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112TH CONGRESS
2D SESSION

H. R. 4106

To permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 29, 2012

Mrs. MALONEY (for herself, Mr. LEWIS of Georgia, Mr. GEORGE MILLER of California, and Mr. SERRANO) introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committees on Oversight and Government Reform, House Administration, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Working Families Flexibility Act''.

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Over the last 50 years, the demographics of the Nation's workforce have undergone significant changes. As a result of the changes, the modern workforce has a more diverse set of needs.

(2) Over time, increasing numbers of women have joined the workforce. The Bureau of Labor Statistics reports that in 1960 women composed 33 percent of employed persons, whereas in 2010 they were 47 percent of employed persons.

(3) Fewer households have at least 1 parent at home. According to the Bureau of the Census, more than 70 percent of children are raised in families that are headed by either a working single parent or 2 working parents. Furthermore, the number of households with married parents and children, in which both parents were in the workforce, rose to 66 percent in 2010. The number of single-parent families has also increased, almost tripling over the last 50 years, from 5 percent in 1960, to 14 percent in 2010.

(4) More households are caring for older relatives. According to the Bureau of the Census, the average life expectancy for a child born in 2010 is 78.3 years, almost 10 years longer than for a child born in 1960. The National Alliance for Caregiving

found that 57 percent of persons who provide unpaid care to an adult or to a child with special needs are employed, with 46 percent working full time and 11 percent working part time.

(5) Many jobs are now located outside of city centers. Low-wage employees in particular have difficulty reaching jobs through public transportation during off-peak shifts, such as shifts that start in the evening or early morning.

(6) In response to the needs of the modern workforce some employers have instituted flexible work arrangements, which, according to Georgetown University Law School's Workforce Flexibility 2010 initiative, are voluntary arrangements between employees and employers that alter the time or place at which work is conducted, or the amount of work that is conducted, in order to allow employees to more easily meet the needs of both work and family life.

(7) The National Study of the Changing Workforce, published in 2002 by the Families and Work Institute, found that employees with access to flexible work arrangements reported less interference between their job and family life, and fewer mental health problems.

(8) Corporate Voices for Working Families found that implementing workplace flexibility improves employee satisfaction, morale, and teamwork as well as employee health, well-being, and resilience, and helps to reduce stress.

(9) Flexible work arrangements have also been shown to improve the bottom line for businesses. Corporate Voices for Working Families found that implementing workplace flexibility improves the bottom line by helping businesses to attract and retain key talent, increase employee retention and reduce turnover, reduce overtime and absenteeism, and enhance employee productivity, effectiveness, and engagement.

(10) The President's Council of Economic Advisors found that, as more businesses adopt flexibility practices, the benefits to society, in the form of reduced traffic, improved employment outcomes, and more efficient allocation of employees to employers, may be greater than the gains to individual businesses and employees.

(11) According to a 2011 Government Accountability Office report, a flexible work environment can increase and enhance employment opportunities for individuals with disabilities.

(12) The Society for Human Resource Management believes that the key to getting the best out of every employee is a flexible work environment.

(13) According to the National Partnership for Women and Families, businesses can retain their most valuable asset—a trained and committed workforce—by offering flexible workplace policies.

SEC. 3. DEFINITIONS.

In this Act:

(1) ADMINISTRATIVE OFFICER.—The term ''administrative officer'', used with respect to an employer or an employee, means the corresponding individual or entity with authority to issue regulations under section 13.

(2) EMPLOYEE.—The term ''employee'' means an individual—

(A) who is—

(i)(I) an employee (including an applicant), as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who is not covered under any of clauses (ii) through (v), including such an employee of the Library of Congress, except that a reference in such section to an employer shall be considered to be a ref-

erence to an employer described in clauses (i)(I) and (ii) of paragraph (3)(A); or

(II) an employee (including an applicant) of the Government Accountability Office;

(ii) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a));

(iii) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301);

(iv) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code; or

(v) a Federal officer or employee (including an applicant) covered under subchapter V of chapter 63 of title 5, United States Code; and

(B) who works at least 20 hours per week or, in the alternative, at least 1,000 hours per year.

(3) EMPLOYER.—

(A) IN GENERAL.—The term ''employer'' means a person who is—

(i)(I) a covered employer, as defined in subparagraph (B), who is not covered under any of subclauses (II) through (V);

(II) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(III) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(IV) an employing office, as defined in section 411(c) of title 3, United States Code; or

(V) an employing agency covered under subchapter V of chapter 63 of title 5, United States Code; and

(ii) is engaged in commerce (including government), in the production of goods for commerce, or in an enterprise engaged in commerce (including government) or in the production of goods for commerce.

