Statement of the U.S. Chamber of Commerce

ON: **HEARING ON H.R. 2339, THE "FAMILY INCOME TO RESPOND TO SIGNIFICANT TRANSACTIONS ACT," AND H.R. 2460, THE "HEALTHY FAMILIES ACT."**

TO: **THE HOUSE COMMITTEE ON EDUCATION AND LABOR'S SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

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ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE

DATE: **JUNE 11, 2009**

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More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

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Testimony of the Honorable Victoria A. Lipnic on behalf of the U.S. Chamber of Commerce

Before the U.S. House of Representatives

Committee on Education and Labor

Subcommittee on Workforce Protections

Hearing on "H.R. 2339, the Family Income to Respond to Significant Transitions Act, and H.R. 2460, the Healthy Families Act."

Thursday, June 11, 2009

Good morning Chairwoman Woolsey, Ranking member Price and members of the subcommittee. Thank you for inviting me to testify before the subcommittee today. My name is Victoria Lipnic. I am an attorney, and have practiced labor and employment law for nearly 16 years in many forums. I most recently served as the Assistant Secretary of Labor for Employment Standards at the U.S. Department of Labor, where I was responsible for, among other things the administration and enforcement of the Family and Medical Leave Act and the Fair Labor Standards Act. I have also served as counsel to this committee and in practice, have litigated employment cases and counseled clients on numerous employment issues.

I am appearing before you today on behalf of the U. S. Chamber of Commerce to discuss H.R. 2460, the "Healthy Families Act" (hereinafter "HFA" or "H.R. 2460.") My testimony today is confined only to H.R. 2460 and does not address the other bill being discussed today, H.R. 2339, the "Family Income to Respond to Significant Transitions Act." The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

My testimony today is based on my personal and professional experience; especially having most recently served as the head of one of the largest federal regulatory enforcement agencies. I know firsthand what it means to take legislative language and turn it into the very real practical rules employers and employees must live by in their workplaces every day. I have seen the consequences of those rules – both intended and unintended – and what they can mean to a workplace. I have also seen cases in which terms, believed to be perfectly well-defined and extremely well-intended by legislators and regulators, raise more questions than they answer, and result in an unsatisfactory answer to the human resource administrator, lawyer, manager, or employee or worse, in costly litigation.

Let me offer a few general comments about the bill before I address specifics about some of the bill's provisions.

First, it is certainly true that the Healthy Families Act has laudable goals. During the past few years when the Department of Labor revised the Family and Medical Leave Act (FMLA) regulations and created the implementing regulations for the military family leave provisions, I have read and studied the more than 20,000 comments to the public record – from employees, health care providers, employers, interest groups, and academics. The concern of everyone –

employees and employers over how to deal, at the same time, with the demands of work and an employee or family member of the employee who has an illness – was palpable.

Secondly, it is also true, however, that the Healthy Families Act would impose a new federal mandate of unprecedented scope on very small business establishments. It would do so at a time of serious economic stress and severe, continued job losses. It would come with a cost in the form of reduced wages and job opportunities.[1] It would come at a time when employers are considering every option available to them, including reducing hours, shifts, benefits, contributions to retirement funds, to avoid either any or further layoffs.[2] And it would do so in the face of evidence that a majority of employees in the United States can access paid leave when they have an illness. A February 2009 report by economists from the U.S. Bureau of Labor Statistics, published in the Monthly Labor Review, provides important new information and insights that are critical to the debate about whether a federal mandate to require paid sick leave is needed. In that new report, the BLS economists found that when looking at leave benefits provided by employers in combination – that is, not just paid sick leave, but including other types of paid leave (such as personal leave) for which employees can use the leave for their illness or to visit a doctor -- 83 percent of workers in private industry have access to illness leave.[3] This is despite the fact that paid vacation leave, holidays, and sick leave are among the

[1] There is a consensus among economists that the costs of employer mandates are passed on to workers in the form of lower wages and reduced job opportunities. See Katherine Baicker and Helen Levy, *Employer Health Insurance Mandates and the Risk of Unemployment*, National Bureau of Economic Research, Working Paper 13528, October 2007; and other citations in that research. See also Linda Levine, *Leave Benefits in the United States*, CRS Report for Congress, June 5, 2009, 19: "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."

[2] See, Raymund Flandez, *Small Businesses Work Hard to Prevent Layoffs*," The Wall Street Journal, March 13, 2009.

