

Workflex in the 21st Century Act (H.R. 4219)

Legislative Overview

Introduced by Mimi Walters (Calif. - 45) and co-sponsored by Rep. Elise Stefanik and Rep. Cathy McMorris Rodgers, the **Workflex in the 21st Century Act** would allow businesses that meet certain requirements to evade state and local paid sick days and fair scheduling laws.

Preemption of State Law

The bill amends ERISA so that any state or local law that relates to a “qualified flexible workplace arrangement plan” (QFWA plan) is preempted. This seems to mean that if an employer has a QFWA plan – which includes compensable time and a flexible work arrangement – they **do not have to comply** with state or local paid sick days laws or with the paid sick days executive order for federal contractors, state or local fair scheduling laws or some aspects of state FMLAs. We are continuing to examine whether the bill has implications for state paid family and medical leave programs.

The adoption of a QFWA plan is completely voluntary on the part of the employer. There is nothing in the bill requiring them to create and/or implement a plan or change any existing plan. Where they choose not to adopt a QFWA plan, they are still subject to state and local law.

Requirements for Employer Participation

To establish a QFWA plan, an employer has to provide employees with a certain amount of leave and access to one of several types of flexible work arrangements, defined below.

- **The amount of leave is based on the tenure of the employee and the size of the employer.** The amount of “compensable leave” required ranges from 12 days for employees with fewer than 5 years of service at an employer with fewer than 50 employees to 20 days for an employee with 5 or more years of service at an employer of 1000 or more employees. Leave is prorated for part-time employees. **Six holidays can count toward “compensable time” days**, which means that the amount of true compensable, non-holiday time is substantially less than the minimums listed in the bill.
- **The flexible work arrangements possible are:** biweekly work program; compressed work schedule program; telework program; job sharing program; flexible scheduling and predictable scheduling.

Limited Protections for Workers

- The flexible work arrangement options come with tenure requirements.
- QFWA plans are to be enforced under the mechanisms of ERISA.
- A plan that substantially complies with the bill qualifies as a qualified flexible work arrangement plan. **This is an obvious loophole and is deeply concerning.**
- The definition of “compensable time” is not specific enough – it does not explicitly define “sick leave” or the purposes or people for which leave can be used. This means, for example, that **an employer could possibly get away with providing “compensable time” that an employee can’t use to care for a sick family member.**
- **Of great concern, the employer can decide if the leave would unduly disrupt the operations of the employer and can decide on the increments of leave** (i.e. full-day or partial-day increments). This substantially undercuts paid sick days guarantees, both in terms of employees’ right to use time when they need it and in terms of potentially being forced to use more leave time than they need.