(B) COVERED EMPLOYER.—

(i) IN GENERAL.—In subparagraph (A)(i)(I), the term ''covered employer''—

(I) means any person engaged in commerce or in any industry or activity affecting commerce who employs 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(II) includes—

(aa) any person who acts, directly or indirectly, in the interest of such an employer to any of the employees of such employer; and

(bb) any successor in interest of such an employer; and

(III) includes an agency described in clause (iii) or (iv) of subparagraph (A) of section 101(4) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611(4)), to which subparagraph (B) of such section shall apply.

(ii) DEFINITIONS.—For purposes of this subparagraph:

(I) COMMERCE.—The terms ''commerce'' and ''industry or activity affecting commerce'' have the meanings given the terms in section 101 of such Act (29 U.S.C. 2611).

(II) EMPLOYEE; PERSON.—The terms ''employee'' and ''person'' have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

(C) PREDECESSORS.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(4) SECRETARY.—The term ''Secretary'' means the Secretary of Labor.

(5) SUPERVISOR.—

(A) IN GENERAL.—The term ''supervisor'' has the meaning given the term in section 152 of the National Labor Relations Act (29 U.S.C. 152).

(B) APPLICATION.—For purposes of applying this paragraph, a reference in such section—

(i) to an employee shall be considered to be a reference to an employee, as defined in this section; and

(ii) to an employer shall be considered to be a reference to an employer, as defined in this section.

SEC. 4. STATUTORY RIGHT TO REQUEST FLEXIBLE WORK TERMS AND CONDITIONS.

(a) IN GENERAL.—An employee may apply to the employee's employer for a temporary or permanent change in the employee's terms or conditions of employment if the change relates to—

(1) the number of hours the employee is required to work;

(2) the times when the employee is required to work or be on call for work;

(3) where the employee is required to work; or

(4) the amount of notification the employee receives of work schedule assignments.

(b) CONTENTS.—An application submitted under this section shall—

(1) state that the application is an application described in subsection (a);

(2) specify the change applied for and the date on which the employee requests that the change become effective; and

(3) explain what effect, if any, the employee thinks the change applied for would have on the employer and how, in the employee's opinion, any such effect might be dealt with.

(c) SUBMISSIONS.—

(1) PERIOD BETWEEN SUBMISSIONS.—If an employee, who has submitted an application under this section to an employer, submits a further application under this section to the same employer before the end of the period of 12 months beginning with the date on which the previous application was submitted, that further application shall not be covered by section 5.

(2) FORM AND TIMING.—The administrative officer shall, by regulation issued under section 13, specify—

(A) the form of applications submitted under this section; and

(B) when such an application shall be considered to be submitted.

SEC. 5. EMPLOYER'S DUTIES IN RELATION TO APPLICATIONS.

(a) IN GENERAL.—An employer to whom an employee submits an application under section 4 shall consider the application, in accordance with regulations issued under section 13.

(b) REGULATIONS.—Regulations issued under subsection (a)—

(1) shall include provisions that provide—

(A) that the employer and the employee shall hold a meeting to discuss such an application;

(B) that the employer shall give the employee a written decision regarding the application, within a reasonable period after the date of the meeting;

(C) that a decision under subparagraph (B) to reject the application shall state the grounds for the decision, including whether those grounds included—

(i) the identifiable cost of the proposed change in a term or condition of employment requested in the application, including the costs of loss of productivity, of retraining or hiring an employee, or of

transferring an employee from 1 facility to another facility;

(ii) the overall financial resources involved;

(iii) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the staffs at the facilities;

(iv) the effect of the change on the employer's ability to meet customer demand; or

(v) another factor specified by the administrative officer in regulation;

(D) that if the employer rejects the employee's application, the employer may propose in writing an alternative change to the employee's hours, times, place, and amount of notification of schedule assignments for work;

(E) that if the employee is dissatisfied with the employer's decision under subparagraph (B) and the alternative described in subparagraph (D), and if the employer has another supervisor, the employee has the right to reconsideration of the decision by such supervisor, and to receive a decision in writing from the reconsid-

eration within a reasonable period, in accordance with procedures specified in regulations issued under section 13;

(F) that the employee shall have a right to be accompanied at meetings described in subparagraph (A) by a representative of the employee's choosing with such qualifications as the regulations shall specify;

(G) that if such a representative of the employee's choosing is not available to attend a meeting described in subparagraph (A), the meeting shall be postponed; and

(H) for extension of a time limit specified in the regulations in a case in which the employer and employee agree, or in such other circumstances as the regulations may specify; and

(2) may include provisions that provide—

(A) that any requirement of the regulations shall not apply in a case in which such an application is disposed of by agreement or withdrawn; and

(B) for applications to be treated as withdrawn in specified circumstances.

