

Statement of
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Good morning Chairman Miller, Ranking Member Kline and distinguished members of the Committee. I appreciate the opportunity to speak with you today about employer-paid sick leave policies and ways that employers are responding to the current H1N1 influenza outbreak.

I am Bruce Clarke, President and CEO of Capital Associated Industries (CAI), a non-profit employers' association that helps 1,000 North Carolina employers manage well, pay well, provide high-quality benefits and stay in compliance with thousands of federal, state and local workplace rules.

While the Committee continues to explore paid leave issues, it is important to recognize the broad scope of their impact and the efforts that are already underway by employers to respond to the current H1N1 pandemic.

CAI shares your goal of protecting the health of the American workforce while minimizing the spread of any contagious disease. As the Committee considers legislation, however, it is important that any proposal support and protect the existing paid leave programs and workplace flexibility initiatives employers have in place –especially among our nation's smallest employers.

Overview of Existing Employer Leave Practices

Our national network of Employer Associations cooperates each year on surveys asking hundreds of questions about pay and benefits at thousands of workplaces nationwide.

I can say confidently that when it comes to the availability of paid leave from employers for sick leave, the glass is not just half full; it is more than 80 percent full. I believe the marginal perceived visible benefit of a proposed national mandate will create far more invisible and unintended detriments that will, most importantly, result in that glass being considerably less full than it is today.

Today, employers provide dozens of types of benefits that give employees paid leave. Manufacturers in particular have provided generous family-friendly benefits that include leave programs. According to the Department of Labor's Bureau of Labor Statistics (BLS), nearly all full-time workers have access to paid illness leave. Specifically, the Monthly Labor Report in February 2009 shows that 93 percent of full-time workers and over half of part-time employees have access to paid sick leave.

According to the BLS, manufacturing employees on average earn over 20 percent more in compensation than the rest of the workforce and 96 percent of manufacturers provide a paid leave benefit that their employees can use specifically for illness, doctor's appointments or to care for an ill family member.

While some may point to the lack of formal requirements for employers in the U.S. to provide paid leave, the reality is that such types of leave are already widespread

in our workforce. Paid leave is an important component of a wide variety of different types of leave provided to employees.

Annually, my organization surveys our members on hundreds of business practices, wages, health care benefits and other data to keep them competitive and aware of market conditions. Our most recently published Policy and Benefits survey for 2009-2010 shows:

- Over 80 percent of employers in North Carolina provide a specific paid leave benefit, with the average being 7 to 9 days per year;
- 70 to 90 percent of respondents allow use of sick time for non-emergency needs like dental and routine doctor visits and for ill family members;
- Vacation pay is such a common benefit in the group of employers with more than 15 employees that we only ask them how many days they provide, not whether they provide it. Virtually all allow its use for personal and family illness;
- 60 percent of employers in this survey even provide long-term disability policies for employees; and
- More than half of the employers provide qualified part-time employees accrual of vacation and/or sick days on a reduced schedule.

While most private sector employees are provided some form of paid leave, many employers don't differentiate between various types of leave. There is evidence of a growing trend by employers to provide general paid time off (PTO) plans that allow employees to use their leave in the way that best fit their needs. A flexible PTO policy supports and encourages employees to stay home when they are sick or to take care of ill family members. These systems also protect employees' privacy as employees often do not have to disclose to their employers the reasons why they are requesting time off.

In particular, over one-quarter of manufacturers use such a policy, and that number is growing. Employers require the flexibility to continue to provide their employees with the benefits and paid leave models that best fit the needs of their individual businesses and workforces.

Employer Response to the H1N1 Outbreak

Just as many families across the country are taking steps to protect against the further spread of the H1N1 flu, many employers also have developed or are in the process of developing continuity plans to proactively mitigate the spread of H1N1 in the workplace. These plans seek to ensure that businesses can function during this national emergency while addressing the needs of their employees.

Examples of these responses include: telecommuting, job sharing, waiving notice requirements, absence forgiveness and paid time off for the employee's own illness or to care for ill family members.

Mandating paid sick leave policies will create a new baseline structure from which all employers with over 15 employees will be required to re-write their many types of “pay when not working” policies. I believe that starting over from that mandated foundation and its rigid terms will discourage the kinds of innovative and additive benefits we see employers spontaneously creating during this pandemic.

I have recently asked our members in North Carolina what specific steps that they are taking. I have heard a wide variety of responses from many members, including:

- Paying for vaccines to be administered at job sites;
- Advising employees to stay home if they are displaying flu-like symptoms without any disciplinary actions or having the leave count against them;
- Allowing employees to make up for the missed hours with additional shifts;
- Allowing them to work from home with greatly reduced responsibilities;
- Enabling employees to advance sick days forward; and
- Allowing employees additional paid time off to take care of ill family members.

While some employers may not have taken specific action in response to the H1N1 outbreak, these employers are clearly the exception to the widespread practices taking place today. These types of creative approaches are the result of flexibility that employers have to develop policies that best fit their workforce needs. Any proposal that mandates the type of leave that employers must provide will ultimately threaten overall levels and types of responses employers are engaged in.

Congressional Proposals

There has been much discussion of paid leave proposals in light of this outbreak. However, it’s important that Congressional activity not threaten employers' ability to creatively design programs that meet the unique needs and constraints of their workforce.

