TESTIMONY OF

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THE HEALTHY FAMILIES ACT

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STATEMENT TO THE RECORD

Good morning Chairman Kennedy, Senator Enzi, and members of the Senate Health, Education, Labor and Pensions Committee. My name is G. Roger King, and I am a partner in the Jones Day law firm. Jones Day is an international law firm with 2,200 lawyers practicing in 30 offices located both in the United States and throughout the world. We are fortunate to count more than 250 of the Fortune 500 employers among our clients. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers. I have been a member of various committees of The Society for Human Resource Management (SHRM) and The American Society of Healthcare Human Resources Association (ASHHRA) and I also participate in the work of other trade and professional associations that are active in labor and employment matters. My testimony today is based on my personal and professional experience.

In the previous Congress, Chairman Kennedy with the co-sponsorship of other Members of this Body introduced two virtually identical bills the provisions of which I understand are the subject matter of today's hearing — S.932 and S.1085. Both of these bills have been captioned the "Healthy Families Act" ("HFA") and have as their fundamental objective the requirement that any private or public sector employer in the country with fifteen (15) or more employees provide at least seven (7) paid days (or 56 hours) of sick leave annually to their employees. It is my further understanding that the Committee's objective today is to discuss the potential effects of the requirements of the HFA on workers, employers, the economy in general and on public health.

Initially, I believe six fundamental policy and structure observations are appropriate to review regarding the HFA:

- First, based on well-established data, employers in this country are not opposed to the concept of paid leave for their workers and have an excellent record in providing such leave on a voluntary basis. Indeed, numerous studies and analyses have conclusively established that 75% of the country's employers provide, in one form or another, paid leave including paid sick leave. (U.S. Dept. of Labor, Bureau of Labor Statistics, the 2006 Employee Benefits Survey). This system of voluntary compliance, which includes collectively bargained policies and procedures, has worked exceptionally well and should not be disturbed. To the extent that positions or employers do not provide paid sick leave, such positions often are entry level in nature or constitute initial or part time employment. Frequently, human capital market forces quickly respond to such situations with workers leaving or progressing out of such entry level positions to higher paid positions and jobs that do offer paid leave.

- Second, given the above-noted employer commitment to the paid leave concept, and a high percentage of employers providing such leave — including paid leave for sick time — a fundamental question that should be asked by this Committee is whether the HFA or a similar legislation is needed. I would submit the answer to such a question is in the negative. Employers in this country are already burdened by numerous federal, state

and local regulations which result in millions of dollars in compliance costs. These mandated, and largely unfunded, "cost of doing business" requirements in certain instances not only hinder and impede the creation of new jobs, but also inhibit our nation's employers from competing globally. Simply stated, a compelling case needs to be established before any additional regulations and statutes are imposed upon our nation's employers in this area.

- Third, enactment of the HFA would create a second "Bermuda benefits triangle" for employers with FMLA, HFA and corresponding and often conflicting state laws forming such a triangle. Employers already face the difficult Bermuda compliance triangle composed of the American With Disabilities Act (ADA), FMLA and various state workers compensation statutes.[1] The potential overlap of all of the above statutes will pose considerable practical/operational and legal burdens on the employment community in this country. Such additional administrative burdens, and the cost of same, including loss of productivity and ability to compete with offshore employers, must be addressed before the Congress proceeds with consideration of the HFA.

- Fourth, the fundamental mechanics and metrics included in the HFA regarding "equivalency" and the requirement that employers provide annually seven (7) paid days of sick leave, would appear to be fundamentally flawed and raise serious policy, practical and expense concerns. To begin with, the term or phrase "sick leave" is a term or concept that is no longer used by a substantial number of employers in this country. Paid sick leave has been replaced or folded into comprehensive leave programs such as paid time off ("PTO") and other similar leave policies and procedures. This approach combines traditional paid sick leave days, vacation days and other paid leave time (e.g., personal days, attendance incentive pay, etc.) into a consolidated or comprehensive paid leave program. Under this approach, a worker is given the option of when to take such paid leave time and may choose to do so within general constraints for any reason for which he or she chooses, including taking leave for personal or family illness situations. The "equivalency" provision of the HFA raises serious questions as to how such PTO and analogous programs would deem to be "equivalent" to the seven day paid sick leave requirement of the HFA. Indeed, the cost of regulatory staff and time associated with such "equivalency" reviews no doubt would be considerable as would be the cost of the inevitable litigation that will arise from such determinations. Consider the following hypotheticals:

  – An employer has a paid time-off program that provides employees with 20 paid days off which an employee may use as he or she wishes (encompassing paid vacation leave, sick leave and personal days). The program has no separate "category" for sick leave. Does this program meet the "equivalency" test?

