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May 6, 2013

Dear Representative:

On behalf of the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, and the 1.6 million members in the public and private sectors that AFSCME represents, I urge you to oppose House Resolution 1406, also known as the Working Families Flexibility Act. Contrary to its stated purposes, the proposed law will result in more overtime hours for employees for less money and without any guarantee of compensatory time when needed. As discussed more fully below, AFSCME urges its withdrawal or defeat.

The Federal Labor Standards Act (FLSA) requires overtime compensation for those covered employees working in excess of 40 hours in a workweek. This bill would amend that requirement by allowing private sector employers to provide compensatory time instead of overtime. However, the proposed law provides no guaranteed right for an employee to use banked compensatory time when needed, even in the case of a personal or family emergency. Instead, the proposed law gives discretion to the employer to permit use of compensatory time only "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer."

If an employee's request to use comp time is denied because the employer unilaterally decides it is "unduly disruptive", the law provides no recourse. In short, employees will be denied overtime pay and will not be permitted time off with their families until they have already been required to spend time away from their families by working overtime. And then, even when provided the compensatory time, the use of that time is controlled solely by the employer.

The proponents of this bill argues that compensatory time in-lieu-of paid overtime exists in the public sector and therefore should be expanded to the private sector. The public sector compensatory time provision includes the same employer veto language as the proposed law: "an employee . . . shall be permitted by the employee's employer to use such [compensatory] time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o) (5).

Our experience in the public sector has revealed that employers' control over the use of compensatory time inflicts very real hardships on the public employees entitled to compensatory time for their overtime work. Employees request specific dates for valid reasons. Employees need the earned time off for milestones such as children's birthdays, family and friends' weddings, funerals, scheduled vacations and other date-specific activities.

**American Federation of State, County and Municipal Employees, AFL-CIO**

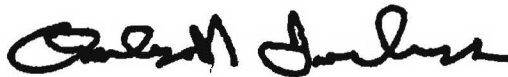
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The employer veto power has been abused by employers in the public sector and it has been cause for litigation. In theory, employees may take compensatory time within a reasonable period after making the request. In practice, employees are denied the time when they really need it and the language of the law becomes a false promise. For example, the United States Court of Appeals for the Ninth Circuit interpreted the law to give an employer absolute power to deny compensatory time requests on dates certain and to delay the awarding of compensatory time for up to one full year. See Mortensen v. County of Sacramento, 368 F.3d 1082 (9th Cir. 2004). Additionally, while the proposed law allows employees to bank up to 160 hours of compensatory time, the Supreme Court has ruled that employers in the public sector have the right to force employees to use their compensatory time. See Christensen v. Harris County, 529 U.S. 576 (2000).

Moreover, we have found that public sector employers continually are seeking to expand employer discretion in limiting employee use of the compensatory time. In 2008, the Bush administration DOL unsuccessfully proposed to revise the rule in the public sector by eliminating the meager requirement imposed on the employer to demonstrate that an employee's requested dates for compensatory time create an unreasonable burden on the employer's operations, before denying a request.

This law will provide less flexibility to a workforce under the guise of providing more. For almost a century the FLSA has required overtime pay to provide employers a disincentive to overworking employees. This bill turns that policy goal on its head and encourages employers to save costs by working employees more hours and then doling out compensatory time as it sees fit down the road. Employees already struggling to earn enough money to pay their bills and feed their families will face even lower wages without overtime pay for their hard work. And these hourly workers do not have the resources to risk their jobs to challenge employers who unlawfully threaten, coerce or intimidate them into one-sided compensatory time agreements. Nothing in the current law prevents employers from giving leave to employees who work long hours. But those employees should continue to be paid fairly for those long hours and this proposal attacks workers' paychecks, time off and flexibility, and is the wrong approach. For the foregoing reasons, AFSCME strongly opposes this bill.

Very truly yours,



Charles M. Loveless  
Director of Federal Government Affairs

CML:md:rf