



## **Workflex in the 21st Century Act: Q & A**

*Building upon increasingly more creative solutions to address the 21st Century Workplace, the Workflex in the 21st Century Act is an innovative approach to providing more time off for employees, more predictability for employers and more options for everyone. For participating employers, the legislation would create a single federal framework for providing paid leave, rather than the fragmented patchwork of state and local laws mandating leave. To date, eight states and more than 30 jurisdictions have adopted paid sick leave laws, and this legislative activity is only expected to increase in coming years.*

*The proposed Workflex legislation builds on the success of the Employee Retirement Income Security Act (ERISA) to create a qualified flexible work arrangement plan as an employee welfare benefit under the statute. If an employer elects to offer all employees a minimum amount of compensable leave and a flexible work arrangement through the plan, this ERISA-covered plan would pre-empt state and local paid leave and Workflex laws.*

### **Q1: Why is this legislation necessary?**

**A1:** This legislation creates an innovative Workflex policy that meets the needs of both employers and employees in today's modern workforce. Rather than a one-size-fits-all, government mandate, a Workflex policy built for the 21<sup>st</sup> Century will have at its core a new approach that facilitates the expansion of paid leave and options for when, where and how work is done. It will also account for the diverse variety of work environments that exist today and anticipate the demands of the modern workplace that apply to employers of all sizes and in all industries.

### **Q2: What requirements must an employer meet to participate in this plan? Why does it have to include a flexible work option?**

**A2:** To maintain a qualified flexible work arrangement plan, an employer must offer all employees, including both full-time and part-time employees, a minimum threshold of paid leave, scalable to the size of the organization, and at least one flexible work arrangement. Research shows that employees value flexibility just as much as they value paid leave, so this represents a comprehensive approach in helping employees meet their work-life needs.

### **Q3: How much paid leave would an employer need to offer under this bill?**

**A3:** The amount of paid leave an employer must offer through this ERISA-qualified plan would depend on the size of the employer and the tenure of the employee. However, the amount of leave available to employees (assuming they work for a participating employer) under the plan would be

more generous than all state and most local leave laws. In addition, under this bill, employees would not only be guaranteed paid leave, they would also be guaranteed access to a flexible work option.

**Q4: How does this bill benefit qualified employees?**

**A4:** The bill will benefit employees by providing greater guaranteed paid leave to all full- and part-time employees than is provided by any state law—and more than most local laws. It also provides guaranteed Workflex options (such as teleworking, compressed schedules and predictable schedules) to all employees, options that many employees don't currently enjoy. Finally, because the bill is part of ERISA, it provides strong protections to employees requesting and using the leave and Workflex options.

**Q5: How is this approach better than those already introduced in Congress, such as the Healthy Families Act (mandating seven paid sick days) and legislation requiring a Federal Paid Leave Insurance Fund?**

**A5:** First, we have strong concerns with one-size-fits-all mandates, such as the one in the Healthy Families Act (HFA). Most employers have fixed and finite resources, with a budget dedicated to their compensation and benefit programs. When organizations are mandated to provide paid sick leave, they will likely offset the added costs by cutting back the paid sick leave and Workflex options they currently do provide; eliminating other employee benefits, such as health or retirement benefits; or delaying wage increases. This only hurts economic security for employees.

Furthermore, some employers have, by necessity, set existing leave coverage to match the mandated requirements or decided to “freeze” their coverage in place in reaction to new federal or state minimum requirements. Employers tend to structure leave allowances as a result of federal standards because coverage deemed as too generous—those that go above and beyond the protected federal minimum requirements—can result in the “stacking” of the paid leave (paid leave on top of the unpaid FMLA leave).

As indicated in the National Study of Employers, with the passage of the Family Medical Leave Act (FMLA), providing 12 weeks of leave for many employers has become the new norm. This limits employer flexibility in controlling their leave and attendance policies. We have also seen this occur in states with mandated sick leave laws, with many employers “designating” portions of their already provided compensable leave as leave needed to comply with a state statute, thereby reducing the overall amount of leave available to the employee.

As for proposals advocating a Federal Paid Leave Insurance Fund, at a time when there are soaring government budget deficits and many businesses are still struggling, paid leave becomes yet another entitlement program, as well as equivalent to another tax on employers and employees. Our legislation identifies incentives and other ways to encourage employers to adopt policies voluntarily, instead of through mandates. If we truly want employers to offer more paid days off, the new Workflex legislation is the approach more likely to garner their support and expand workplace flexibility.

It is also important to advance workplace solutions that are sustainable from a government funding perspective. One example is the voluntary long-term care insurance program known as the CLASS Act (enacted as part of the Affordable Care Act), which has never been implemented due to serious

concerns over its financial solvency. We question the long-term sustainability of federal and state paid leave insurance funds as a strategy for addressing this workplace issue.

**Q6: Why should employers support this legislation?**

**A6:** While clearly beneficial to employees, Workflex legislation benefits employers by providing much needed certainty and predictability over the fragmented patchwork of state and local laws requiring mandated leave. To date, eight states and more than 30 jurisdictions have adopted paid sick leave laws and other laws governing workplace flexibility. With the recent successes of state ballot initiatives that mandate leave, this legislative activity is only expected to increase in coming years. This Workflex bill provides employers with the predictability and certainty of one federal standard, as opposed to the complex, conflicting puzzle of state and local paid sick leave laws. Additionally, the bill ensures the program is voluntary, allowing employers to choose whether to participate.

**Q7: How does this legislation impact state paid family leave insurance laws in California, New Jersey, Rhode Island, New York and the District of Columbia?**

**A7:** This bill has no impact on these states' paid family leave insurance laws because ERISA does not preempt state disability insurance laws.

