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of Consumer Affairs**

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**Submitted to the House Education and Workforce Committee Subcommittee
on Health, Education, Labor and Pensions**

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**Hearing on “Workplace Policies: Opportunities and Challenges for
Employers and Working Families”**

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The New York City Department of Consumer Affairs (“DCA”) strongly urges Congress to work with local and state governments and heed grassroots efforts that have led to enhanced labor standards, like local paid sick leave laws. Federal labor standards should operate, as many already do, by creating baseline rights that may be supplemented by greater protections provided by state and local governments.

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New York City has demonstrated that local government’s role in labor law enforcement is essential to promoting individual financial security and improving family and public health without sacrificing a vigorous and growing economy.¹ DCA, particularly its Office of Labor Policy and Standards (“OLPS”), has first-hand knowledge of this as it is charged with implementing and enforcing New York City’s workplace laws, developing innovative policies to raise job standards, and providing a central resource to help working New Yorkers assert their rights under local, state, and federal law.

Since the New York City Paid Sick Leave Law took effect in April 2014, OLPS has received more than 1,350 complaints, closed more than 1,150 cases, secured nearly \$4.7 million in relief for more than 20,000 workers, and assessed close to \$2 million in fines through settlements with businesses. Despite robust enforcement, 85 percent of employers surveyed in 2015 and 2016 reported that compliance with the law did not increase costs,² and more than 94 percent reported that the law had no effect on productivity.³ Some even reported that productivity increased.⁴ Similarly, 96 percent of employers reported no change in customer service as a result of the new law, and more than three percent saw an

¹ NEW YORK CITY, OFFICE OF THE MAYOR, “TWO YEARS AFTER MAYOR DE BLASIO EXPANDS PAID SICK LEAVE TO ONE MILLION NEW YORKERS, CITY’S ECONOMY STRONGER THAN EVER,” April 1, 2016, available at <http://www1.nyc.gov/office-of-the-mayor/news/318-16/two-years-after-mayor-de-blasio-expands-paid-sick-leave-one-million-new-yorkers-city-s-economy>.

² EILEEN APPELBAUM & RUTH MILKMAN, NO BIG DEAL: THE IMPACT OF NEW YORK CITY’S PAID SICK DAYS LAW ON EMPLOYERS 3, 21 (2016), available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>.

³ EILEEN APPELBAUM & RUTH MILKMAN, NO BIG DEAL: THE IMPACT OF NEW YORK CITY’S PAID SICK DAYS LAW ON 4, 23, and 24 (Table 13B) (2016), available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>.

⁴ EILEEN APPELBAUM & RUTH MILKMAN, NO BIG DEAL: THE IMPACT OF NEW YORK CITY’S PAID SICK DAYS LAW ON EMPLOYERS (2016), available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>.

increase; less than one percent reported a decrease in customer service.⁵ Employee retention was steady.⁶

Notwithstanding New York City's success in strengthening workers' rights in tandem with a growing local economy, there is plenty of work left to do. Even in localities where there is already a right to paid sick leave, employers of the most vulnerable workers are still falling short of what the law requires.⁷ The Community Service Society's (CSS) research shows, for example, that New York City's Paid Sick Leave Law has significantly increased low-income workers' access to paid sick leave, but that a sizable percentage of vulnerable low-income workers still cannot use this benefit and many do not even know that they are entitled to it. The percentage of low-income workers in New York City without paid time off has dropped from 53 percent of eligible low-income workers surveyed by CSS in 2013, to 38 percent of eligible low-income workers in 2016. And yet, many vulnerable low-income workers still lack access to this critical right: 43 percent of eligible low-income Latino workers, 48 percent of immigrant low-wage workers, 65 percent of low-income part-time workers, and 61 percent of low-income restaurant and retail workers report that they still do not have paid sick leave.⁸ Even with this progress, there is still a need for increased and targeted enforcement of this important right.

CSS' research underscores the complexities of serving our nation's most vulnerable individuals, particularly when it implicates their livelihood. As Congress, and this Committee in particular, continues to study workplace policies it should recognize that the federal government has an important role to play in supporting local enforcement needs and should not consider policies that would dilute or repeal progressive local labor laws, or exacerbate the power imbalance between employers and employees such as by shifting away from employees their ability to control their work schedules and time off.

