

November 17, 2009

The Honorable George Miller
Chairman
House Committee on Education
and Labor
Washington, D.C. 20515

The Honorable John Kline
Ranking Member
House Committee on Education
and Labor
Washington, D.C. 20515

Dear Chairman Miller and Ranking Member Kline:

We write today in reference to the recently introduced *Emergency Influenza Containment Act* (H.R. 3991). While we share your goal of protecting the health of the American workforce and minimizing the spread of the H1N1 virus and other contagious illnesses, we must oppose H.R. 3991 as it is currently drafted. The bill's vague provisions would significantly impair employers' existing paid leave programs and initiatives, thus creating a convoluted and unworkable mandate impacting businesses of all sizes.

As you know, many employers have developed, or are in the process of developing, continuity plans in response to the current H1N1 outbreak. These plans include the full range of workplace flexibility options, including telecommuting, job sharing, schedule changes, shift swapping and paid time off for the employee's own illness or to care for ill family members. In addition, the vast majority of employers, more than 80 percent, already provide employees with paid time off that may be used as sick leave. The rigid requirements of H.R. 3991 threaten employers' ability to flexibly and creatively design programs that meet the unique needs and constraints of that employer and its employees. Moreover, the legislation fails to adequately recognize and clearly exempt from any mandated paid leave requirement employers that are already providing paid leave that may be used for sick leave to its employees.

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. A one-size-fits-all paid leave mandate that is applied to the broad, diverse industries that make up our nation's marketplace would negatively impact all employers, including small businesses, and limit our ability to retain and create new jobs.

The attached document outlines in more detail the important concerns we have about the *Emergency Influenza Containment Act*. We look forward to working with the Committee to address our shared goal of maintaining a healthy and productive workforce while ensuring the job retention and job creation that will ultimately bring us out of this recession.

Sincerely,

American Bakers Association
American Hotel & Lodging Association

Associated Builders and Contractors
Association of Equipment Manufacturers
American Foundry Society
Associated General Contractors
College and University Professional for Human Resources
Food Marketing Institute
HR Policy Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Franchise Association
North American Die Casting Association
National Association of Home Builders
National Association of Wholesaler-Distributors
National Club Association
National Federation of Independent Business
National Retail Federation
National Roofing Contractors Association
National Small Business Association
Plumbing-Heating-Cooling Contractors-National Association
Printing Industries of America
Retail Industry Leaders Association
Small Business & Entrepreneurship Council
Tree Care Industry Association

Emergency Influenza Containment Act H.R. 3991

Employer Action Triggers

- The bill provides paid leave for workers who are “directed” or advised by their employer to leave work or not come into work because the employer “believes the employee has symptoms of a contagious illness, or has been in close contact with an individual who has” these symptoms. (See Sec. 3 (a), (b).)
 - This legislation does not define how the term “directed” should be defined. As a result, employers could have a range of conversations or contacts with their employees which might or might not rise to the level of a “direction”. Preexisting guidance contained in employer policies could be construed to meet this definition therefore triggering employer payment obligations.
 - This legislation doesn’t define who can act as the employers. As written the determination could be made by a lower level supervisor that could be later revoked by someone with more authority.
 - The legislation leaves the determination of symptoms to the employers if they “believe the employee has symptoms of a contagious illness.” The legislation lacks a clear threshold that would be sufficient to form this conclusion. Typically, most employers are not medical professionals, nor do they usually have such medical professionals on site to make this determination.
 - This bill lacks protections for employee privacy rights with regard to an employer determining whether an employee has been in close contact with an individual who has such symptoms.

Employee Compensation

- The bill calculates the rate of pay “based on the employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work (sic)” (See Sec. 3 (c) (2) (a).)
 - This legislation does not address how overtime pay would be taken into account.
 - The hours an employee might normally be scheduled to work might not be fixed, or set for the time that the employee would be out. This legislation lacks the necessary guidance to make this determination.

Employer Guidance

- The Secretary is directed to issue guidelines to assist employers on these calculations, but no deadline for these guidelines is set, while the bill is supposed to take effect 15 days after enactment. (See Sec. 3 (c) (2) (b), Sec. 8.)
 - This legislation does not provide for the Secretary to issue implementing regulations to assist employers in fully understanding their obligations. The

absence of regulations, and the notice and comment process to develop them, will mean that employers will be left to figure out how to implement this law on their own and heighten the risk that they will not be in compliance.

Employer Termination of Leave

- The bill allows an employer to indicate to the employee that it no longer “believes the employee...has symptoms of a contagious illness or poses a threat of contagion to other employees or to the public (sic)” (See Sec. 3 (c) (4).)

As noted above, employers are not typically in the position of making such medical determinations. Nor would they be able to examine the employee once they are at home, or not at work.

Impact on Current Policies and Requirements

- The bill specifies that “nothing in this Act shall be construed to in any way to diminish the rights or benefits that an employee is entitled to” based on another federal, state or local law, collective bargaining agreement, or existing employer policy. (See Sec. 7.)
 - This provision lacks the necessary clarity to be effectively implemented.
 - One interpretation would be that it means an employer would have to restore any paid leave used as a result of them directing an employee to stay home so that in effect, an employer would have to add five days to what they are currently providing.
 - Another interpretation would be that an employer would not be able to adjust their current policy to reflect that paid leave they would have to provide under this bill, i.e. they could not reduce the amount of leave they provide from 10 days to five days.

Sunset of Bill

- This bill is supposed to sunset two years after enactment. (See Sec. 9.)
 - There is no history of such a benefit being enacted and then being removed. There is no such thing as a temporary benefit, just as there is no such thing as a temporary tax.

Definition of Illness

- This bill defines a “contagious illness” as including “influenza-like-illnesses such as the novel H1N1 virus.” (See Sec. 10 (1).)
 - “Influenza-like-illnesses” is a very open ended phrase that could end up meaning many conditions.
 - This bill is described as responding only to the current epidemic of H1N1, however that illness is not the only condition for which leave would have to be paid. The current definition would result in an overly broad application.

Definition of Covered Employers—Safe Harbor

- This bill attempts to provide a safe harbor for employers that either do not employ 15 or more employees, or already meet its requirements. (See Sec. 10 (3) (A), (B).)
 - However, the bill does not take into account the growing trend by employers to provide Paid Time Off (PTO) plans. Under these plans employees are provided with paid leave without specifying the reason for its use. 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. Under the current language, whether employers would be exempted if they offer a PTO style plan is not clear.
 - The bill does not make clear whether additional paid leave must be provided if an employee has already been provided leave, but has exhausted it by the time they need to be out under this bill.
 - The bill does not define the application of leave for employees that are contracted through an employment agency.
 - The bill does not specify how part time or temporary employees should be treated for purposes of the 15 employee threshold.
 - The language of (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. The bill does not make clear if such requirements disqualify a leave policy from satisfying this safe harbor.