

TESTIMONY BEFORE THE UNITED STATES CONGRESS  
ON BEHALF OF THE

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS**



Statement for the Record of Elizabeth Milito

NFIB Small Business Legal Center

Before the

**Committee on Education and Labor's Subcommittee on Workforce Protections**

Hearing on *"The Healthy Families Act (H.R. 1784): Examining a Plan to Secure Paid Leave for U.S. Workers"*

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Thank you to Chairwoman Adams and Ranking Member Byrne for holding this hearing and inviting me to speak today. I also thank the additional committee members and staff who are here with us today.

My name is Elizabeth Milito and I work in the National Federation of Independent Business's Small Business Legal Center. NFIB is a member-driven organization that represents about 300,000 small and independent businesses. NFIB members define our neighborhoods, fill our communities with character, create local jobs and homegrown economic opportunity for small businesses owners and their employees alike: local hardware stores, independent restaurants, florists and barbers, plumbers and paper companies, roofers, landscapers and mechanics, fitness and retail boutiques. These are NFIB members.

Small businesses employ nearly half the country's private sector workforce. When small businesses succeed, communities succeed. A strong, vibrant small business eco-system supports local tax bases, governments, and schools. It is estimated that 68 cents of every dollar spent at a local small business is reinvested into the community.<sup>1</sup> I trust you all recognize and value the importance of small businesses in your home districts.

I describe our membership and the importance small business has on our economy to illustrate one of the key points of my testimony and what I think often gets lost in the public policy discussions here in Washington, D.C., when it comes to labor and business issues: there is no such thing as a "one size fits all" policy that works for every business or every industry.

Consider the varied types of small businesses you frequent – pizza parlor, auto shop, drycleaner, hair salon - some have employees that are strictly full-time, others strictly part-time or hourly. Some have a combination of both. Perhaps others are seasonal employers. Small businesses face complex issues that are unique to them, and when solutions to perceived problems are put in place by government, policymakers too often paint business with a broad brush and fail to consider the unique structure of Main Street employers.

We appreciate the reasons the bill has been proposed. NFIB believes, however, that this bill will inadvertently affect the livelihood of many and should be considered in the context of its impact on this country's economic environment and the flexibility

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<sup>1</sup> The Multiplier Effect of Local Businesses, <https://www.amiba.net/resources/multiplier-effect/>.

many employees are already provided by their employers in difficult situations. NFIB has long opposed inflexible or mandated leave requirements for a variety of reasons. Today, I would like to focus on three concerns that NFIB has with the *Healthy Families Act* and explain why NFIB and its members oppose leave mandates.

1. *Small Business and Employee Benefits: Flexibility Makes Small Businesses Employers of Choice in Our Communities*

The term employer of choice is often associated with big corporations that have access to Cadillac employee benefit programs and seemingly endless resources to throw around, but the reality is that it doesn't have to be that complex or challenging. Small businesses have demonstrated time and again that being an 'employer of choice' simply means becoming an employer that potential and existing employees want to work for. Small businesses do this by offering competitive compensation and investing in employees and their communities.

The problem with debating paid leave legislation is that it ignores the basic fact that most small business owners already provide their employees with paid time off.<sup>2</sup> The reality is that employers across the country provide flexible, mutually beneficial arrangements that allow employees time off when necessary in a predictable, fiscally responsible way.

According to an NFIB national small business poll, a majority of small business owners indicated that they already provide flexible leave.<sup>3</sup> Most small employers (73 percent) offer paid time off (PTO) to the majority of their fulltime employees, and 67 percent of them offer two weeks or more of leave.<sup>4</sup> The number of days offered is dependent on an employee's length of service in 76 percent of small businesses offering the benefit.<sup>5</sup>

Small business owners compete for employees based on the flexibility and compensation they can provide. Mandated leave will result in a decreased ability of employers to offer other benefits that employees may want more than mandated

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<sup>2</sup> *NFIB National Small Business Poll, Employee Compensation and Small Business* (2016), available at [http://www.411sbfacts.com/files/NFIB\\_SBP\\_Emp-Compensation2017\\_v2.pdf](http://www.411sbfacts.com/files/NFIB_SBP_Emp-Compensation2017_v2.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

leave, such as pay increases, health insurance, paid-time-off banks, or additional vacation days. In short, mandates impede small employers' ability to attract and retain employees based on desirable compensation offerings.