[3] See, Iris S. Diaz and Richard Wallick, *"Leisure and illness leave: estimating benefits in combination,"* Monthly Labor Review, February 2009, p. 30, "The unduplicated total of paid vacation, paid sick leave, paid family leave,

most expensive benefits offered to employees in private industry.[4] To quote from that Monthly Labor Review article:

> Current NCS [National Compensation Survey] publications report, for example, that 61 percent of private industry workers have access to paid sick leave. *But they do not report that 83 percent of workers have access to the more broadly defined illness leave.* Nor do they report that only 22 percent of workers have access to comprehensive illness-leave benefits. In some contexts, paid sick leave alone does not tell the whole story. Some benefits are close substitutes, and others are complements. A complete picture of access to benefits should present not just benefits in isolation, but benefits in combination.[5] *Emphasis added*.

I would respectfully suggest to the committee that it would be useful to have the Bureau of Labor Statistics provide further information about their study of the combinations of benefits and their "use-oriented" analysis as the committee considers legislation that mandates new or additional benefits.

Third, the HFA is inexplicably punitive on employers who already offer paid leave benefits. The HFA removes the discretion of employers to design benefits which best meet the needs of their employees and their operations. Employers provide leave benefits as a recruiting and retention tool, as a market differentiator, as part of a total compensation/total rewards package, but have the ability to take into account how the benefits are structured. Under the HFA, employers who are already providing these benefits would be subject to a new regulatory regime, additional compliance and recordkeeping costs and litigation for alleged violations of the law. They would be subject to liquidated damages that are awarded, in an unprecedented fashion, as a matter of course, with no good faith defense and no discretion from the courts. This is for people who already provide paid leave benefits.

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and paid personal leave is 83 percent. Therefore, 83 percent of workers in private industry have access to illness leave." The full article can be found at www.bls.gov/opub/mlr/2009/02/art3full.pdf.

[4] *Id.*

[5] *Id*. at p. 33.

Finally, we know from years of experience, commentary and observation about the use of the Family and Medical Leave Act that different workplaces experience the use of leave very differently. In some workplaces it may be essential that everyone be there on time in order to start the shift or run a particular piece of machinery. The loss of one person to that shift may be critical to the start of an entire production line or transportation system. That is very different than a workplace setting where the start time of an individual or individuals is not critical to the completion of that day's work or project.[6] Those issues have downstream effects on other employees and services. Just as under the FMLA, the HFA makes no allowance for differences among industries or workplaces as to their operational needs.

Since this is a legislative hearing, let me turn to some comments about specific provisions in the bill. I recognize that H.R. 2460 makes a number of changes as compared to prior versions of the same titled bill introduced in the 110th Congress, H.R.1542 and S. 910, not the least of which is now including coverage for victims of domestic violence. Nevertheless, there remains a number of ambiguities, inconsistencies, and problematic areas in H.R. 2460.

The HFA will cover businesses even smaller than those with 15 employees and makes no differentiation between small and large businesses and their ability to deal with the business cycle.

The HFA provides that a "covered employer" is one "who employs 15 or more employees for each working day during each of 20 or more calendar workweeks in the current *or*

[6] See, "Specific Industries Report Difficulties With Unscheduled FMLA Leave," Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed Reg 35550, 35632 – 35638, citing to report from Criterion Economics: "A regulation that reduces labor productivity for example, will have a larger impact on economic welfare in industries where production requires 'fixed proportions' of capital and labor (e.g. air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor. . . Further, in some industries, employee absenteeism will have a relatively small effect on firms' overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment."

preceding calendar year.[7] The bill also allows for the carry-over of unused accumulated leave, 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."[8] Given these provisions, a small business which has 15 employees one year, but due to business conditions, may have only five employees the next year, would be in a position where it had to provide potentially 56 hours of paid leave, to an employee in the year when it had as few as five employees. That would be after it laid off 10 other people. The ability of that small business to absorb those costs are far different than for an employer who has over 1,000 employees and Congress should give that great consideration as it considers this legislation.

Paid sick leave under the HFA will also be designated and counted as Family and Medical Leave Act leave for <u>some</u> employees in the workplace.

