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Subcommittee on Health, Employment, Labor and Pensions

Hearing on H.R. 4219, Workflex in the 21st Century Act

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Good morning Chairman Walberg, Ranking Member Sablan, and Subcommittee members. I am pleased to provide testimony today on H.R. 4219, the Workflex in the 21st Century Act.

My name is Jon Breyfogle, I am a principal with Groom Law Group, Chartered. Groom Law Group is located in Washington D.C. and is the Nation's largest law firm that specializes in employee benefits, health insurance and the retirement services industry. I have been with Groom for 26 years, and prior to that time I held various positions at the Department of Labor ("DOL"), Pension Benefit Guaranty Corporation ("PBGC"), and the Office of Management and Budget. My daily law practice includes counseling large employers that sponsor benefit programs for their workers and retirees, as well as health insurers and financial services firms that offer benefit programs and services to employers and individuals. As you can see, my legal expertise centers on employee benefits, rather than generally applicable federal or state labor and employment laws.

H.R. 4219 would give employers the voluntary option to establish a paid leave and flexible work benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). The bill terms these benefit plans as "qualified flexible workplace arrangement

plans.” Employers that elect to offer such plans must meet a variety of minimum federal standards, and are subject to the overall regulatory and enforcement framework of ERISA.

My testimony first provides some general background on the ERISA regulatory framework, which is substantial, and then discusses some of the key features of the H.R. 4219, with an emphasis on how it fits into the ERISA framework.

Background on ERISA Framework

ERISA is organized through three primary “Titles”, which are administered the DOL, Treasury and the PBGC. For our discussion, I will focus on “Title I” of ERISA, which is administered by the DOL.

ERISA applies to pension plans and “welfare plans” sponsored by employers and unions. Welfare plans include benefits like health, life and disability programs, but can also include plans that provide for sick pay and vacation pay (more on that in a minute). (*See* Section 3(1) of ERISA.)

ERISA establishes detailed reporting and disclosure rules, standards of conduct for plan fiduciaries, procedures for handling claims and appeals, and a broad scheme of civil and criminal penalties. ERISA is also the statute by which Congress applied the requirements of the Affordable Care Act, federal mental health parity, and COBRA on plans sponsored by employers and unions.

When ERISA passed in 1974, one of the “crowning achievements” (words used by one of the lead House sponsors) of the measure was that Congress broadly preempted state regulation of employee benefit plans. Exceptions from preemption are provided, the primary exception is the

saving of state insurance law from preemption where state insurance laws are directed at insurers, rather than at the employee benefit plan itself. Because of preemption, states cannot regulate ERISA plans directly, and state law remedies (*i.e.*, suits under state law) are preempted.

There are strong policy considerations favoring preemption, particularly for employers and unions whose plans cover employees residing in many states. Simply put, preemption allows plans to be uniformly designed and administered so that all employees access the same benefit regardless of where they reside. In so doing, ERISA encourages the creation of employee benefit programs, which are voluntary under federal law.

From time to time, some have asserted that ERISA's enforcement scheme is not strong enough, and that the preemption of state law remedies limits the rights of consumers. It is true that ERISA precludes state law litigation, but what is not true is that the ERISA enforcement scheme is not comprehensive. ERISA authorizes both private parties and the DOL to sue to enforce violations of ERISA. DOL can and does assess civil penalties for violations, and there are criminal sanctions for bad actors. Some illustrative statistics:

- There were over 100 private ERISA class actions filed in each of 2015, 2016 and 2017;
- Private ERISA settlements exceeded \$900 million in 2017; and
- DOL recovered over \$600 million in ERISA enforcement actions in 2017.

I can say with certainty that most big employers and their vendors think that ERISA's enforcement scheme is meaningful.

Finally, a word about sick pay and vacation pay plans. As noted above, ERISA's definitions (Section 3(1)) indicate that Congress contemplated that sick and vacation programs could qualify as benefits subject to ERISA. But very early guidance from DOL generally

exempted vacation and sick pay programs from ERISA on the grounds that they were simply “payroll practices.” (See 29 CFR 2510.3-1(b).) However, DOL has issued several advisory opinions that indicate that certain vacation or sick pay plans that are funded via a trust do not constitute a payroll practice and therefore might qualify as ERISA plans. (See, e.g., DOL Advisory Opinions 2004-08 (July 2, 2004); 2004-10 (December 30, 2004).) The guidance is complex and the caselaw regarding such plans is mixed. In my experience, this uncertainty typically discourages employers from going this route.