H.R. 1784's one-size-fits-all mandate would handicap businesses' ability to attract workers at a critical time. Across the nation, small business owners are showing unparalleled confidence in the economy, as NFIB's Small Business Optimism Index continues at record high numbers, with the number of small business owners reporting "Now is a Good Time to Expand" registering at 28 percent, one of the highest levels in the 46-year history of the survey.<sup>6</sup>

Many businesses are hiring and expanding, with 38 percent currently hiring or trying to hire, and 36 percent planning to raise wages to attract and retain talented employees, the highest in more than 28 years.<sup>7</sup> However, finding qualified workers is the number-one-sited problem for small business owners, surpassing taxes and regulations, which have held the top two spots for years.<sup>8</sup>

One of the primary ways in which small businesses attract and retain talented workers is by providing innovative benefits like flexible leave policies, designed specifically to fit the needs of their employees and their businesses. The vast majority of small business owners work hard to ensure compliance with employment and labor laws in a workplace that treats employees fairly, but their informal and unstructured nature and more limited financial resources require greater flexibility in creating policies and solutions. Indeed, small businesses are leaders in flexible working arrangements, a key benefit for many of their employees. Studies have shown that small businesses are more likely to allow employees to change starting and quitting times, work some regular paid hours at home occasionally, have control over when to take breaks, return to work gradually after childbirth or adoption, and take time off during the workday to attend to

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<sup>6</sup> NFIB Small Business Economic Trends (January 2020 report), available at <https://www.nfib.com/surveys/small-business-economic-trends/>.

<sup>7</sup> NFIB Jobs Report (February 2020) available at <https://www.nfib.com/foundations/research-center/monthly-reports/jobs-report/>

<sup>8</sup> *Id.*

caregiving or other family or personal needs without loss of pay.<sup>9</sup> Flexible work arrangements like these directly correlate with increased employee satisfaction.<sup>10</sup>

In summary, expanding leave mandates, as H.R. 1784 would do, has two results that impact flexibility in the workplace. Mandating uniform leave policies for all employers cuts off an avenue through which small business owners can shine through unique programs that benefit their businesses, their customers, their employees, and, ultimately, their communities. In addition, as I'll discuss below, leave mandates increase costs for small employers, which almost always limits the flexibility of small businesses to provide benefits that many employees already enjoy.

## *2. The Complexity and Costs of Mandated Leave: Unforeseen, Unintended, and Hidden Costs of H.R. 1784*

Small businesses depend on predictability to stay competitive. A mandate like H.R. 1784 would further complicate compliance with workforce laws for employers and raise costs on businesses. Mandated leave is not a free benefit for employees; mandated leave comes with a cost that businesses will have to shoulder and will eventually be absorbed by the employer, employees, and customers. In a small business with a finite amount of resources, this translates into less money available for wage increases and hiring additional employees.

Small businesses, which are the backbone of our economy, are especially vulnerable to the impact of labor mandates. Small business owners typically have few administrative staff members and little human resources experience or regular access to legal counsel. And yet, they already contend with antidiscrimination laws, wage-hour laws, privacy laws, workplace safety laws, and labor laws. They often struggle to decipher the overlapping, sometimes even conflicting, federal, state, and local laws. Adding H.R. 1784 to existing federal, state and local labor and employment law requirements complicates an already difficult legal and regulatory

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<sup>9</sup> *Workplace Flexibility: Information and Options for Small Business*, U.S. Department of Labor Women's Bureau (2015), available at [https://www.dol.gov/wb/WorkplaceFlexibility\\_508\\_FINAL.pdf](https://www.dol.gov/wb/WorkplaceFlexibility_508_FINAL.pdf).

<sup>10</sup> *Workplace Flexibility Survey - Strategic Use of Flexible Work Arrangements*, Society for Human Resource Management (2014), available at [https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/2014-workplace-flexibility-survey-strategic-use-of-flexible-work-arrangements-\(fwas\).aspx](https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/2014-workplace-flexibility-survey-strategic-use-of-flexible-work-arrangements-(fwas).aspx).

environment for small businesses and exposes these businesses to legal challenges.

