Statement of the U.S. Chamber of Commerce

ON: **Reviewing H.R. 1180, the Working Families Flexibility Act of 2017**

TO: **U.S. House of Representatives Committee Subcommittee on Workforce Protections of the Committee on Education and the Workforce**

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

STATEMENT OF LEONARD COURT
SENIOR PARTNER, CROWE & DUNLEVY, A PROFESSIONAL CORPORATION
BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

Reviewing the Working Families Flexibility Act of 2017

April 5, 2017

Mr. Chairman and Members of the Subcommittee:

I am honored to appear today on behalf of the U.S. Chamber of Commerce to express our support for H.R. 1180, the Working Families Flexibility Act of 2017. My law firm, Crowe & Dunlevy is one of the two largest firms in Oklahoma, and, is a member of the Chamber's Labor Relations Committee where I serve as the Chairman of the Subcommittee on Wage, Hour and Leave issues.

The Working Families Flexibility Act of 2017, like its predecessors, would allow employers to offer employees the option to choose to take their overtime compensation as paid time off instead of just direct compensation. Employees who chose this would thus be getting the same amount of extra income by getting paid time off at the rate of 1.5 hours for each hour of overtime worked. The bill would harmonize the private sector with the public sector where this option is already available and has been used without problems.

The bill is carefully drafted to ensure that employees retain maximum flexibility in being able to choose whether to take the comp time option, whether to continue exercising it, when they may seek a cash out of their banked time, and to protect them from any coercion or undue influence from the employer as to whether they exercise the comp time option.

Because this bill has been introduced and considered by this committee several times before, there is little new that can be said about it. Other witnesses this morning have discussed their views on the merits of the legislation and I would like to use my remarks to refute various arguments we know opponents of this bill will raise. Many of these are based on a misreading of the bill, and others are based on a view that employers simply do not treat their employees properly.

Among the attacks opponents like to raise is that by promoting this bill, Republicans are undermining the 40-hour workweek and jeopardizing overtime pay. The Fair Labor Standards Act's (FLSA) 40-hour workweek as the threshold for earning overtime compensation remains totally untouched. Ironically, Obamacare's definition of a full time employee being 30 hours a week averaged over the course of a month represents a direct challenge to the 40-hour workweek and may make it harder for some employees to earn overtime. The FLSA 40-hour workweek remains the threshold necessary to earn overtime, and thus compensatory time under this bill.

Opponents argue that the bill will undermine protections for low wage workers because employers will coerce employees into taking comp time instead of traditional overtime

compensation. The decision to opt for comp time always rests with the employee, not the employer. The bill explicitly prohibits employers from trying to "intimidate, threaten, or coerce" any employee regarding their rights to choose or not to choose to take the comp time option, or their right to use banked comp time. The bill provides that employers who violate these protections are subject to specific penalties. Finally, this argument seems based on the misreading of the bill that comp time is unpaid, as opposed to the fact that it is paid time off. The only incentive an employer would have to coerce an employee into taking comp time would be if the leave was unpaid.

A variation on that assertion is that the bill will weaken overtime protections for working Americans by significantly reducing the cost of overtime to employers. This argument only works if the bill converted overtime compensation into unpaid leave. But under the bill, comp time is paid time off and will accrue at the rate of one-and-one-half paid hours for each hour of overtime worked. The cost to employers is the same. In addition, the employer must pay the employee for accrued, unused comp time at the highest rate received by the employee during the time in which the comp time was accrued.

We have also heard opponents claim that employers are only interested in offering comp time because it will mean they can hold onto the employee's earnings and use those funds for their own purposes. In fact, employers must carry the liability for the employee's earnings thereby tying up those funds. Further, given that an employee can request a pay out of their accrued earnings at any time and the employer must comply within 30 days, employers will need to ensure that sufficient funds are obligated to cover these amounts. Employers who would choose to offer the comp time option would do so because their employees are interested in having the choice.

Similarly, some opponents have suggested that private sector employers cannot be trusted like public sector employers because they are in business to make a profit. Private sector employers must abide by the various laws that protect employees' interests, including all the other provisions of the FLSA. To suggest they cannot be trusted to responsibly implement this provision is to suggest that they cannot be trusted with any new law. Furthermore, that same profit motive means private sector employers must respond to market forces and be vigilant that they remain a desirable employer. Offering comp time would be one way a private sector employer could distinguish itself from its competitors.

Opponents also fear that the employer maintains too much control over when the employee may use the comp time. Under the bill, the timing and use of comp time is up to the employee – subject only to the employee giving reasonable notice to the employer of the intent to use comp time, and the employer's limited right to limit the employee's use based on whether the employee's absence would unduly disrupt the business operations. These conditions are identical to those that apply to the use of comp time in the public sector and similar to the limits on use of leave under the Family and Medical Leave Act (FMLA). They are also similar to basic leave request procedures used by employers outside the context of these laws.