One piece of legislation being debated in Congress that is particularly troubling is H.R. 4219, the "Workflex in the 21st Century Act" ("H.R. 4219" or the "bill"). H.R. 4219 undermines local labor standards that are tailored to maintain robust local economies by removing local control that benefits workers and businesses. The bill purports to require paid time off comparable to state and local paid sick leave laws, but in fact replaces meaningful rights to paid time off, which are the product of grassroots democratic processes, with individual employers' own parameters for when and how employees can use time and what employees will be paid when they use the time. Accordingly, we urge Congress to reject the bill.

1. H.R. 4219 Creates Merely an Illusion of Required Paid Time Off

H.R. 4219 would allow employers to opt-in to provide a minimum number of paid days off to employees per year, setting no parameters for how such paid days off are requested, used, or paid. Employers who opt-in to this model can easily dilute the paid time off they provide in whatever ways they may conceive that discourage employees from requesting or using the paid time off, except in the most narrow circumstances. For example, an employer may discipline employees for using the time off,

⁵ EILEEN APPELBAUM & RUTH MILKMAN, NO BIG DEAL: THE IMPACT OF NEW YORK CITY'S PAID SICK DAYS LAW ON EMPLOYERS (2016), available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>.

⁶ EILEEN APPELBAUM & RUTH MILKMAN, NO BIG DEAL: THE IMPACT OF NEW YORK CITY'S PAID SICK DAYS LAW ON EMPLOYERS (2016), available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>.

⁷ U.S. BUREAU OF LABOR STATISTICS. NEWS RELEASE: EMPLOYEE BENEFITS IN THE UNITED STATES MARCH 2017 from <https://www.bls.gov/news.release/pdf/ebs2.pdf>.

⁸ NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, STATE OF WORKERS' RIGHTS IN NEW YORK CITY (2017), p. 28.

impose unlimited advance notice requirements which prevent employees from any unforeseeable use, such as for sudden illness, or impose a requirement that the employees only use their time in increments of one full day. Additionally, the bill is silent about how much an employee must be paid for the time off—employers could decide to pay significantly less than what the employee would make if she was working, effectively discouraging any use of her time off but doing so in compliance with H.R.4219.

By contrast, paid sick leave laws in local and state jurisdictions are the product of thoughtful analysis of the standards needed to make the right meaningful in our own jurisdictions. In New York City, employers must pay employees who use sick leave what they would have earned had they worked. They are prohibited from disciplining employees for valid uses of paid sick days and can only require advance notice of the need to use sick time that is practicable under the circumstances. This reflects the reality of sick time: workers cannot plan when they or their family member will be sick. And when they get sick, they can focus on getting well without fear that they will lose their job or pay.

2. H.R. 4219 Supplants Strong Local Standards with a Weak National Standard

Employer plans that comply with H.R. 4219 would preempt local laws. As such, the bill threatens to strip workers in New York City and over 40 other jurisdictions of the protections provided by local paid sick leave and fair scheduling laws and substitute them with time and leave policies *unilaterally chosen by the employer*. Employers' policies that may comply with H.R. 4219 are almost certain to be less favorable to workers than the rights provided by local and state laws. Replacing state and local laws under the guise of easing business operations ignores the positive impact state and local laws have had on individual financial security and public health. This approach also overlooks that businesses that are large-enough to operate in multiple jurisdictions are usually sophisticated enough and have sufficient resources to understand and comply with the different laws in those jurisdictions. For example, multi-jurisdictional companies already account for differing local payroll taxes depending on where they operate and employ individuals.

By supplanting local jurisdiction over paid sick leave and scheduling laws, H.R. 4219 threatens to weaken all labor standards. State and local labor law enforcement can create a culture of compliance with even those labor laws that the locality might not have jurisdiction to enforce. For example, OLPS is conducting directed paid sick leave investigations of home health care agencies. OLPS chose this industry because of the predominately immigrant woman and woman of color workforce and the prevalence of labor law violations in the industry. While these investigations are in their early stages, we anticipate that they will demonstrate OLPS' ability, in collaboration with other government agencies, to achieve compliance with labor laws that is broader than the paid sick leave law.