Understanding and complying with the complexity of a new mandate is expensive, both in terms of time and money. According to the Small Business Administration, workplace compliance costs small businesses 36 percent more per employee than it costs large businesses.<sup>11</sup> Some will argue or propose that the solution would be to exempt businesses with x number of employees as an attempt to protect small employers. There are a few problems here as well. One would be that it could discourage growth, hiring, and economic expansion, which is not an outcome our country can afford. Additionally, whether an employer is subject to the paid leave mandate or subject to the unpaid leave mandate, H.R. 1784 would impose onerous recordkeeping requirements with which small businesses would need to comply including new leave tracking, notification, documentation, and reporting requirements. Records would need to be maintained to demonstrate compliance with the following requirements:

- The employers must grant sick leave of one hour for every 30 hours worked with a maximum time required of 56 hours (7 days) in a year.
- An employer may grant additional sick time past 56 hours if they so choose. Sick time can start to be accrued 60 days after the start of employment.
- Accrued paid sick time shall carry over from one year to the next.
- The employee can take mandated sick time for any of the following reasons:
  - an absence resulting from a physical or mental illness, injury, or medical condition.
  - an absence resulting from a physician's diagnoses, or preventive medical care.
  - an absence resulting from caring for a child, parent, spouse, domestic partner, or anyone related by blood or affinity whose relationship with the employee is the equivalent of a family relationship suffering from any of the above-stated reasons.
  - in the case of a child, is required to attend a school meeting or a meeting at a place where the child is receiving care necessitated by the child's health condition or disability or a child in need of care.
  - an absence resulting from domestic violence, sexual assault, or stalking.

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<sup>11</sup> *The Impact of Regulatory Costs on Small Firms*, SBA Office of Advocacy (2010), available at [https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\).pdf](https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf).

- An employer may only request a doctor's note if the leave covers more than three consecutive days. The employee shall have 30 days to provide such documentation.
- Employers are required to notify employees and include in the employee handbook description of the policy. Each employer shall also post a notice describing the policy in a public place on the work premises. \$100 fines per violation for willfully violating this requirement.

It is important to consider that only about 12 percent of small businesses have a human resources professional or dedicated employee who handles personnel matters.<sup>12</sup> In the vast majority of small businesses, all "HR" matters are handled by the business owner or an employee who handles back office and administrative tasks. This means that the recordkeeping and reporting requirements mandated by H.R. 1784 will fall more times than not on the business owner.

Of course, despite their best efforts to do so, failure to comply with the mandates outlined in H.R. 1784 could result in fines, penalties, and potential litigation, which could be crippling for small businesses. Even the threat of a lawsuit can lead to a costly settlement that threatens a business. A small business owner who reads the list of legal and enforcement provisions contained in H.R. 1784 will likely conclude that a settlement – regardless of the merits of the underlying claim – is in the business's best interest. In summary, the bill allows for the following:

- Gives the Secretary of Labor investigative authority related to this act, including the power to request records relating to this act once in a 12-month period, unless the Secretary believes an employer is in violation of any regulation or order related to this act. It also gives the Secretary subpoena authority, in which case the Secretary gains unlimited ability to request records.
- Allows for private right of action in any federal or state court of competent jurisdiction by one or more employees or individuals for and on behalf of employees and individuals similarly situated.
- Provides for remedies including wages, salary, or benefits denied with interest, an additional amount as "liquidated damages," equitable relief as may be appropriate, reasonable attorney's fees, expert witness fees, and costs of action paid by the defendant.

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<sup>12</sup> NFIB National Small Business Poll Business Structure (2004), available at <http://www.411sbfacts.com/files/bizstructurepoll11.pdf>.

- Grants the Secretary authority to bring an action in a civil court of competent jurisdiction.