Another unfounded argument raised against the bill is that an employer could refuse to hire an employee or give overtime based upon whether the worker will take comp time. This is

rebutted by specific language in the bill prohibiting an employer from coercing or attempting to coerce an employee into taking comp time in lieu of cash overtime. The language of the bill prohibiting coercion is the same language that covers federal employees in the use of flex time (5 USC 6132). Furthermore, under the bill, willingness or unwillingness to take comp time cannot be a condition of employment. The bill allows workers the option of comp time, while protecting those workers who do not want comp time but prefer traditional cash overtime wages.

Consistent with their view that employers will find ways to coerce their employees, notwithstanding the prohibitions such actions, opponents argue that the penalties for coercion in the bill are too weak. In fact, the penalties in the bill for coercion are the same as those for unpaid overtime under the FLSA, and comparable to those in other labor laws such as the FMLA. The employee receives the amount of pay owed plus an equal amount in liquidated damages (plus attorney's fees and costs). If the employee has already used and been paid for the comp time, then that amount is deducted from the award (since they have already received the overtime pay), but he or she may still receive the liquidated damages. In addition, the other remedies, including civil and criminal penalties and injunctive relief, under the FLSA apply. The employee can seek redress through a private right of action, or the Department of Labor may sue on behalf of the employee.

Opponents also believe an employer may force an employee to cash out comp time against his or her will. The bill allows the employer to cash out accrued comp time after giving 30 days' notice to the employee and restricts this option to accrued hours over 80, unless the employee requests the cash out. The employee can request a cash out at any time, and the employer must comply in 30 days. These provisions are in recognition that either party may, for a variety of reasons, change their mind and prefer to cash out the comp time and pay the accrued overtime wages.

Another fallacious argument is that employees who earn comp time should receive credit for those hours for purposes of health and pension benefits. Comp time is given for overtime hours, which are hours for which the employee has worked and is "entitled to pay" and are therefore considered "hours of service" under ERISA (29 C.F.R. Sec. 2530.200b-2). There would be no change in the hours of service with which an employee would be credited for purposes of accrual, participation, and vesting under ERISA.

Likewise, opponents seem to think that when an employee takes comp time, that time should be considered hours worked for purposes of additional overtime pay. The standard for calculating "hours worked" has been in place under the FLSA since the 1930's. The only hours which may be counted in the calculation of overtime pay are hours which the employee has actually worked. Comp time would be treated the same as vacation leave, sick leave, and leave under the FMLA, none of which are considered "hours worked" under the FLSA. Similarly, comp time in the public sector has not been considered "hours worked."

Some on the other side worry that an employee who is terminated with comp time eligibility may suffer a loss of unemployment compensation because of the comp time entitlement. The bill requires the employer to cash out all accrued comp time upon termination of employment, whether voluntary or involuntary. Depending upon state laws, such payments

might be netted out against the initial week or weeks' unemployment benefits, in the same way as severance pay is when that is provided. The employee's unemployment benefits are thus deferred not lost for the employee. In other words, the employee would be eligible for the same amount of unemployment benefits whether or not he or she receives cashed out comp time, but if the comp time is cashed out, the unemployment benefits will last longer.

One of the most creative opposition arguments is that allowing comp time banks of up to 160 hours 'may encourage' employers to go out of business to escape liability. The 160 hours is a maximum. The employer or the employee may insist on a lower limit, and an employee may choose not to take comp time at all. The bill also requires an annual cash out of accrued comp time, and allows the employee to request a cash out of his or her accrued comp time at any time. Finally, the notion that an employer would voluntarily go out of business to avoid paying out accrued comp time is absurd.

Opponents also worry that the bill has no protections for employees if an employer goes bankrupt. But, the bill explicitly says that accrued comp time is given the same status as unpaid wages, and thus given the same priority as any other wages owed to workers in the event of bankruptcy.

Ironically, those opposed to the bill believe that a union could bow to pressure from the management, to specify that accrued comp time must be used by employees during a period of slow work, such as during a model change-over in an automobile plant. However, a collective bargaining agreement cannot preempt the parameters on comp time that are spelled out in the bill. Thus, an employee may use comp time whenever he or she wishes, subject to the requirements for reasonable notice the employee's absence not being "unduly disrupt[ive]" to the operations of the employer. This applies even if the agreement to accept comp time is negotiated by the union; the union may not waive this right of the employee who owns the comp time. The employee is also protected by the prohibitions against employer coercion.

Finally, the other side worries that the bill fails to require an employer to notify employees of their rights under the Act. Section 4 of the bill explicitly provides for notification to employees through the FLSA poster that employers must display in the workplace.

This bill has been introduced and debated many times. All of the arguments opposing it have been answered and rebutted. It is now time to enact the Working Families Flexibility Act of 2017.