer their own ambiguities, even for seasoned HR professionals and employment lawyers. Indeed, the Government Accountability Office has acknowledged that a significant number of FLSA violations requiring back pay are due to increasing difficulties calculating fringe benefits.[3] In short, employers operating in good faith may still find themselves in noncompliance with the FLSA due to unintentional error, miscalculation, or mistaken interpretation.

To the extent that there is a small minority of bad actors that intentionally and habitually engage in wage theft, such companies should undoubtedly be held accountable. However, targeting such bad actors, and increasing FLSA compliance in general, does not require the type of wide-ranging, one-size-fits all approach contemplated by H.R.7701 which in its current form would disproportionately penalize employers operating in good faith. Instead, effective actions against egregious violators can be achieved using existing available resources. Strategic and targeted enforcement of intentional and chronic violators of the FLSA, and increased compliance assistance resources for the vast majority of companies whose FLSA violations, if any are, unintentional, provides a more surgical approach towards increased compliance without unnecessarily increasing litigation.

H.R. 7701, purportedly meant to provide meaningful FLSA reform and increased compliance, would instead needlessly increase litigation to the detriment of all stakeholders and overly penalize

[1] The Trump administration's final rule updating and clarifying this test is currently the subject of litigation.
[2] See Richard R. Carlson, Why the Law Still Can't Tell an Employee When it Sees One and How It Ought to Stop Trying, 22 Berkeley J. Emp. & Lab. L. 295, 335-42 (2001).
[3] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-11, FEDERAL CONTRACTING: ACTIONS NEEDED TO IMPROVE DEPARTMENT OF LABOR'S ENFORCEMENT OF SERVICE WORKER WAGE PROTECTIONS 17 (2020).

employers for what are most often unintentional violations. Further, some provisions – such as those that prohibit arbitration clauses and change the opt in rules for class actions – have no reasonable relation to the purported goals of the bill and instead are little more than a gift for the plaintiff's bar.

Specifically, H.R. 7701 would prohibit the use of arbitration agreements as a condition of employment. To begin with, banning the use of arbitration agreements is beyond the scope of a bill purportedly aimed at increasing FLSA compliance. If Congress wishes to discard nearly a century of legal norms and judicial precedent established – by Congress – via the Federal Arbitration Act of 1925, then it should do so in a standalone bill, and not as language tucked away within a larger piece of legislation that on its face has little if anything to do with alternative dispute procedures. Further, the individuals who would be most affected by prohibiting or restricting arbitration clauses would be the class of people H.R. 7701 is purportedly designed to most protect – low-income workers. Such workers often cannot afford the considerable expense and protracted nature of litigation, which more often than not takes years to conclude. For workers that live to paycheck to paycheck, this avenue for recovery of lost wages is simply unavailable. Arbitration provides a fair, speedy, and inexpensive alternative to protracted litigation that is statistically proven to result in increased recovery for employee plaintiffs, and at a much faster rate than going through the courts.[4] As former U.S. Supreme Court Justice Stephen Breyer has noted:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[5]

To the extent that further procedural safeguards may be needed for the arbitral process, the Association supports ensuring that arbitration and all alternative dispute resolution systems are fair for all

[4] *See, e.g.,* NAM D. PHAM & MARY DONOVAN, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).
[5] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

stakeholders. A blanket ban, however, would harm all such stakeholders and significantly increase unnecessary litigation, to the benefit of only the plaintiff's bar. Regardless, debating the efficacy of arbitration and arbitration agreements is clearly beyond the scope of this bill.

H.R. 7701 would also remove the FLSA's "opt in" requirement that employees affirmatively "opt in" to engage in a collective action under the FLSA – another provision that at best is only tangentially related to the stated purpose of the bill, and one that would provide no benefit to the group of workers the bill is aiming to protect. This provision is clearly designed to increase class action claims, despite there being no available evidence to support the underlying claim that employees are unfairly barred from pursuing such actions under the FLSA. Indeed, the plaintiff's bar files thousands of such claims every year. Further, as noted above, increased litigation does not benefit low-wage workers, and only serves to benefit plaintiffs' attorneys. Indeed, a recent study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in payouts for plaintiffs, with an average award of $32, while plaintiffs' attorneys received more than one million dollars.[6] Increasing class action litigation should not be a goal of any legislation.

H.R. 7701 as currently drafted is not an effective solution and would only serve to increase needless litigation to the benefit of only plaintiffs' attorneys and to the detriment of all other stakeholders. HR Policy Association supports FLSA reform and increased compliance through strategic enforcement initiatives that target the minority of bad actors. The Association also supports increased compliance assistance resources and clear regulations for all employers, among other uses of existing resources. To that end, the Association supports H.R. 5743/S.3074, the Ensuring Workers Get PAID Act. This legislation would reinstate and make permanent the Department of Labor (DOL) Payroll Audit

[6] *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 18, 2020), https://instituteforlegalreform.com/the-mass-arbitration-racketunscrupulous-abuse-of-the-arbitration-ecosystem/.

Independent Determination (PAID) pilot program that was launched in March 2018. The PAID pilot program provided an efficient method for employers to proactively rectify inadvertent overtime and minimum wage violations under the FLSA. Specifically, the PAID program encouraged employers to conduct payroll self-audits and voluntarily self-report any FLSA wage and hour violations that were discovered to DOL in order to quickly resolve claims and improve compliance moving forward. If self-reported and corrected by paying 100 percent of the back wages that are owed, employers were then protected from litigation and penalties for their potential FLSA violations. The program resulted in employees receiving back wages in a more timely manner, as opposed to traditional DOL investigations that take more time and are more costly. Despite the program's success, the PAID program was discontinued in January 2021.