



Testimony

Submitted on behalf of the  
Pennsylvania Chamber of Business and Industry

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**Public Hearing on Senate Bill 580**

Before the:  
**Pennsylvania Senate Labor and Industry Committee**

Presented by:

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Chairwoman Bartolotta, 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. Our members include employers of all sizes, crossing all industry sectors throughout Pennsylvania. Thank you for the opportunity to testify today regarding S.B. 580.

Senate Bill 580 would establish the Pennsylvania Family and Medical Leave Insurance Program. Under this proposal, employers would be required to deduct and remit to the Commonwealth a portion of their employees' wages, which would be deposited into statewide fund and ultimately made available as wage replacement benefits during periods in which an individual is caring for themselves or family members. Eligible employees would generally be entitled to up to 20 weeks per year to care for themselves or 12 weeks per year to care for a family member.

The PA Chamber has traditionally opposed proposals to impose additional mandates on employers, who already must navigate a labyrinth of federal, state and local regulations related to practically every facet of their operations and workplace. When we survey Pennsylvania employers every year and ask respondents to name the single most important issue affecting their business, "mandates/regulations" is typically cited as a top concern. This was true in the most recent survey conducted this past August:

out of 18 specific options provided, “mandates/regulations” was the third most popular response after Workforce issues and Taxes.

Concerns with over-regulation certainly apply to mandatory leave proposals, which typically require a one-size-fits-all policy related to time off that disregards a company’s size, industry, financial stability, interstate competition or any of the countless variables that distinguish businesses. They also prohibit employers from developing customized leave policies that benefit their employees while still accommodating their own unique staffing requirements.

That said, we do appreciate the intent behind S.B. 580 and agree with bill advocates that all parties benefit when employers are able to implement reasonable leave policies. We further appreciate elements of this particular bill that appear to acknowledge and attempt to address a number of concerns raised by the business community with respect to previous proposals.

Perhaps most notable and obvious is the employee-based means in which this new entitlement program would be financed. Employees would initially contribute 0.588 percent of their wages to the Family and Medical Leave Fund. This rate translates to a nearly 20 percent increase in Pennsylvania’s Personal Income Tax rate of 3.07 percent and could increase every two years with no action by the legislature required. An

employee-financed model certainly mitigates the financial impact on employers compared with an employer-financed approach; however, employers would still likely experience additional costs, including the need for additional staff, overtime costs and for what could be significant direct and indirect expenses related to administration.

Furthermore, it is worth noting the national trend of legislation imposing so-called predictive-scheduling requirements on employers, which, among numerous mandates or prohibitions, typically provide employees full discretion to refuse requests to work during any period not scheduled well in advance. Employees who agree to work shifts that were not pre-scheduled are typically required to be paid a premium above their regular rate. It is paradoxical to consider the simultaneous administration of laws that 1) allow, and likely encourage, unannounced work absences and 2) prohibit employers from shifting schedules with other employees to help cover for the absence. With at least one municipality already having passed a predictive-scheduling ordinance, others likely to follow and legislation pending in the Pennsylvania General Assembly, this is not strictly a hypothetical concern among employers.

Another element of S.B. 580 that appears intended to address a concern previously cited from the business community is Section 309(a), which provides that leave taken under this act shall run concurrently with leave that is eligible under the federal Family and Medical Leave Act (FMLA). FMLA became law in 1993 and requires certain

employers to provide up to 12 weeks of job-protected unpaid leave annually to eligible employees to care for themselves or certain family members. We appreciate the inclusion of this provision; otherwise, Pennsylvania employers would be required to manage a workforce in which employees could annually miss between 46 percent and 62 percent of work every year. Section 309(a) mitigates, but does not eliminate this concern; particularly given eligibility disparities between the two laws, as described below.

Senate Bill 580 is clearly attempting to be consistent with the federal FMLA but guaranteeing long-term alignment is impossible. Over the last 25 years, FMLA has been subject to reams of U.S. Department of Labor regulations, guidelines and case law that contemplate a variety of scenarios and ultimately dictate eligibility and how employers must comply with the law. Senate Bill 580 references FMLA, yet it too will ultimately be subject to state level regulations, guidelines and case law which over time could create two different criteria for eligibility. An employee who qualifies for leave under S.B. 580 but not FMLA, or vice versa, would be eligible to miss between 46 percent and 62 percent of work every year, as previously noted. Now, running a business certainly entails managing absences and employees on leave; but mandating an entitlement of as many as 32 weeks of leave in a 52-week period would likely cause undue negative impacts to company operations and to other employees who are often asked to pick up the slack.