SEC. 6. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.—It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this Act.

(b) INTERFERENCE WITH APPLICATION, PROCEEDINGS, OR INQUIRIES.—It shall be unlawful for any employer to discharge or in any other manner discriminate against (including retaliating against) any individual because such individual—

(1) has submitted (or attempted to submit) an application under section 4 or requested (or attempted to request) a reconsideration under section 5;

(2) has filed an action, or has instituted or caused to be instituted any proceeding, under or related to this Act;

(3) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this Act;

(4) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this Act;

(5) has opposed any practice made unlawful by this Act; or

(6) has in any other way exercised or attempted to exercise any right provided under this Act.

SEC. 7. ENFORCEMENT.

(a) DEFINITIONS.—Except as provided in subsection (d), in this section:

(1) EMPLOYEE.—The term ''employee'' means an employee described in clause (i) or (ii) of section 3(2)(A).

(2) EMPLOYER.—The term ''employer'' means an employer described in subclause (I) or (II) of section 3(3)(A)(i).

(b) GENERAL AUTHORITY.—The provisions of this Act may be enforced pursuant to the following provisions:

(1) INVESTIGATION AND ASSESSMENT.—An employee who is affected by a violation of a right in section 6 (including a violation relating to a right provided under section 4 or 5) may make a complaint to the Secretary of Labor, alleging that the employer involved has violated section 6. The Secretary shall receive, investigate, and attempt to resolve such complaints of violations in the same manner as the Secretary receives, investigates, and attempts to resolve complaints of violations of section 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207), and may issue an order

making determinations, and assessing a civil penalty described in section 8(a)(1) or awarding relief described in section 8(a)(2), as appropriate, with respect to such an alleged violation.

(2) ADMINISTRATIVE REVIEW.—An affected person who takes exception to an order issued under paragraph (1) may request a review of and a decision regarding such an order by an administrative law judge, who may hold an administrative hearing concerning the order under procedures established by the administrative officer that comply with the requirements of sections 554, 556, and 557 of title 5, United States Code, and regulations promulgated by the administrative officer. Such hearing shall be conducted expeditiously. If no affected person requests such review within 60 days after the order is issued under paragraph (1), the order shall be deemed to be a final order that is not subject to judicial review.

(3) ENFORCEMENT.—The amount of any penalty assessed against an employer under this subsection, when finally determined, may be—

(A) deducted from any sums owed by the United States to the employer; or

(B) recovered in a civil action brought against the employer by the Secretary, represented by the Solicitor of Labor (or brought against the employer by the administrative officer specified in section 13(a)) in any court of competent jurisdiction.

(4) CIVIL ACTION.—An affected person desiring review of a decision issued under paragraph (2) (other than a nonreviewable order) may file a petition for review in an appropriate Federal court of appeals.

(5) CIVIL ACTION BY THE SECRETARY FOR INJUNCTIVE RELIEF.—The Secretary (or the administrative officer specified in section 13(a)) may bring an action for a violation described in paragraph (1) in a district court of the United States to obtain the injunctive relief described in section 8(b).

(c) OTHER EMPLOYEES.—

(1) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—Notwithstanding any other provision of this section or section 8, the powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of that Act (2 U.S.C. 1301)), or any person, al-

leging a violation of section 202(a)(1) of that Act (2 U.S.C. 1312(a)(1)) shall be the powers, remedies, and procedures this Act provides to that Board, or any person, alleging an unlawful employment practice in violation of this Act against an employee described in section 3(2)(A)(iii).

(2) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—Notwithstanding any other provision of this section or section 8, the powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Merit Systems Protection Board, or any person, alleging a violation of section 412(a)(1) of that title, shall be the powers, remedies, and procedures this Act provides to the President, that Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 3(2)(A)(iv).

(3) EMPLOYEES COVERED BY CHAPTER 63 OF TITLE 5, UNITED STATES CODE.—Notwithstanding any other provision of this section or section 8, the powers, remedies, and procedures provided in title 5, United States Code, to an employing agency, provided in chapter 12 of that title to the Merit Systems Protection Board, or provided in that title to

any person, alleging a violation of subchapter V of chapter 63 of that title, shall be the powers, remedies, and procedures this Act provides to that agency, that Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 3(2)(A)(v).

SEC. 8. REMEDIES.

(a) ADMINISTRATIVE PROCEEDINGS AND ACTIONS FOR REVIEW.—

(1) INTERFERENCE WITH EXERCISE OF RIGHTS.—In an action brought under paragraph (1), (2), or (4) of section 7(b), an employer who commits a willful or repeated violation of the provisions of section 6 (including a violation relating to a right provided under section 4 or 5) shall be subject to a civil penalty of not more than $1,100 for each employee who was the subject of such a violation.