H.R. 4219 – Workflex in the 21st Century Act

The bill amends ERISA’s definitions to create a new kind of ERISA plan – termed a “qualified flexible workplace arrangement plan” (“Workplace Plan”). In order to qualify as a Workplace Plan, employers must offer *both* a compensable leave benefit and a workflex benefit (workflex options include programs like biweekly work, compressed work schedules, telework, job sharing, flexible scheduling and predictable scheduling).

Compensable leave and workflex options are subject to a range of federal minimum standards. (Sections 802 and 803.) For example, compensable leave programs must meet a minimum number of compensable days of leave each year, which vary by employer size and employee tenure. Workplace Plans that meet all these standards will get the benefit of ERISA preemption – state laws will not apply to them.

Instead of reviewing the specific requirements applied to compensable leave and workflex programs under the bill, I wanted to spend my time addressing on how these programs fit within the ERISA regulatory framework and the specific preemption provisions that have

been included. I think this discussion might help address any concerns that there is any sort of regulatory or enforcement gap surrounding Workplace Plans.

First, as the bill makes clear, that these plans are voluntary undertakings. No employer is required to meet the federal standards, and if the employer does not adopt a Workplace Plan, the employer's programs are subject to state regulation. (Section 801(d)(2), (3).)

Second, in addition to the specific standards imposed by the bill, an employer that adopts a Workplace Plan is subject to all of the requirements of ERISA that generally apply to welfare benefit plans. (Section 801(d)(1).) This means that –

- ERISA's reporting and disclosure rules apply, including the provision of summary plan descriptions and summaries of material modification to plan participants,
- The terms of the Workflex Plan must be memorialized in a written plan document,
- Employers that administer such plans do so subject to ERISA fiduciary standards. ERISA's fiduciary standards impose a duty of loyalty and a duty of prudence, and require that plans be administered consistent with their written terms. Fiduciaries have *personal* liability under ERISA,
- Claims procedures must be established to allow participants the opportunity to have denied benefits reviewed by the plan's fiduciary prior to any litigation,

- DOL has plenary investigative authority over such plans,

- Both plan participants and DOL can sue for violations of ERISA, including all of the new qualification-related standards imposed on Workplace Plans.

- Among other things, ERISA authorizes actions:
 - To obtain inappropriately denied benefits
 - Seeking an injunction to comply with ERISA and the plan provision
 - For the removal of fiduciaries,
 - To address adverse job actions by employers against employees asserting their rights under Workplace Plans,
 - That award attorneys fees, and
 - Imposing potential civil penalties (where the DOL brought the action).

Importantly, a Workplace Plan that substantially complies with the requirements imposed on such plans, will qualify for ERISA preemption. This means that employers will be able to administer such plans across state lines. This will simplify plan administration, and facilitate a more efficient delivery of these benefits. It is important to note, however, that the preemption provisions around workflex options (rather than compensable leave) are more tailored than ERISA preemption generally. That is, generally ERISA would preempt any state law that relates to the benefit plan. But for the workflex telework, job sharing, flexible scheduling and predictable scheduling options, the employee must be offered the particular workflex option for

preemption to apply. And for the biweekly work program and compressed work schedule program, the employee must be actually enrolled in the program.

I would also note that the bill's preemptive force is tempered in another way. That is, if any employer fails to substantially comply with all of the requirements surrounding Workplace Plans, they will not qualify as a Workplace Plan, which means the plan loses the benefit of preemption. This is unlike any other set of federal standards that apply to ERISA plans. For example, a self-insured group health plan that fails to meet all of the standards set under the Affordable Care Act, or federal mental health parity, in no way loses the benefit of ERISA preemption and is not subject to springing liability under state law. The same is true for pension plans that fail to meet the myriad of federal standards relating to such plans (*e.g.*, vesting, nondiscrimination). Clearly, because of the stakes involved – loss of state law preemption – employers will have strong incentives to comply with the federal standards that apply to Workplace Plans.

A final word about state family and medical leave laws. I believe the bill would preempt state laws that mandated *paid* family and medical leave programs. This is intentional in light of the federal standards created for compensable leave under the bill. However, I do not think that the bill preempts state laws that impose more extensive *unpaid* family and medical leave requirements on employers. To me, these laws likely would not relate to the compensable (*paid*) leave portion of the Workplace Plan. Similarly, I do not think that state-funded and administered family and medical leave programs (there are only a few) are implicated because the state provides the benefits in question (these laws do not mandate that employers provide paid family and medical benefits). The focus of preemption under the bill is limited to state laws that impose *paid* leave requirements on employers (in addition to the workflex options).

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Thank you for inviting me to testify. I look forward to answering your questions.