Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Public Hearing on Senate Bill 479

Before the:
Pennsylvania Senate Labor and Industry Committee

Presented by:

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Chairwoman Ward, Chairwoman Tartaglione and members of the Senate Labor and Industry Committee, my name is Alex Halper and I am Director of Government Affairs for the Pennsylvania Chamber of Business and Industry. The PA Chamber is the largest, broad-based business advocacy association in the Commonwealth. We represent employers of all sizes, crossing all industry sectors throughout Pennsylvania. Thank you for the opportunity to testify today regarding Senate Bill 479.

The federal Family and Medical Leave Act (known as FMLA) became law in 1993 and requires certain employers to provide up to 12 weeks of job-protected leave annually to eligible employees for various reasons, including to care for a sick child, parent or spouse. SB 479 would provide a similar benefit for eligible employees in Pennsylvania by requiring employers to provide an additional six weeks of leave to care for grandparents, grandchildren and/or siblings.

While this is a well-intentioned proposal that clearly seeks to help individuals experiencing very difficult circumstances, we do have concerns with this particular bill and do not believe it should be advanced at this time.

First, it is worth noting that federal law likely covers some situations this bill seeks to address, as the definition of "parent", as it relates to FMLA, has been interpreted to include an individual who stands or stood *in loco parentis*. According to the U.S.

Department of Labor (USDOL), this refers to the type of relationship in which a person has put themselves in the situation of a parent by assuming and discharging the obligations of a parent to a child. An employee is entitled to take FMLA leave to care for a child if there is an *in loco parentis* relationship, even if the child has one or both biological parents in the home, or another individual acting *in loco parentis*. An employee may also utilize FMLA for a person who stood *in loco parentis* to them when they were a child, such as a grandparent or sibling. In all of these cases, an employee may simply assert that the relationship exists and the employer is prohibited from requiring any additional verification.

Several of our concerns with S.B. 479 stem from the fact that the bill is state legislation attempting to amend and expand a federal program. For example, over the last 25 years the federal FMLA has been subject to myriad USDOL regulations, guidelines and case law that contemplate countless sets of circumstances and ultimately dictate how employers can attempt to comply with the law. While S.B. 479 references the federal FMLA, it will no doubt also be subject to state level regulations, guidelines and case law. Federal FMLA is already often cited by employers as among the most, if not the most, complicated and administratively perilous mandates with which employers are required to comply. The notion of two programs, with two sets of administrative requirements and compliance nuances is daunting. It will also exacerbate another commonly cited human resources law challenge for employers:

workplace laws imposed by different levels of government that are similar in purpose but different in detail, leaving employers vulnerable to inadvertent violations when they're compliant at one level but possibly in violation at another.

We believe attempting to expand Federal FMLA through this state legislation also means increasing mandatory leave by 50 percent, as an individual who utilizes six weeks of leave under S.B. 479 must also be entitled to 12 weeks under Federal FMLA and vice versa. Certainly, running a business entails managing absences and employees on leave; but mandating an entitlement of 18 months of leave in a 12-month period – more than one-third of a year – is very likely to cause negative impacts to company operations and other employees; and would disrupt the balance sought under FMLA.

These are among the reasons we believe that, should a proposal of this nature be pursued, the appropriate vehicle is an amendment to the Federal FMLA introduced in Congress.

That said, even if this legislation was introduced in Congress there would still be areas of concern. For example, expanding FMLA to include other types of relatives would inherently add significant complexity to a step in the process of confirming that an event is indeed eligible for FMLA leave. Currently, an employee can verify the familial status of their relative by producing a birth certificate or marriage certificate.

There is typically no comparable documentation for a sibling, grandparent or grandchild. Moreover, S.B. 497 would require employers to verify that the sibling, grandparent or grandchild has no living spouse, child older than 17 years of age or parent younger than 65 years of age. Under this framework, an employer must verify and the employee must prove a negative: that an individual in one or more of the categories does not exist. While we understand and appreciate that this provision seeks to narrow the scope of eligibility under the legislation, as a practical matter, administering this aspect of the legislation could be enormously complicated and burdensome.

Should this or any other FMLA expansion proposal be taken up by Congress we would advocate for a broader discussion regarding improvements to the law to occur before or at least concurrently. While FMLA has certainly benefited millions of individuals dealing with unfortunate family and medical circumstances, it has also regretfully become defined by its difficulty to administer and conduciveness to misuse. Conflicting court decisions, unclear or insufficient rules promulgated by USDOL and the inability or unwillingness of Congress to address these problems have exacerbated this burden, which falls not just on the employer but also other employees.

As previously stated, many of our members, often specifically HR professionals, cite FMLA as the most difficult employer mandate with which they must comply and

report it is only getting worse. For example, a couple aspects of the law that employers report finding most challenging are tracking and accommodating intermittent leave and establishing that a health condition for an employee or employee family member is an FMLA-qualifying event.

The FMLA's intermittent leave requirement allows employees who report chronic health problems for themselves or for family members to utilize FMLA leave in short increments of sometimes an hour or less. Employees must give appropriate notice when their need to take leave is foreseeable, but when the leave is unanticipated, the employee is asked to notify the employer as soon as they can. This can mean an employer is made aware of an absence or late arrival immediately before or even after the leave is taken. And though the original health condition that triggered FMLA in the first place must be certified by a medical professional, employers may not be able to confirm that the intermittent leave taken was necessary due to the condition. Moreover, keeping track of intermittent leave, particularly when used in very short increments and by multiple employees, can be extremely challenging, forcing many employers to either purchase expensive software or hire a third party administrator simply to track FMLA leave .

Establishing and confirming that a condition or illness is a "serious health condition" and therefore qualifies under FMLA is also difficult for employers. People may

commonly associate FMLA with health conditions like the birth of a child, recovering from a major accident or caring for a seriously ill relative. Many HR professionals will tell you that far more often they are managing FMLA cases for employees or their relatives related to conditions like joint pain, asthma, migraines or mental health conditions. To be clear, I do not mean to imply that these conditions are not "serious" – only to provide some insight to the scope of health situations for which FMLA is applied. As previously noted, these conditions must be certified by a medical provider. However, employers report that certificates often lack adequate information to help determine work restrictions or expectations for duration of the condition or frequency of necessary leave and the ability to follow up or get clarification from the provider is often insufficient or nonexistent.

Intermittent leave and enforcing the "serious health condition" requirement are just two examples of problem areas employers report to experience related to FMLA. While some challenges are simply inherent in the law, others exist because the law lacks sufficient protections for employers to prevent misuse or excessive, inappropriate utilization. For example, employers often cite an increase of FMLA utilization for chronic conditions on Mondays, Fridays, around holidays or when a vacation request has been denied.

Obviously any employee absence, for any reason, can create real and costly challenges for employers in terms of productivity and planning – that's part of running a business. However, FMLA abuse and the difficulty employers experience trying to thwart it, unfairly, and sometimes significantly, exacerbate these challenges and can also generate resentment and frustration among the claimant's coworkers who are asked to pick up the slack even when misuse of FMLA is justifiably suspected. Though employers can challenge an FMLA submission, they are often reluctant to do so at the risk of subjecting themselves to potential civil action in a litigation environment tilted against them.

Until some of these serious problems with the administration and enforcement of FMLA are addressed, the PA Chamber will be hard-pressed to support any proposal to expand the scope of this employer mandate.

Again, thank you for the opportunity to testify. I am happy to answer any questions.