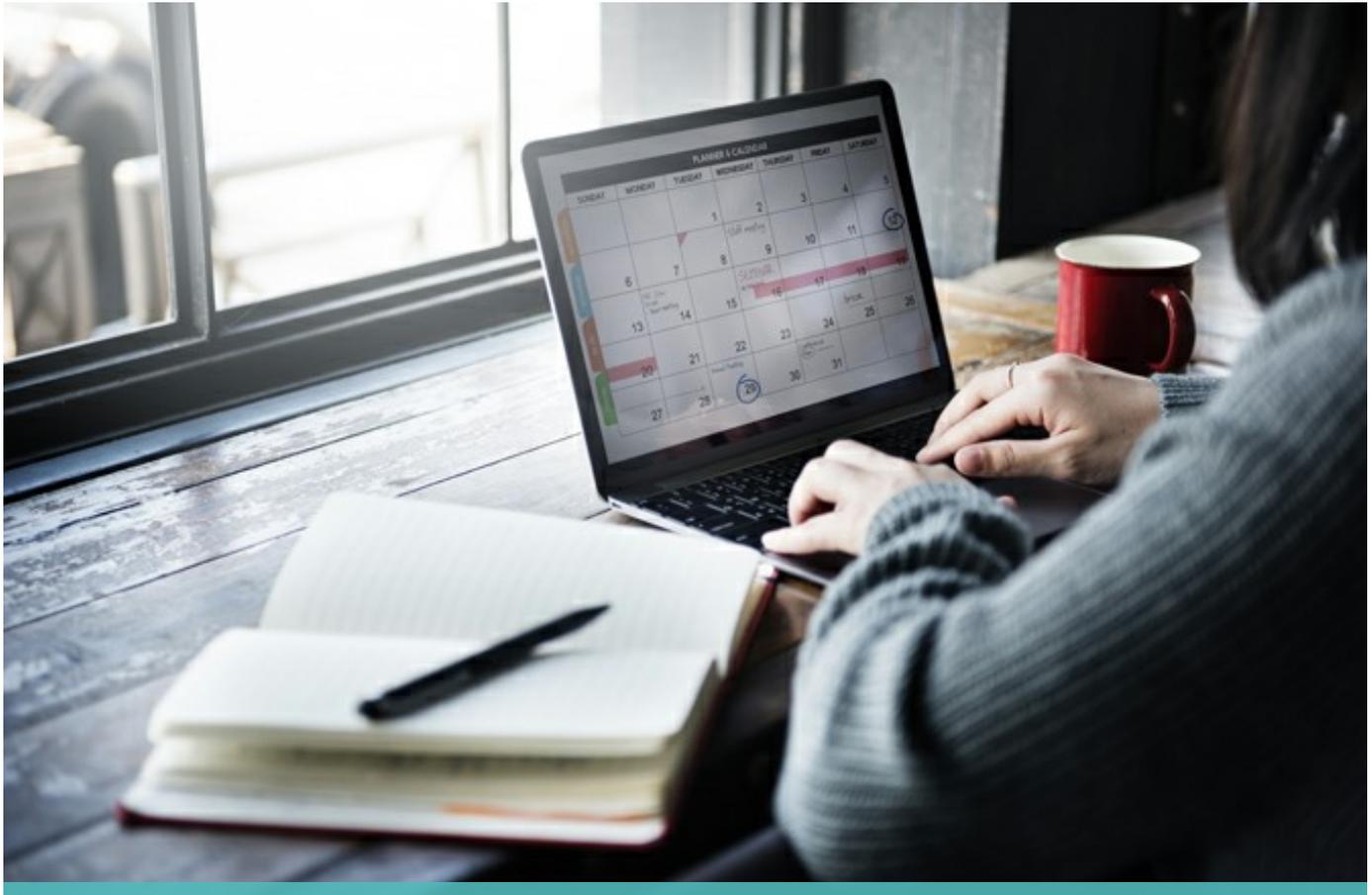


Proposed Workflex bill offers employers unique federal approach to paid leave time



Miriam L. Rosen, Antoinette M. Pilzner | Thursday, November 9, 2017

As the list of states, counties, and cities that require employers to provide paid leave time continues to grow, the variations in these requirements can pose a hardship for multi-state employers aiming for consistency in their leave practices. Looking for a way to tame this growing patchwork of leave laws, Representative Mimi Walters (R-Calif.) introduced the Workflex in the 21st Century Act (the Workflex Act) in the U.S. House on Nov. 2, 2017. Walters' bill would allow employers to voluntarily offer a qualified flexible work arrangement plan under the Employee Retirement Income Security Act (ERISA) as an alternative to state and local requirements.