3. H.R. 4219 Takes Away Local Control that Benefits Workers and Employers

New York City strikes an important balance between making sure labor laws help workers *and* the businesses they work for by tailoring laws and enforcement to the unique needs and characteristics of the local economy. We can respond quickly to problems on the local level that can take decades to remedy through national consensus.⁹ The access that diverse stakeholders have to local lawmakers is

⁹ See, e.g., 79 FR 18737 (Apr. 3, 2014).

greater than at the state or federal level and facilitates a rich, transparent democratic process where the ultimate result accounts for a variety of viewpoints.

New York City's Paid Sick Leave Law is the product of this process. During the bill's drafting, key stakeholders—businesses, large and small, and workers—had and took advantage of their access to lawmakers to shape the final legislation. Later, during the rulemaking process, stakeholders' comments were carefully but promptly considered and incorporated into the final rules. During the initial implementation of the law, we prioritized educating businesses about the Law's requirements through trainings and an extensive public education campaign—a direct response to businesses that thought the Law was complex. OLPS also created a variety of tools to help employers comply, including sick leave tracking forms and employee authorizations that time used was for sick purposes. OLPS's current enforcement of the Paid Sick Leave Law responds to the specific circumstances of a particular worker or business. OLPS can quickly address a retaliatory termination due to a worker's use of sick time and have succeeded in getting workers their jobs back almost immediately. OLPS can also directly target investigations at industries and employers in NYC that have an established track-record of labor law violations through directed investigations.

4. Enforcing H.R. 4219 is Confusing and Leaves Workers and Employers without Clear Standards

Enforcement of H.R. 4219 will be confusing, and the confusion will be compounded in jurisdictions that have paid sick leave and scheduling laws. Unlike plans currently regulated by ERISA (and that trigger preemption for federal law), H.R. 4219 envisions certain minimum standards with which a time and leave plan must “substantially comply.” Workers will not know what they are entitled to—their employer's plan or rights under local law—until a determination is made as to whether the employer's plan “substantially complies” with H.R. 4219. Lawyers, enforcement agencies, and courts, let alone workers, will have difficulty answering this threshold question.

In jurisdictions that have paid sick and scheduling laws, localities will need to assess the applicability of their own laws by determining whether the employer's policy “substantially complies” with H.R. 4219. If the policy meets the minimum standards under H.R. 4219, the policy would be enforced under ERISA for covered employees and the locality would not have jurisdiction. But if the policy does not meet the minimum standards, or certain employees at a workplace were not covered by it, the local law is not preempted and would apply. The chaos created by H.R. 4219 means that workers do not know what they are entitled to, and employers cannot be sure about what their obligations are. It makes virtually inevitable inconsistent application across different employers and increased litigation as parties dispute the applicability of local law. Again, this scheme operates to put state and municipal enforcement at odds with federal enforcement of labor laws. Federal laws should – and generally do – provide the opposite incentives: for all levels of government to work in partnership with each other to combat chronic non-compliance with labor laws.

5. H.R. 4219 Ignores Local Business to the Advantage of Large Corporations

Paid sick days are good for business because they increase worker productivity and retention. But many small businesses—those who operate on the thinnest margins—can only afford to offer paid sick

days if their competition does as well.¹⁰ When jurisdictions like New York City require that all employers within the jurisdiction provide time off for employees' most basic needs – to heal after illness or to care for a loved one – it helps to level the playing field between small and large business.

In sum, rather than make workplaces more inclusive, and provide recognition of the realities faced by both workers and employers in today's economy, H.R. 4219 erodes gains in ensuring that the most vulnerable workers, and those who are often most financially insecure, have access to employment. New York City is committed to supporting these workers by ensuring fair, safe workplaces for all. Federal legislation should set strong national baselines while allowing cities and states to do better, like H.R. 1516, the "Healthy Families Act", which would establish a federal paid sick days standard, and H.R. 2942, the "Schedules that Work Act", which provides fair scheduling protections. These laws would meaningfully ensure that working people can count on the pay—and paid time off—they need to support themselves and their families.

¹⁰ BALLANTYNE, AMANDA. GIVE SMALL BUSINESS OWNERS AN EVEN BREAK, PASS A MINIMUM STANDARD FOR PAID SICK LEAVE, https://www.huffingtonpost.com/entry/give-small-business-owner_b_9635872.html (last visited Dec. 5, 2017).