115TH CONGRESS
1ST SESSION

H. R. 4219

To amend the Employee Retirement Income Security Act of 1974 to include a voluntary option for qualified flexible workplace arrangements.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 2, 2017

Mrs. Mimi Walters of California (for herself, Ms. Stefanik, and Mrs. McMorris Rodgers) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend the Employee Retirement Income Security Act of 1974 to include a voluntary option for qualified flexible workplace arrangements.

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 “Workflex in the 21st Century Act”.

SEC. 2. QUALIFIED FLEXIBLE WORKPLACE ARRANGEMENT PLAN TREATED AS WELFARE PLAN.

Section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)) is amended—
(1) by striking “or (B)” and inserting “(B)”;

and

(2) by inserting before the period at the end the following: “, or (C) any qualified flexible workplace arrangement plan described in part 8 of subtitle B”.

SEC. 3. RELATIONSHIP TO OTHER LAWS.

Section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144) is amended by adding at the end the following:

“(f)(1) Subsection (a) shall apply with respect to any and all State laws insofar as they may now or hereafter relate to any qualified flexible workplace arrangement plan described in part 8, except that in the case of workflex options offered under such a plan—

“(A) except as provided in subparagraph (B), if only certain employees are eligible to enroll in a particular workflex option under the plan, such subsection shall apply with respect to any and all State laws insofar as they may now or hereafter relate to the particular workflex option solely with respect to those employees who are so eligible; and

“(B) in the case of a workflex option consisting of a biweekly work program or a compressed work schedule program, such subsection shall apply with respect to any and all State laws insofar as they
may now or hereafter relate to such workflex option
solely with respect to those employees who enroll in
such workflex option.

“(2) For purposes of paragraph (1)(B), a State over-
time law shall be considered to relate to any workflex op-
tion consisting of a biweekly work program or a com-
pressed work schedule program.

“(g) Subsection (d) shall not be construed to permit
the application of any State law otherwise permitted under
section 401(b) of the Family and Medical Leave Act of
1993 (29 U.S.C. 2651(b)) that would impose require-
ments relating to a qualified flexible workplace arrange-
ment plan.”.

SEC. 4. REQUIREMENTS OF QUALIFIED FLEXIBLE WORK-
PLACE ARRANGEMENT PLAN.

Subtitle B of title I of the Employee Retirement In-
come Security Act of 1974 (29 U.S.C. 1021 et seq.) is
amended by adding at the end the following:

“PART 8—QUALIFIED FLEXIBLE WORKPLACE
ARRANGEMENT PLANS

“SEC. 801. DEFINITION OF QUALIFIED FLEXIBLE WORK-
PLACE ARRANGEMENT PLAN.

“(a) In general.—A qualified flexible workplace ar-
rangement plan is a plan that—
“(1) subject to the requirements of this title, an employer administers in accordance with a written plan document, in accordance with section 402(a)(1), which shall—

“(A) establish the requirements of the plan (which shall include requirements with respect to accrual of compensable leave, request and use of such leave, withdrawal from or termination of such a plan, determination of an employee’s service, and workflex options); and

“(B) as appropriate, incorporate the rights of employees to compensable leave and workflex options pursuant to one or more collective bargaining agreements between the employer and the labor organization that has been certified or recognized as the representative of the employees under applicable law; and

“(2) provides—

“(A) compensable leave in accordance with section 802; and

“(B) workflex options in accordance with the requirements of section 803.

“(b) Relationship to Executive Order 13706.—A qualified flexible workplace arrangement plan meeting all the requirements of this part shall be deemed
to satisfy the requirements established by Executive Order 13706.

“(c) SUBSTANTIAL COMPLIANCE.—A plan shall not fail to be treated as a qualified flexible workplace arrangement plan under this title so long as the plan substantially complies with the requirements of this part.

“(d) RULE OF CONSTRUCTION.—Nothing in this part shall be construed—

“(1) to relieve an employer that offers a qualified flexible workplace arrangement plan from the requirements of this title that are otherwise applicable to an employee welfare benefit plan, including the reporting and disclosure, fiduciary responsibility, and enforcement provisions of parts 1, 4, and 5 of this title;

“(2) to require an employer to adopt or maintain a qualified flexible workplace arrangement plan; or

“(3) in the case of an employer that has not adopted or is not maintaining such a plan, to require the employer to comply with any requirement under this part with respect to such a plan.