By amending ERISA to treat qualified flexible work arrangement plans as ERISA-covered welfare benefit plans, the bill offers a unique approach to paid leave and flex time that would let employers bypass the various local and state paid leave regulations. A key aspect of ERISA is that it pre-empts state and local governments' ability to mandate requirements for any ERISA-covered employee benefit plans. The Workflex Act harnesses ERISA's preemptive power to allow employers who create paid leave and flex time plans that meet certain requirements to escape state and local paid leave laws. However, the Workflex Act does not pre-empt state and local laws mandating unpaid leave or state temporary disability insurance requirements.

The Workflex Act was developed with the input of various employer organizations, including the Society

proposed workflex bill offers employers unique federal approach to paid leave time

for Human Resources Management. Contributing to the development of the ERISA preemption concept was [Antoinette Pilzner](#), a Member at McDonald Hopkins in the firm's [Employee Benefits Practice Group](#). According to Pilzner, "One of the initial concepts underlying ERISA was to enable an employer with employees in multiple locations to establish and administer benefit plans that were subject to a single set of requirements, instead of varying requirements in each location, so that all of its employees could have the same benefits. Applying that element of ERISA to paid leave programs that meet specified minimum requirements enables an employer to have a uniform paid leave program across its workforce."

Pilzner also noted that as an ERISA plan, a qualified flexible work arrangement would provide specific remedies for plan participants and impose specific requirements on sponsoring employers.

The Elements of the Workflex Act

To qualify as an ERISA-covered plan, a Workflex paid leave plan must include two components:

- A paid leave policy that meets specified standards.
- Flexible work arrangements for all employees.

Employers who choose to voluntarily participate in this federal option would be required to follow the federal guidelines for both the paid leave and flexible work arrangement components.

- **Paid leave requirements:** Under the proposed act, the amount of paid leave time per plan year is based on an employer's size and the employee's length of service as follows:

Employer Size	Employees with five or more years of service with the employer at the beginning of the plan year would receive:	Employees with fewer than five years of service with the employer at the beginning of the plan year would receive:
1,000 or more employees	20 days	16 days
250 to 999 employees	18 days	14 days
50 to 249 employees	15 days	13 days
Fewer than 50 employees	14 days	12 days

The bill provides that full- and part-time employees would accrue paid leave throughout a plan year with such time pro-rated for part-time employees. An employee must be employed for no less than 12

proposed workflex bill offers employers unique federal approach to paid leave time

months and for at least 1,000 hours with the employer during the previous 12-month period to be eligible to participate in a qualified plan.

- **Flexible work arrangements:** The bill also requires employers who participate in a qualified plan to offer at least one of the following flexible work arrangements to each eligible employee:
 - Compressed work schedule
 - Biweekly work program
 - Telecommuting
 - Job sharing
 - Flexible scheduling
 - Predictable scheduling

The biweekly option provides employers with the opportunity to offer a schedule of 80 hours of work over a two week period and would require overtime pay for any hours in excess of each established workweek (e.g., 30 hours in week one and 50 in week two) or for work of more than 80 hours over those two weeks. This provision would likely require amendment of the Fair Labor Standards Act as well.

With a fall calendar focused on tax reform, it is unclear whether Congress will turn its attention to this legislation before the end of the year. However, with continued state and local activity putting pressure on employers, paid leave is an issue that certainly will not go away.



Miriam L. Rosen

[Team member bio](#)



Antoinette M. Pilzner

[Team member bio](#)