One of the foremost unanswered questions is does the paid sick leave contemplated under the HFA constitute leave under the Family and Medical Leave Act (FMLA) as well, or is it intended as an additional benefit over and above the twelve weeks of unpaid leave provided by the FMLA? And, how are the two statutes to be reconciled? There will be different answers for different employees in the workplace. Certainly there are significant differences in coverage and eligibility between the HFA and the FMLA. The HFA applies to a much broader group of employers (50 employee threshold for coverage under the FMLA; 15 employee threshold for coverage under the HFA); a broader group of employees who can take leave (employees must meet an eligibility requirement under the FMLA of having worked for the employer for 12 months and 1250 hours; there is no eligibility requirement under the HFA), as well as a broader group of individuals for whom the employee can take leave in order to care for that individual (under the FMLA leave can be taken for a spouse, son, daughter or parent who has a serious

[7] Healthy Families Act, H.R. 2460, 11th Cong. § 4(4)(B).
[8] *Id*. at § 5(a)(3).

health condition, as well as additional family members, such as "next of kin" who are blood relatives, for purposes of military family leave; under the HFA employees can take paid sick leave to care for "children, spouse, parents, and parents-in-law, and other children and adults for who they are caretakers" and/or "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship"). Despite these differences, the HFA and the FMLA crossover in significant ways, particularly because the bar is set fairly low for what constitutes a "serious health condition" under the FMLA.

For example, assume you are an employee who takes leave under the HFA for "an absence resulting from a physical or mental illness, injury or medical condition" of the employee."[9] Such an absence would easily meet the standard for an FMLA-eligible employee who has a certified chronic health condition and is absent from work due to his or her medical condition.[10] In such a case, the paid sick leave would be counted as FMLA leave. The same would apply for the employee who is sick for more than three days and visits a health care provider and receives a prescription for treatment.[11] This would also be counted as FMLA leave. In both of these cases there will be two different standards in the workplace for individuals covered and eligible under both the FMLA and those only covered under the HFA creating additional inequities and compliance quagmires for employers and employees.

Intermittent leave and the time increment by which paid sick leave is used – what is it?

The use of intermittent leave, particularly unscheduled intermittent leave has long been documented as one of the most significant unintended consequences of the FMLA and continues to be one of the most vexing issues under the FMLA. Employers have long advocated for a change to the time increment in the use of intermittent FMLA leave which they have found to be

[9] See H.R. 2460 § 5 (b)(1).
[10] See 29 C.F.R. §§ 825.115(c) and (f).
[11] See 29 C.F.R. §825.115(a)(2).

both administratively burdensome and, in many cases depending on the industry, wreaking havoc on their operational needs.[12] The revised FMLA regulations restated the "one hour is dispositive" rule and eliminated confusing and conflicting references to the employer's payroll systems and recordkeeping systems, but the time increment is still determined by "an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's leave entitlement may not be reduced by more than the amount of leave actually taken."[13]

The HFA does not address the time increment directly. (Previous versions of the bill did address it directly although they imported the same problems as under the FMLA.) For example, in Section 4 - "Definitions" of the bill at paragraph (7) "Paid Sick Time" – is defined as "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 . . ." . Compare that to Section 5 - "Provision of Paid Sick Time" of the bill at paragraph (a) "Accrual of Paid Sick Time" (1) An employer shall permit each employee employed by the employer to earn not less than 1 hour of paid sick time for every 30 hours worked. . ." Read together, presumably that means that one hour is the minimum "increment" by which an employee can take leave, since that is the increment at which he or she is earning it. But, what if an employer allows an employee to earn leave in an increment smaller than one hour? What if it is in six minute increments? Must he allow the use of paid sick leave in that same amount? If left to the regulators would they follow

[12] See Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed Reg 35550, 35553: " . . . it is precisely the use of unscheduled (or unforeseeable) intermittent leave for chronic conditions that presents the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. With respect to employer comments, no other FMLA issue even comes close."

[13] See 29 C.F.R. §825.205(a).

the "shortest period of time" rule from the FMLA regulations? If that is the case you would then again be importing one of the most problematic areas from the FMLA. Congress should consider the allowing employers to set the time increment for use according to their operational needs even if that is above one hour. At the very least, the HFA should make clear, that one hour is minimum time increment by which the leave is both earned and used.

What medical conditions are covered?