“SEC. 802. COMPENSABLE LEAVE REQUIREMENTS.

“(a) AMOUNT OF COMPENSABLE LEAVE.—
"(1) IN GENERAL.—The minimum amount of compensable leave that shall be provided to an employee for each plan year under a qualified flexible workplace arrangement plan shall depend upon the size of the employer and an employee’s years of service with the employer, and shall be not fewer than the minimum number of days as follows:

<table>
<thead>
<tr>
<th>&quot;Number of employees employed by an employer&quot;</th>
<th>Minimum number of compensable days of leave per plan year</th>
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<tbody>
<tr>
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<td>Employees with 5 or more years of service with the employer as of the beginning of the plan year:</td>
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<tr>
<td>1000 or more .....................</td>
<td>20 days</td>
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<td>250 to 999 .......................</td>
<td>18 days</td>
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<td>50 to 249 ........................</td>
<td>15 days</td>
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<td>less than 50 ......................</td>
<td>14 days</td>
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"(2) MINIMUM REQUIREMENTS.—

"(A) IN GENERAL.—An employer that provides an unlimited number of compensable leave days per year to employees under a qualified flexible workplace arrangement plan shall be deemed to satisfy the amount of compensable leave required under paragraph (1), and nothing in this section shall prohibit a qualified flexible workplace arrangement plan from pro-
providing more than such minimum amount of compensable leave.

“(B) Treatment of Holidays.—An employer that provides paid time off to employees for holidays recognized under Federal or State law may include up to 6 such paid holidays towards satisfying the amount of compensable leave required under paragraph (1).

“(3) Accrual Permitted.—A qualified flexible workplace arrangement plan of an employer shall—

“(A) provide all the compensable days of leave available to an employee for the plan year at the beginning of the plan year; or

“(B) provide that an employee’s compensable leave for a plan year accrue during the plan year on a proportional basis in relation to the number of compensable days provided to such employee, and except as otherwise provided in subsection (b)(4), is available to an employee as the compensable leave accrues.

“(4) Determining Number of Employees.—

“(A) In General.—The number of employees of an employer for a plan year shall be determined by calculating the average monthly
number of employees for the preceding plan year in accordance with subparagraph (B).

“(B) CALCULATION.—The average monthly number of employees for a plan year shall be calculated by adding the total number of monthly employees for each month of such preceding plan year and dividing by 12.

“(C) SERVICE REQUIREMENT.—An individual shall be considered an employee for a month if such individual is an employee on at least the first day and last day of the month.

“(5) YEARS OF SERVICE.—The determination of an employee’s years of service shall be made by the employer in a manner consistent with section 203(b)(2), except that, upon adoption of a qualified flexible workplace arrangement plan, all employees’ prior years of service with the employer maintaining the plan shall be taken into account when calculating the employee’s years of service for the purpose of this subsection.

“(6) CARRYOVER.—An employer may permit employees to carry over unused compensable leave from one plan year to the subsequent plan year.

“(7) CASHOUT.—An employer may permit employees to cash out unused compensable leave after
or in connection with the termination of employment.

“(b) Full-Time, Part-Time, and New Employees, and Pro-Rated Calculations.—

“(1) Full-time Employees.—

“(A) In general.—For any plan year, the requirements described in subsection (a)(1) shall only apply to employees who are full-time employees.

“(B) Definition.—The employer, in its qualified flexible workplace arrangement plan, shall reasonably define ‘full-time’, when used with respect to an employee, for purposes of such plan.

“(2) Part-time Employees.—

“(A) In general.—For any plan year, if an employee was employed by the employer in the preceding plan year, but was not a full-time employee in the preceding plan year, and is not a full-time employee of the employer in the current plan year, subsection (a)(1) shall apply, in a pro-rated manner to such employee by multiplying—
“(i) the number of days of compensable leave required under such subsection, by

“(ii) the part-time employee factor described in subparagraph (B).

“(B) PART-TIME EMPLOYEE FACTOR.—For purposes of this paragraph, the part-time factor shall be equal to the result obtained by dividing—

“(i) the number of hours of service that the employer reasonably estimates the employee had in the preceding plan year, by

“(ii) the number of hours that the employer reasonably determines the employee would have had if such employee had been a full-time employee.