As I mentioned earlier, NFIB is a member-driven organization. Through NFIB's ballot process, members dictate NFIB's positions on federal and state policy matters. And NFIB members have consistently opposed federal and state leave mandates for good reason. The paid sick leave mandate outlined in H.R. 1784 would impose new costs on U.S. employers that would lead to reduced profitability, lost sales and production, and lost jobs. In 2015, NFIB's research department conducted a study to determine the economic impact of the *Healthy Families Act*. Assuming passage and implementation of then-H.R. 932 in 2016, the business economic model forecast that the sick leave mandate could result in 430,000 jobs lost over a ten-year period.<sup>13</sup> The cumulative real output lost during this period was estimated to be \$652 billion.<sup>14</sup> Job losses at small firms would have accounted for 58 percent of all jobs lost, and small firms would bear 50 percent of lost output.<sup>15</sup>

Most small businesses already offer flexible paid leave benefits. Those few that do not offer do so because of affordability. Mathematics leads to conclusions that cannot be argued with, regardless of what seems right, just or fair. Mandating leave will not change the ability of those businesses to offer these benefits, they will simply stop being in business.

### 3. *Death by a Thousand Mandates*

Efforts to expand labor mandates never stop. For small business owners, it's near impossible to keep up with the unprecedented number of changes in the past few years.<sup>16</sup> In 2019, a new mandated leave law seemed to appear every week. A federal mandated leave program will further complicate the patchwork quilt of labor laws that are problematic and confusing for employers and create unintended consequences for workers, businesses, and for the economic environment as a whole.

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<sup>13</sup> *The Economic Impact of H.R. 932 and Mandatory Paid Sick Leave on U.S. Small Businesses*, NFIB Research Foundation (2016), available at <https://www.remi.com/wp-content/uploads/2017/10/320-NFIB-Mandatory-Paid-Sick-Leave.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>

A federally mandated leave would add another benefit to the growing list of expenses that employers must absorb. In recent years, leave laws have passed in a dozen states.<sup>17</sup> Some of these state initiatives were funded via payroll deductions, only to later be modified to be strictly employer-funded. Many enacted paid leave mandates additionally incorporate private right of action language, which opens small employers up to an increased threat of litigation. Consider these comments from current NFIB members facing new state leave mandates: “With liability and workers compensation costs going up every year...we cannot take another mandate that raises the cost of doing business. My liability rates went up 22%!” or “This increase in payroll costs would force us to raise our prices, decrease existing benefits or reduce raises. This will hurt our employees; the very workers a paid leave mandate would seek to protect.”

A federal mandated leave program will put small businesses at a competitive disadvantage for attracting and retaining employees. In today’s economic boom, not only are employers competing to attract workers, but the competition amongst states for employers and jobs is fierce. Businesses in states with mandated leave programs will not fare well, compounding the already complicated compliance measures under H.R. 1784.

### *Conclusion*

Small business owners get the changing dynamics in the workplace - they are parents and caregivers, too - and they want to do all they can to attract and retain the best employees. But when it comes to benefits, flexibility is key for small businesses. Mandated leave laws represent a significant challenge for small business owners since flexibility is critical for a small business, and mandated leave laws are generally anything but flexible, simple to comply with, and affordable. Small business owners can and do offer support to employees in their lives away from work, whether it’s for their own care or to care for a parent, child, or other family member, but they must have flexibility in creating a policy that works for both the employees and the business.

During times of emergencies like now, flexibility is even more important than ever before. NFIB is monitoring the current situation and working to support our

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<sup>17</sup> *Id.*

members.<sup>18</sup> We have been providing them with the CDC's guidance to prevent workplace exposure, which includes the recommendation that employers maintain flexible policies to allow employees to stay home to care for themselves or a sick family member.<sup>19</sup> Employers must be prepared for emergencies, as CDC advises, but employers cannot be saddled with more mandates and costs. A better solution is to reduce regulations and lower taxes so that employers can weather storms and adopt flexible policies.

In summary, time-off for sick and family issues is currently worked out in small businesses across the country every day without government intervention. Mandates, whether paid or unpaid, drive up costs and force businesses to cut jobs. H.R. 1784 is an economically dangerous imposition of additional costs on this country's employers.

On behalf of all the small-business owners of the NFIB, thank you for focusing on this important issue and allowing us to appear before the committee. I would be happy to answer questions.

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<sup>18</sup> <https://www.nfib.com/content/legal-compliance/healthcare/how-small-business-can-prepare-for-coronavirus/>.

<sup>19</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.