



April 16, 2013

U.S. House Committee on Education and the Workforce
Subcommittee on Workforce Protections
2181 Rayburn House Office Building
Washington, D.C. 20515

Re: Working Families Flexibility Act, H.R. 1046

Dear Members of the Subcommittee on Workforce Protections:

The National Women Law's Center (the Center) writes to express its opposition to the Working Families Flexibility Act of 2013, H.R. 1046, introduced by Representative Martha Roby on April 9th. The Center is a nonprofit organization that has worked since 1972 to expand the possibilities for women and girls in the areas of education and employment, family economic security, and health. The Center has long worked to remove barriers to women's participation in the workplace, and it is a strong advocate for the strengthening and enforcement of our nation's employment and civil rights laws. Throughout its work, the Center maintains a particular focus on achieving solutions that meet the needs of low-wage working women and their families. The Center opposes this legislation out of concern for its impact on all workers, and in particular, its impact on women workers who still shoulder the majority of caregiving responsibilities and make up a disproportionate share of workers in low-wage jobs. As Representative Roby has stated, legislation to help "better balance the demands of work and family" is sorely needed.¹ Compensatory time off (comp time) in lieu of overtime pay is simply not the answer.

I. THE WORKING FAMILIES FLEXIBILITY ACT MAKES FALSE PROMISES.

The bill's promise of providing greater flexibility to workers to both get the job done and provide care for their families is totally illusory. In fact, it does the opposite. This legislation would result in cash-strapped and time-strapped workers having to work more hours for less pay to earn time off, with no guarantee that they will be able to take that time off when they actually

¹ Roby Statement: Hearing on "H.R. 1046, the Working Families Flexibility Act of 2013."

need it. It requires workers to forfeit the overtime pay that is crucial to the economic security of many working families in order to earn comp time. Workers should not be forced to choose between providing for their families and earning time off to care for them. Furthermore, this bill does nothing to address the need for time off of the roughly 7.6 million workers on involuntary part-time work schedules who do not have any opportunity to work overtime,² since they want but cannot even get full-time hours; nor does it address the needs of voluntary part-time workers or of those workers who are exempt from the FLSA's overtime protections. Its limited reach is yet another one of the many reasons that this bill is a deeply flawed solution to private-sector workers' need for time off.

II. WORKERS HAVE NO GUARANTEES THAT THEY WOULD BE ABLE TO USE THEIR COMP TIME WHEN THEY NEED IT.

Like the public sector comp time law which permits state and local government employers to provide comp time in lieu of overtime pay, the Working Families Flexibility Act allows an employer to deny an employee's request to use comp time on specific days if granting the request would "unduly disrupt" the employer, and only requires the employer to permit the employee to use comp time within a "reasonable period" after receiving the request.³ A number of lower courts have resolved disputes about whether the employer may prohibit use of comp time on specific days in favor of the employer.⁴ When employees need to take a day off it is usually for a specific purpose such as going to a doctor's appointment, caring for a sick child or an aging relative, or attending a parent-teacher conference or a child's graduation. The vagueness of the legislative language, together with the lower court precedent on comp time in the public sector which gives employers significant leeway to refuse employee requests for particular days off, leaves little hope that employees will be able to rely on comp time when they need time off on a particular date.

III. WORKPLACE REALITIES MEAN THAT MANY WORKERS IN LOW-WAGE JOBS WILL FEEL COERCED TO ACCEPT COMP TIME IN LIEU OF OVERTIME PAY.

Despite the Act's provision that employers can only provide comp time in lieu of overtime pay when employees voluntarily agree, low-wage workers are likely to view comp time as a non-negotiable term of employment. Private sector unionization hovers around 6.6 percent, meaning that most low-wage workers will not have the benefits of union representation when it

² This is the number of employees classified by the Bureau of Labor Statistics as part-time for economic reasons. Bureau of Labor Statistics, Economic News Release, Table A-8: Employed persons by class of worker and part-time status, available at <http://www.bls.gov/news.release/empsit.t08.htm>.

³ 29 U.S.C. § 207(o)(5).

⁴ *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003); *Mortensen v. Sacramento*, 368 F.3d 1082 (9th Cir. 2004); *Scott v. City of New York*, 2004 WL 1418018 (S.D.N.Y.).

comes time to negotiate a comp time agreement with their employers.⁵ Low-wage workers with little bargaining power are unlikely to feel empowered to say no to employers' requests that they accept comp time in lieu of overtime pay.

IV. EMPLOYERS' TRACK RECORD OF ABUSE OF WAGE AND HOUR LAWS CUTS AGAINST LEGISLATING COMP TIME IN THE PRIVATE SECTOR, WHERE EMPLOYEES ALREADY HAVE TOO FEW TOOLS TO FIGHT BACK.

While more than a third of public sector employees have the benefits of union representation to address problems with comp time as they arise, private-sector workers are generally on their own.⁶ Violations of existing wage and hour laws are already rampant in the private sector, and these violations routinely go unchecked. For example, in a study of workers in low-wage jobs in a range of industries in Chicago, Los Angeles, and New York City, researchers found that 76 percent of workers who worked more than 40 hours in a week were not paid the legally required overtime rate.⁷ The Department of Labor simply does not have the resources to prosecute all of these violations, and low-wage workers often cannot afford to retain counsel to enforce their rights. Particularly in light of the profit motive private-sector employers have to coerce employees to accept comp time in lieu of overtime pay, private-sector comp time would likely give rise to yet another form of wage theft that would go unchecked.

V. CONGRESS SHOULD PASS WORKPLACE LEGISLATION THAT TRULY VALUES WOMEN AND FAMILIES.

Legislation providing comp time in lieu of overtime pay has been recycled in numerous Congresses with many detractors and few sympathizers. In contrast, there are several pieces of legislation being considered by Congress right now that would truly make it easier for workers with caregiving responsibilities to both provide for and take care of their families. These policies include raising the minimum wage and tipped minimum wage; ensuring equal pay for equal work; ensuring that women can get workplace accommodations when they need them to continue safely working during pregnancy; and providing access to paid sick days to workers of all income levels.

If Congress wants to act to support working families, there is a clear policy agenda it should follow. Comp time in lieu of overtime pay is not on it.

⁵ Bureau of Labor Statistics, News Release, Union Members – 2012, (2013) *available at* <http://www.bls.gov/news.release/union2.nr0.htm>.

⁶ *Id.*

⁷ Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 2* (2009).



Thank you for considering our concerns about The Working Families Flexibility Act. We would be happy to discuss our comments further and answer any questions you may have. Please feel free to contact us at (202) 588-5180.

Sincerely,

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