The HFA provides extraordinarily broad and not entirely consistent definitions for the medical conditions that are covered. In Section 2 of the "Findings" at paragraph (2) the bill refers to: " . . . medical treatment and recovery in response to short and long-term illnesses and injuries." In contrast, Section 3 of the "Purposes" at paragraph (5)(A) refers to paid sick time being made available for "eligible medical reasons." "Eligible medical reasons" is not defined anywhere in the bill. Finally, Section 5 of the bill "Provision of Paid Sick Time" at paragraph (b) "Uses" provides that paid sick time earned under this section may be used by an employee for any of the following: (1) an absence resulting from a physical or mental illness, injury, or medical condition of the employee; (2) an absence resulting from obtaining professional medical diagnosis or care, or preventive medical care, for the employee." Presumably, everything is covered. Does that include if the doctor says "take a day off?"

Who exactly is covered?

The Healthy Families Act provides coverage for employees and individuals to use paid sick leave for a seeming limitless group of family and friends. Individuals can use leave for "an absence for the purpose of caring for a child, parent, a spouse, or any other individual related by

blood or affinity whose close association with the employee is the equivalent of a family relationship."[14] Who will decide what the "equivalent of a family relationship" is?

Employers can use their existing leave policies – sort of.

Unlike previous versions of the HFA, H.R. 2460 recognizes that employers may have existing paid leave policies or paid time off banks (rather than designated sick leave) and allows employers to essentially substitute their existing paid leave policy for the requirements of this bill.[15] This is an improvement over previous versions of the bill which did not take into account existing employer policies and, on its face, seems like it offers greater flexibility to employers. But, employers must provide the same amount of leave as provided under the HFA and allow for its use under exactly the same terms and conditions as outlined in the bill. When combined with the certification requirements and restrictions on those certifications provided by the HFA, which may include disregarding employer procedural requirements for requesting leave and employer call-in procedures (that is unclear under the bill), along with the fact that the legislation seems to prohibit the use of "any absence control policy" in relation to the use of this leave, it seems there is little regard given to employers' existing leave policies.

H.R. 2460 is especially punitive in awarding liquidated damages.

Section 7(B)(i)(III) in its discussion of liability and damages provides that an employee or other individual can recover "an additional amount as liquidated damages." The liability/damages provisions in Sec. 7 in the bill for the most part track with the damages provisions of the FMLA. But, the HFA inexplicably eliminates the good faith defense of

[14] See H.R. 2460 § 5(b)(3).
[15] See *Id*. at § 5(a)(5) and § 5(d)(2).

employers and the discretion of the court in awarding liquidated damages.[16] Instead, the HFA applies liquidated damages as a matter of course without question or review.

Job applicants can sue even though they will not have "earned" the benefit of the bill.

The HFA emphasizes that "any individual" including "job applicants" cannot be subject to any retaliation for exercising, or attempting to exercise any right provide under the Act." Therefore, job applicants could bring suit under this legislation even though the benefits under this act are based on the accrual and earning of leave.[17] While there is no eligibility requirement before an employee can use leave under the Act, as there is with the FMLA, damages would be available to job applicants under the bill even though they would not yet have accrued or earned any leave. Presumably, an example of this would be where a job applicant asks during an interview, "I have a son who has asthma. I have to take him to the doctor every Friday morning for a treatment for about an hour. Will that be a problem?" Theoretically, an employer could discriminate against that applicant by not hiring him or her, because of the need to take leave on a weekly basis. This would be an extraordinarily difficult case to prove. This raises the question as to what is the value of creating such a federal cause of action given the potential recovery for that applicant and the commensurate litigation costs for the employer?

I would be remiss not to also note that one additional provision that should be considered should the Committee decide to proceed in moving this legislation. This provision would strengthen the ability of small businesses to recoup attorneys' fees and expenses when they successfully defend themselves from meritless charges by the government. Unfortunately,

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[16] The FMLA at Sec. 107 (a)(1)(A)(iii) provides for damages equal to: "an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), *except that if an employer who has violated section 105 proves to the satisfaction of the court that the act or omission which violated section 105 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii) respectively; and . . .*" (Emphasis added).

[17] See H.R. 2460 §7(a) and (b).

questionable claims are made all too frequently and the Equal Access to Justice Act has not been effective at discouraging such claims by the government. The least that can be done is to pay the costs of small businesses that successfully defend themselves from unmeritorious claims.

Conclusion

Madame Chairwoman and members of the Committee, these are just some of the concerns of the U.S. Chamber of Commerce about H.R. 2460, the Healthy Families Act. Above all, the Chamber is particularly concerned about moving forward with such legislation at a time of severe economic distress when businesses are doing everything they can to preserve jobs. We look forward to working with you as the Committee gives further consideration to this legislation. I'd be happy to answer any questions you may have.