Federal paid leave policy should encourage employers to provide paid sick leave rather than impose restrictive, one-size-fits-all mandates. Such requirements applied to the broad, diverse industries that make up our nation's economy negatively impact all employers, especially small businesses, and limit our ability to retain and create new jobs.

Many of the proposals introduced, such as the Healthy Families Act, are overly burdensome because they apply to the smallest of employers. Under the Healthy Families Act proposal – employers of all sizes would be subject to the same restrictive leave mandate that includes both part-time and full-time employees. This would be on top of or in addition to requirements in place in several states and municipalities. Congress has previously recognized the disproportionate impact leave mandates have on small employers in related employment statutes like the Family Medical Leave Act. Federal legislation should continue to reflect these principles.

In many ways, such mandate proposals would actually hinder current efforts by employers. Specifically, the Emergency Influenza Containment Act would place requirements on employers without comprehensive guidance from the Department of Labor on how to implement them.

Additionally, the language of this proposal creates a leave entitlement to employees directed, instructed or advised by their employer to not come into work or to leave work if they are displaying contagious symptoms. This overly broad definition will make effective implementation by employers difficult. In many workplaces, it may also discourage employers from sending employees home. We have several questions about how this bill would be implemented:

- The bill states that paid leave should be provided to employees who are directed by their employer to come into work. However – how should “directed” be interpreted? Employers could have a range of conversations or contacts with their employees, which might or might not rise to the level of a “direction”.
- Who is the employer? What if a lower level supervisor says something that is later revoked by someone with more authority?
- What does it mean to have the employer “believe the employee has symptoms of a contagious illness?” Is one sneeze enough for them to form this conclusion? Employers are typically not medical professionals able to make this determination.
- How is an employer to protect the rights of employees’ privacy with regard to their determination if an employee has been in close contact with an individual who has such symptoms?
- Under this bill – an employer can terminate the paid leave if he or she “believes the employee...has symptoms of a contagious illness or poses a threat of contagion to other employees or to the public.” How would an employer formulate this belief if the employee isn’t present in the workplace?
- This bill would take effect 15 days after enactment without any implementation regulations or timeliness for when guidance from the federal government will be provided. How are employers expected to meet this bill’s requirements without appropriate regulations in place?
- This bill attempts to provide a safe harbor for employers who either do not employ 15 or more employees or already meet its conditions. (See Sec. 10 (3) (A), (B).)
 - How would employers provide PTO plans, where an employee has paid leave provided without specifying the reason for being treated? Such plans are becoming very popular as they relieve employers of the need to track multiple kinds of leave and the reasons for the leave and typically allow employees to receive the paid leave in compensation when they terminate employment.
 - Would employers get credit only for offering a traditional paid sick leave style plan?

- What happens if an employee is provided leave but has exhausted it by the time he or she needs to be out under this bill?
- How should part-time employees be treated with respect to whether an employer employs 15 or more employees?
- What if the company uses an employee agency? How should those employees be counted?
- The language of Section (B) says that for an employer policy to qualify, it must not only provide five days of paid sick leave per 12 month period, but that this leave “may be used at the employee’s discretion.” Such a requirement would disqualify many employer leave policies that would otherwise satisfy this safe harbor as employers frequently include a provision that leave be subject to notification, scheduling, or other requirements. Would such requirements disqualify a leave policy from satisfying this safe harbor?

These proposals lack the necessary clarity for employers to effectively implement and would limit the flexibility employers have to address their workforce needs.

Further, these current proposals do not recognize employers that are already providing generous levels of paid leave from any mandated leave requirements. Specifically, they will require employers that provide generous leave benefits through a PTO system to add additional leave on top of their existing benefit mix – thus adding costs.

If employers are required to carve out 3 percent of overall payroll dollars for a specific benefit to be used under specific conditions with specific rollover provisions and penalties for violations, they will do so as a group but by reducing expenditures on other pay and benefits. The problems with benefit substitution are most acute in employers that utilize general PTO policies which typically combine vacation/sick/personal days into one bank of time and allow use for any of those purposes. If employers are mandated to provide a certain level of a specific leave benefit – they must decide whether to add that on top of existing employer leave policies or to reduce the existing in order to meet the new mandate.

A mandate would be a strong disincentive for employers to utilize PTO programs. Under such a system, they could no longer control the terms of use and accrual on the newly mandated days of paid sick time. Employers would either have to carve out separate leave to meet the definitions of the new mandate or have to convert their entire PTO system to be subject to the same procedural rules as the new mandate.

As our economy begins to recover from the most severe recession since the Great Depression, businesses need to maintain flexibility in order to survive, grow and provide jobs in the face of ongoing challenges, including the potential impact of contagious illnesses such as H1N1.

Conclusion

During this public health crisis and challenging economic times, I strongly caution against Congress rushing legislation that doesn't recognize and protect efforts currently underway by employers and hinders existing response and job creation efforts. Employers are in the best position to understand the needs of their workforce.

Employers have serious concerns with many aspects of the paid leave proposals as currently drafted. However, I look forward to working with the Committee to meet our shared goal of maintaining a healthy and productive workforce while ensuring the job retention and job creation that will assist economic recovery efforts.

Thank you for the opportunity to testify before the Committee, and I welcome your questions.