“(C) HOURS OF SERVICE DETERMINATION.—For purposes of this subsection, the determination of an employee’s hours of service shall be made in a manner consistent with section 202(a)(3)(C), except that an estimation of such hours is permitted.

“(3) NEW PART-TIME EMPLOYEES.—
“(A) IN GENERAL.—For any plan year, if a part-time employee was employed as a full-time employee by the employer in the preceding plan year or was not employed by the employer in the preceding plan year, then subsection (a)(1) shall apply, in a pro-rated manner to such employee by multiplying—

“(i) the number of days of compensable leave required under such subsection, by

“(ii) the new part-time employee factor described in subparagraph (B).

“(B) NEW PART-TIME EMPLOYEE FACTOR.—For purposes of this paragraph, the new part-time employee factor shall be equal to the result obtained by dividing—

“(i) the hours of service that the employer reasonably estimates that the employee will have during the current plan year, by

“(ii) the hours of service that the employer reasonably estimates that a full-time employee would have during such plan year.
“(4) Restrictions regarding new employees permitted.—In the case of a new employee, the employer may restrict the employee’s right to use compensable leave during the first 90 days of employment with the employer.

“(c) Use of compensable leave.—In a qualified flexible workplace arrangement plan the employer may—

“(1) determine whether the use of compensable leave at the time requested by an employee would unduly disrupt the operations of the employer; and

“(2) determine whether an employee may use compensable leave in full-day or partial-day increments.

“SEC. 803. WORKFLEX OPTIONS.

“(a) Workflex options.—

“(1) In general.—Under a qualified flexible workplace arrangement plan, an employer shall offer each employee meeting the requirements of paragraph (2) at least one of the following workflex options:

“(A) A biweekly work program that meets the requirements of section 804.

“(B) A compressed work schedule program that meets the requirements of section 805.

“(C) A telework program.
“(D) A job sharing program.

“(E) Flexible scheduling.

“(F) Predictable scheduling.

“(2) SERVICE REQUIREMENT.—

“(A) IN GENERAL.—For purposes of this section, an employee is eligible to participate in a workflex option if such employee—

“(i) has been employed for at least 12 months by the employer and for at least 1,000 hours of service with such employer during such 12-month period, determined by the employer to mean—

“(I) the calendar year; or

“(II) any fixed 12-month plan year; or

“(ii) meets eligibility requirements of the plan that otherwise permit participation prior to the date described in clause (i).

“(B) HOURS OF SERVICE.—For the purposes of this paragraph, the determination of an employee’s hours of service shall be made in a manner consistent with section 202(a)(3)(C), except that the number of such hours may be estimated by the employer.
“(3) Employment positions.—A qualified flexible workplace arrangement plan may specify which employment position or positions are offered participation in a particular workflex option described in paragraph (1).

“(4) Clarification.—A qualified flexible workplace arrangement plan shall not be required to offer an employee more than one workflex option without regard to whether another employee is offered more than one workflex option.

“(b) Conditions.—A qualified flexible workplace arrangement plan shall offer a workflex option under subsection (a) to employees pursuant to the following:

“(1) Voluntary participation.—

“(A) In general.—Except as provided in subparagraph (B)(i), an employee’s participation in any workflex option offered under a qualified flexible workplace arrangement plan shall be voluntary and the acceptance of a workflex option may not be a condition of employment.

“(B) Agreement or understanding.—A workflex option shall be carried out pursuant to—
“(i) applicable provisions of one or more agreements described in section 801(a)(1)(B); or

“(ii) in the case of an employee who is not subject to an agreement referred to in clause (i), a written agreement—

“(I) setting forth the employee’s work schedule;

“(II) including a description of the workflex option in which the employee is participating;

“(III) executed before the employee begins to participate in such workflex option; and

“(IV) entered into knowingly and voluntarily by such employee.

“(2) Termination, Modification, or Withdrawal.—

“(A) Termination or Modification.— Subject to section 803(a)(1), an employer may amend a qualified flexible workplace arrangement to eliminate—

“(i) any workflex option described in subsection (a)(1); or
“(ii) the eligibility of an employee or group of employees to participate in a workflex option after the employer has provided 30-day written notice.