(2) RETALIATION.—In an action brought under paragraph (1), (2), or (4) of section 7(b), if an employer violates section 6(b), the employee who is affected by the violation or the Secretary (or the administrative officer specified in section 13(a)), as appropriate, may obtain an order awarding such equitable relief as may be appropriate, including employ-

ment, reinstatement, promotion, back pay, and a change in the terms or conditions of employment.

(b) CIVIL ACTION BY THE SECRETARY FOR INJUNCTIVE RELIEF.—In an action brought under section 7(b)(5), the Secretary (or the administrative officer specified in section 13(a)) may obtain an order—

(1) restraining violations of section 6 (including a violation relating to a right provided under section 4 or 5); or

(2) awarding such other equitable relief as may be appropriate, including employment, reinstatement, promotion, back pay, and a change in the terms or conditions of employment.

SEC. 9. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary (or the administrative officer specified in section 13(a)) setting forth excerpts from, or summaries of, the pertinent provisions of this Act and information pertaining to the filing of a complaint under section 7(b).

(b) PENALTY.—Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $500 for each separate offense.

SEC. 10. RECORDKEEPING.

Any employer shall make, keep, and preserve records pertaining to compliance with this Act in accordance with regulations issued under section 13.

SEC. 11. RESEARCH, EDUCATION, AND TECHNICAL ASSISTANCE PROGRAM.

(a) IN GENERAL.—The Secretary (and each administrative officer specified in section 13(a), as applicable) shall provide information and technical assistance to employers, labor organizations, and the general public concerning compliance with this Act.

(b) PROGRAM.—In order to achieve the objectives of this Act—

(1) the Secretary, acting through the Administrator of the Wage and Hour Division of the Department of Labor, shall issue guidance on compliance with the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) regarding providing a flexible work environment through changes in employee terms and conditions of employment as provided in section 4(a); and

(2) the Secretary shall carry on a continuing program of research, education, and technical assistance, including—

(A) conducting and promoting research with the intent of encouraging flexibility in work terms and conditions;

(B) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the various communication media, and the general public the findings of studies and other materials for promoting compliance with this Act;

(C) sponsoring and assisting State and community informational and educational programs; and

(D) providing technical assistance to employers, labor organizations, professional associations, and other interested persons on means of achieving and maintaining compliance with the provisions of this Act.

SEC. 12. RIGHTS RETAINED BY EMPLOYEES.

Nothing in this Act shall be considered to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under a collective bargaining agreement.

SEC. 13. APPLICATION OF PROVISIONS.

Not later than 12 months after the date of enactment of this Act—

(1)(A) except as provided in subparagraph (B), the Secretary shall issue such regulations as are necessary to carry out this Act (including regulations described in sections 4(c)(2), 5(a), 5(b)(1)(E), and 7(b)(2)) with respect to employees described in clause (i) or (ii) of section 3(2)(A); and

(B) the Comptroller General of the United States and the Librarian of Congress shall issue such regulations as are necessary to carry out this Act (including regulations described in sections 4(c)(2), 5(a), 5(b)(1)(E), and 7(b)(2)) with respect to employees of the Government Accountability Office and the Library of Congress, respectively;

(2) the Board of Directors of the Office of Compliance shall issue (in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384)) such regulations as are necessary to carry out this Act (including regulations described in sections 4(c)(2), 5(a), 5(b)(1)(E), and 7(b)(2)) with respect to employees described in section 3(2)(A)(iii);

(3) the President (or the designee of the President) shall issue such regulations as are necessary to

carry out this Act (including regulations described in sections 4(c)(2), 5(a), 5(b)(1)(E), and 7(b)(2)) with respect to employees described in section 3(2)(A)(iv); and

(4) the Director of the Office of Personnel Management shall issue such regulations as are necessary to carry out this Act (including regulations described in sections 4(c)(2), 5(a), 5(b)(1)(E), and 7(b)(2)) with respect to employees described in section 3(2)(A)(v).

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to carry out this Act such sums as may be necessary for fiscal year 2013 and each subsequent fiscal year.

SEC. 15. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this Act takes effect on the date of enactment of this Act.

(b) APPLICATION OF NONREGULATORY PROVISIONS.—

(1) IN GENERAL.—Except as provided in paragraph (2), sections 2 through 12 shall apply on the earlier of—

(A) the date that occurs 3 months after the date on which the Secretary issues regulations under section 13(a)(1)(A); and

(B) the date that occurs 15 months after the date of enactment of this Act.

(2) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the application date prescribed by paragraph (1), sections 2 through 12 shall apply on the earlier of—

(A) the date of the termination of such agreement; or

(B) the date that occurs 12 months after the date of enactment of this Act.

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