**Q8: Why doesn't the legislation *require* employers to provide paid leave and flexible work options?**

**A8:** Public policy needs to encourage the expansion of paid leave and workplace flexible options, not curtail it. One size does not fit all, and what works for one employer or employee might not work for another employee, employer or industry. Employers tend to restructure and scale back existing leave benefits as a result of mandated federal or state laws because coverage deemed as too generous—those that go above and beyond the protected requirements—can result in the “stacking” of the paid leave (paid leave on top of the unpaid FMLA leave, for example) and limit the employer's flexibility in controlling their leave and attendance policies. The Workflex bill incentivizes employers to offer more flexible work options to assist employees with their work-life needs, while also meeting business demands.

**Q9: Currently, the FMLA does not cover employers with fewer than 50 employees. Why does this legislation apply to small employers?**

**A9:** *This legislation is completely voluntary—and no employer is required to participate.* It does provide a unique opportunity to facilitate the adoption of paid leave and flexible work options for employees of small employers. If an employer chooses to provide a qualified flexible work arrangement plan to employees, the employer would enjoy the ERISA framework. The paid leave requirements would be scaled to the size of the employer's workforce, allowing employers to design a leave plan within a framework that meets the needs of their employees. Alternatively, an employer could choose to remain under the current provisions of state and local paid sick leave law requirements.

**Q10: How does this proposal impact leave under the FMLA?**

**A10:** The legislation does *not* affect the coverage protections afforded under the FMLA. Consistent with current law, this legislation will allow an employee to request or an employer to require accrued paid leave provided through an ERISA-covered plan to be used concurrently for FMLA-qualified leave purposes.

**Q11: If the FMLA already provides for employee leave, why is this legislation needed?**

**A11:** The FMLA is limited in the fact that it only entitles eligible employees to take *unpaid*, job-protected leave for specified family and medical reasons. Of course, employees value paid leave over unpaid leave. If an employer voluntarily chooses to offer a qualified flexible work arrangement plan, an employee could use his or her accrued paid leave to substitute it for unpaid, qualified FMLA leave.

**Q12: What if the employer's workforce is represented by a union?**

**A12:** Under the bill, when implementing an ERISA-covered plan in a workplace governed by a collective bargaining agreement, an employer would be required to negotiate with the union to offer the plan to its represented employees.

**Q13: Do employees have a legal protection from retaliation for requesting or participating in the arrangement under this proposal?**

**A13:** Yes. The bill has strong anti-retaliation protections for employees seeking to exercise their rights under ERISA. If an employer were to offer a qualified flexible work arrangement plan, the employer would be prohibited from taking adverse action against any employee based on the employee's request for leave or any other benefits provided in that plan, in accordance with ERISA. Remedies may include potential loss of plan qualification. Loss of plan qualification status means that the employer then may be subject to penalties under federal and state laws that govern compensation and leave (e.g., Fair Labor Standards Act (FLSA), FMLA).

**Q14: What remedies are available under this legislation?**

**A14:** Remedies available for employees are those provided by ERISA, which include equitable relief. These plans may also lose qualified plan status under ERISA, triggering potential applicable state law coverage requirements and penalties for the employer.

**Q15: Why amend ERISA instead of taking another legislative approach?**

**A15:** Creating a 21st Century Workflex policy by amending ERISA makes the most sense because employers are already familiar with this statute, one that has a proven track record of success. Congress enacted ERISA in 1974 to establish uniform federal standards to protect and promote the expansion of employee pension, welfare and health care plans. The bill amends ERISA to create a qualified flexible work arrangement plan as an employee welfare benefit under the statute.

There are numerous benefits for employers and employees provided through ERISA. First, ERISA creates a uniform federal standard for employer-sponsored benefit plans in terms of paid leave and Workflex options, providing greater compliance uniformity and certainty for employers (including

the preemption state laws related to these covered plans). ERISA creates a greater transparency of information of coverage and benefits to employees, provides standardized process and review for denied benefits and provides known remedies to denied benefits. ERISA requires plan sponsors to: maintain a written plan document (with an ERISA-compliant claims procedure); file annual returns (Form 5500s); respond to participant requests for documents in a timely manner; and maintain and distribute summary plan descriptions.

**Q16: If an employer offers this ERISA-covered plan, are there other requirements under ERISA that an employer must follow?**

**A16:** Yes, under ERISA the employer or plan sponsor must: maintain a written plan document detailing the elements of the qualified flexible work arrangement plan, including a claims procedure; annually file the Form 5500; respond to participant requests for documents in a timely manner; and maintain and distribute summary plan descriptions.

**Q17: Why are you making changes to the biweekly workweek? This will shortchange workers.**

**A17:** First, this provision is *completely voluntary for employer and employees alike*. Although very successful, biweekly workweeks are currently only available to certain employers engaged in the operation of a hospital under Section 7(j) of the FLSA. This new legislation would provide added flexibility by allowing more employers to offer a biweekly workweek to their employees. This greater flexibility would give employees the ability to create schedules that coordinate their work responsibilities, while being able to meet their life obligations. Employers do not have to offer biweekly schedules, and any employee who is not interested in a biweekly schedule may keep a traditional work schedule.

**Q18: What is the interaction between these ERISA-covered plans and the requirement of the executive order for federal contractors to provide paid leave?**

**A18:** An employer that meets the requirements of the ERISA-covered plan will be deemed to have satisfied the executive order on paid leave.

**Q19: How does this bill interact with the Americans with Disabilities Act (ADA)?**

**A19:** Nothing in this bill would affect the protections afforded under the ADA or corresponding state disability laws.