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. This is one of the most common HR challenges cited by 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 are compliant at one level but possibly in violation at another.

FMLA is referenced throughout S.B. 580 so it is worth examining how the federal law and proposed state law are different and how they are the same. On their face, S.B. 580 and FMLA appear to differ most significantly with respect to eligibility, with S.B. 580 establishing a far more expansive reach. For example:

- FMLA has always recognized the unique workforce challenges associated with running a small business and therefore only applies to companies with 50 or more employees within 75 miles. S.B. 580 applies to all employers regardless of size.
- Under FMLA, an employee must have worked 1,250 hours for the employer during the previous 12-month period to potentially be eligible for leave; under S.B. 580, the requirement is 720 hours.

- FMLA provides for leave to care for oneself, a spouse, child or parent. Senate Bill 580 defines "Family" as anyone related by blood to the second degree of consanguinity or any individual whose close association with the employee is the equivalent of an immediate family relationship.

These disparities – the two latter in particular – practically ensure circumstances will arise in which the intent of Section 309(a) could be unenforceable and employees would ultimately be eligible for leave under both FMLA and S.B. 580.

Senate Bill 580 is also similar to FMLA in specific ways; unfortunately this includes aspects of the law that employers often report finding most challenging: tracking and accommodating intermittent leave and establishing that a health condition for an employee or employee family member is an FMLA-qualifying event.

FMLA and Section 307 of S.B. 580 both permit intermittent leave, in which employees who report chronic health problems for themselves or for family members may take leave in short increments of sometimes an hour or less. Employees are only required to give appropriate notice when their need to take leave is foreseeable; but when the leave is unanticipated, the employee is simply asked to notify the employer as soon as practical. An employer may become 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. This would surely be exacerbated if intermittent leave was provided for under a completely separate statute, with different eligibility requirements and the possibility of an employee simultaneously eligible for different events: one covered under FMLA and the other under state law.

Establishing and confirming that a condition or illness is a “serious health condition” and therefore qualifies under FMLA is also difficult for employers and would certainly be difficult under S.B. 580, which relies on FMLA’s definition. 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 report 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 like anxiety. I certainly do not mean to imply that these conditions are not “serious” – only to provide some insight to the scope of health situations to 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 with respect to FMLA. While this federal law has certainly benefited millions of individuals dealing with unfortunate circumstances, it has also regrettably become defined by its difficulty to administer and conduciveness to misuse, unclear or insufficient rules promulgated by USDOL and the inability or unwillingness of Congress to address these concerns. Unfortunately, these issues appear to be just as problematic under S.B. 580.

We have concerns with several other specific aspects of S.B. 580 as well:

- The PA Chamber has generally opposed burdensome mandates on businesses that prevent employers from developing policies that fit the unique contours of their operation and workplace. Senate Bill 580 appears to go even farther by essentially removing the employer from the process entirely: claimants are directed to apply for leave directly to the PA Department of Labor and Industry (the Department), which, according to Section 302(c), will only hear appeals if the Department denies

a claim. While some employers may initially appreciate the ability to outsource administration of this program to the Department, I suspect most would ultimately lament the extent to which the statute shuts employers out of the process entirely.

- The bill contemplates the potential for both employer and employee violating or otherwise misusing this law; yet it sets significantly different standards for each: under Section 502(a) employees must be found to have *willfully* made a false statement, omitted key information, etc. – a high threshold not afforded to employers under Section 504; the only penalty for an employee found to have willfully violated this act is the denial of benefits, while even inadvertent errors committed by an employer may trigger significant penalties and expose the employer to litigation; Section 308(f) appears to provide safe harbor if an employee mistakenly, but in good faith, alleges an employer violation, no such protection exists for the employer.
  
- Section 308(d) prohibits employers from discriminating or retaliating against an employee for exercising rights under this Act. While this concept is certainly appropriate, the language is so broad it unduly exposes employers to potential violations for inappropriate reasons, such as promoting or awarding bonuses to the employee’s coworkers.

- While S.B. 580 attempts to address the potential for “stacking” leave entitlements provided under state and federal law, it does not address mandatory leave ordinances imposed at the local level by municipalities. Employers in two Pennsylvania cities, and potentially more in the future, would be subject to at least three different leave policies, required to decipher three different eligibility criteria, responsible for administering three different sets of paperwork, etc. Should S.B. 580 advance, it should at least be amended to include state preemption.

While we have strong reservations with this bill, we appreciate the work and thoughtfulness that has gone into its drafting; in particular, recognition of and efforts to address a number of employer concerns.

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