“(B) WITHDRAWAL.—An employee may withdraw from a workflex option offered under a qualified flexible workplace arrangement plan at any time, except as otherwise specified for a biweekly work program under section 804(e)(2) or a compressed work schedule program under section 805(d)(2).

“(3) RECORDKEEPING REQUIREMENT.—The employer shall maintain—

“(A) written descriptions of workflex option offerings made available to employees; and

“(B) written agreements described in paragraph (1)(B)(ii).

“SEC. 804. BIWEEKLY WORK PROGRAM.

“(a) IN GENERAL.—Notwithstanding any other provision of law, as part of a qualified flexible workplace arrangement plan, an employer may establish a biweekly work program as a workflex option for eligible employees that allows the use of a biweekly work schedule—
“(1) that consists of a basic work requirement
of not more than 80 hours, over one 2-week period;
and
“(2) in which more than 40 hours but not more
than 60 hours of the work requirement may occur
in a week of the 2-week period.
“(b) CONDITIONS.—A biweekly work program shall
meet the conditions described in section 803(b).
“(c) ELIGIBLE EMPLOYEE.—For purposes of this
section, an ‘eligible employee’ means an employee who is
subject to the minimum wage and overtime requirements
of sections 6 and 7 of the Fair Labor Standards Act of
“(d) COMPENSATION FOR HOURS IN SCHEDULE.—
In the case of an eligible employee participating in a bi-
weekly work program—
“(1) the eligible employee shall be compensated
for each hour in such biweekly work schedule at a
rate not less than the regular rate at which the eligi-
ble employee is employed;
“(2) any hour worked in excess of such a bi-
weekly work schedule for a week of the 2-week pe-
period, or in excess of 80 hours in the 2-week period,
shall be overtime hours; and
“(3) the eligible employee shall be compensated for each such overtime hour at a rate not less than one and one-half times the regular rate at which the eligible employee is employed, in accordance with section 7(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(a)(1)).

“(e) DISCONTINUANCE OF PROGRAM OR WITHDRAWAL.—

“(1) DISCONTINUANCE OF PROGRAM.—An employer who has established a biweekly work program under subsection (a) may discontinue the program, after providing 30 days written notice to the eligible employees who are subject to the employer’s agreement or understanding described in section 803(b)(1)(B).

“(2) WITHDRAWAL.—

“(A) IN GENERAL.—An eligible employee may withdraw from an agreement or understanding described in section 803(b)(1)(B), with respect to a biweekly work program established under subsection (a), by submitting a written notice of withdrawal to the employer.

“(B) EFFECTIVE DATE.—Not later than 30 calendar days after receiving an eligible employee’s written notice of withdrawal, an em-
ployer shall restore the employee to one of the
employer's regular schedules.

“SEC. 805. COMPRESSED WORK SCHEDULE PROGRAM.

“(a) IN GENERAL.—Notwithstanding any other pro-
vision of law, as part of a qualified flexible workplace ar-
rangement plan, an employer may establish a compressed
work schedule program as a workflex option for employees
that allows the employee to work the equivalent of full-
time employment by increasing the number of daily hours
worked, such as a four-day workweek.

“(b) CONDITIONS.—A compressed work schedule pro-
gram shall meet the conditions described in section
803(b).

“(c) COMPENSATION FOR HOURS IN COMPRESSED
WORK SCHEDULE.—In the case of an employee who is
participating in a compressed work schedule program and
who is subject to the minimum wage and overtime require-
ments of sections 6 and 7 of the Fair Labor Standards
Act of 1938 (29 U.S.C. 206; 207)—

“(1) the employee shall be compensated for
each hour in such 40-hour compressed work sched-
ule at a rate not less than the regular rate at which
the employee is employed; and

“(2) the employee shall be compensated for
each overtime hour at a rate not less than one and
one-half times the regular rate at which the employee is employed, in accordance with section 7(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(a)(1)).

“(d) DISCONTINUANCE OF PROGRAM OR WITHDRAWAL.—

“(1) DISCONTINUANCE OF PROGRAM.—An employer who has established a compressed work schedule program under subsection (a) may discontinue the program after providing 30 days written notice to the employees who are subject to an agreement or understanding described in section 803(b)(1)(B).

“(2) WITHDRAWAL.—

“(A) IN GENERAL.—An employee may withdraw from an agreement or understanding described in section 803(b)(1)(B), with respect to a compressed work schedule program established under subsection (a), by submitting a written notice of withdrawal to the employer.

“(B) EFFECTIVE DATE.—Not later than 30 calendar days after receiving a written notice of withdrawal, an employer shall restore the employee to one of the employer's regular schedules.
“SEC. 806. RELATIONSHIP TO FAMILY AND MEDICAL LEAVE ACT.

Consistent with section 102(d)(2)(A) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(d)(2)(A)), an employee may elect, or an employer may require the employee, to substitute compensable leave for leave provided under subparagraph (A), (B), (C), or (E) of section 102(a)(1) of the Family and Medical Leave Act (29 U.S.C. 2612(a)(1)) for any part of the 12-week period of such leave under such section.

“SEC. 807. REINSTATEMENT RIGHTS.

“(a) IN GENERAL.—Except as provided in subsections (b) and (c), an employee who uses compensable leave under a qualified flexible workplace arrangement plan shall be entitled—

“(1) to be restored to the position of employment held by the employee when the leave commenced; or

“(2) to be restored to an employment position equivalent to the employment position described in paragraph (1), with equivalent employment benefits, pay, and other terms and conditions of employment.

“(b) LIMITATIONS.—An employee shall be entitled to such reinstatement after using compensable leave even if the employee has been replaced or the employee’s employment position has been restructured to accommodate the
employee’s absence, except that the reinstatement rights shall not apply—

“(1) to an employee who uses more than 12 workweeks of compensable leave during a 12-month period; or

“(2) to an affected employee, as defined under section 104(b)(2) of the Family and Medical Leave Act (29 U.S.C. 2614(b)(2)).

“(e) REINSTATEMENT OF LEAVE.—In the case of an employee who is rehired following termination of employment, any compensable leave that has not been used prior to such termination may be reinstated by the employer.


“Nothing in this part shall be construed to modify or relieve an employer from any obligation imposed by the Americans with Disabilities Act (42 U.S.C. 12111 et seq.) and the Rehabilitation Act of 1973 (29 U.S.C. 791 et seq.).

“SEC. 809. EDUCATION AND TECHNICAL ASSISTANCE; LIMITATION ON RULES.

“(a) EDUCATION AND TECHNICAL ASSISTANCE.—The Secretary shall provide education and technical assistance to employers and employees with regard to qualified
flexible workplace arrangement plans, and shall maintain an electronic database available online consisting of examples of workflex options.

“(b) Limitation on Rules.—

“(1) In general.—No regulation or other guidance issued by the Secretary to carry out this part may result in new restrictions with respect to the establishment or administration of a qualified flexible workplace arrangement plan under section 801.

“(2) invalidation.—Any rule or regulation issued in contravention of paragraph (1) shall have no force or effect.

“Sec. 810. Definitions and Other Special Rules.

“For purposes of this part:

“(1) Compensable Leave.—The term ‘compensable leave’ means paid leave to be used for—

“(A) paid time off, sick leave, personal leave, or vacation, the use of which is subject to the terms of a qualified flexible work arrangement plan; and

“(B) paid holidays provided in accordance with section 802(a)(2)(B).
“(2) WORKFLEX OPTION.—The term ‘workflex option’ means any of the programs described in section 803(a)(1).

“(3) EMPLOYER.—For purposes of determining whether an employer is maintaining a qualified flexible workplace arrangement plan, sections 210(c) and 210(d) shall apply.

“(4) JOB SHARING PROGRAM.—The term ‘job sharing program’ means an arrangement under which an employer approves the sharing of one employment position amongst two or more employees.

“(5) PLAN YEAR.—The term ‘plan year’ means any 365-day period designated in a qualified flexible workplace arrangement plan.

“(6) FLEXIBLE SCHEDULING.—The term ‘flexible scheduling’ means an arrangement under which an employee’s regular work schedule is altered.

“(7) PREDICTABLE SCHEDULING.—The term ‘predictable scheduling’ means an arrangement under which an employer provides a work schedule to an employee—

“(A) with reasonable advanced notice; and

“(B) that is subject to as few alterations as are reasonably possible.
“(8) Telework Program.—The term ‘telework program’ means an arrangement under which an employee performs the duties and responsibilities of such employee’s employment position, and other activities authorized by the employer, from a worksite approved by the employer other than the location from which the employee would otherwise work.”.