[1] See, e.g., Chapman, Russell D., Garay, Joyce-Marie, Avoiding the "Bermuda Triangle": Navigating the ADA, FMLA and Workers' Comp Void, Compensation & Benefits Review, Vol. 34, No. 3, 58-67 (2002); Bell, Christopher G., The ADA, FMLA, and Workers' Compensation: The Bermuda Triangle of Employment Law, SHRM Legal Report (1997).

- An employer has a paid time-off program that provides full time employees (those who work 40 or more hours per week) with 20 paid days off, but does not provide a similar benefit for part-time employees (defined as those employees who work less than 40 hours per week). How will this program have to be adjusted to meet the "equivalency" test?

- An employer has a paid time-off program that includes 20 paid days off, which includes vacation days, personal days, and attendance incentive days which can be used by an employee for illness situations. The employer also provides employees with 5 paid sick days per year. Does this employer have to add 2 paid sick days annually to meet the "equivalency" test?

- An employer provides employees with 5 paid sick days per year along with other paid leave time and permits exempt employees to accrue compensation time for hours worked over forty (40) in a given work week. Does this employer have to add 2 paid sick days annually to meet the "equivalency" test?

- An employer provides, at no cost to employees, a short term and/or a long term disability plan that provides paid sick leave time to employees. Is the employer in compliance with the HFA's "equivalency" requirement?

- Fifth, while employers in this country have embraced the spirit and the concept of the Family Medical Leave Act (FMLA) and are committed to its continuation, this statute and its implementing regulations need to be fixed before any other federally mandated leave requirements are enacted. Notwithstanding FMLA's laudable policy objectives and the high degree of acceptance that it has achieved with employers it simply does not work well in a number of areas. Further, certain of the regulations implementing FMLA are in particular need of renewed scrutiny and redrafting. It has been well-documented in proceedings both in this Committee and in committees of the Other Body that FMLA in its current regulatory enforcement state is confusing, subject to abuse and a source of considerable litigation. As this Committee is well aware, The United States Department of Labor (DOL) has presently pending a request for information (RFI) regarding a number of issues with respect to the regulations that implement FMLA. I submit that this Committee may be well informed by many of the comments that the DOL will receive in response to its RFI. Specifically, I would urge this Committee to review the following issues that have arisen with respect to FMLA compliance:

  (1) Definition of what constitutes a "serious health condition";

  (2) The use (and abuse) of intermittent leave;

  (3) The inadequacy of notice and certification before a leave period begins;

  (4) The time period to measure eligibility for FMLA leave;

  (5) The time in which a worker is eligible to commence FMLA leave;

(6) Employer communication with health care providers and verification of "serious health condition" claims; and

(7) Impact on attendance incentive programs.

Intermittent leave is one area that particularly deserves this Committee's attention. Two different regulations, the regulation permitting intermittent leaves when there is no planned and scheduled medical treatment on the day of the absence and the regulation embracing chronic conditions as covered "serious health conditions," intersect to create one of the biggest problems for employers in terms of day-to-day operations. Together, these regulations allow an employee to have unscheduled absences of up to sixty (60) single work days per year or approximately 25% of all workdays for conditions that may not be a serious health condition. This means that an employee could be absent for 1.2 days every single week in a calendar year or a consecutive twelve (12) month period. Additionally, intermittent leave could be taken in as little as 10 or 15 minute increments with the potential, therefore, for an employee to take off a portion of his or her workday everyday in the calendar year or in a consecutive twelve (12) month period. Further, if the employee manages to work 1250 hours in the previous twelve (12) months, the employee will be eligible to continue this cycle.

Problems arising from other FMLA compliance issues as noted above have also resulted in considerable litigation. One example of such litigation is the recent case *Rucker v. Lee Holding Co., d/b/a Lee's Auto Mall*, 471 F.3d 6 (1st Cir. 2006). In this case, the Court of Appeals for the First Judicial Circuit ruled that an employee could meet the twelve (12) month FMLA eligibility requirement by combining separate periods of employment, including the employee's current employment period together with a prior period of employment with such employer that was separated by a period of five years. The underlying regulation that is applicable to such issues — 29 C.F.R. 825.110 — lacks clarity and has provided the result noted above which from any perspective is neither practical nor workable.

- Sixth, to the extent that the HFA is premised on the concept of "presenteeism" [a relatively new term used to describe workers who remain on the job, or come to work, but who are not as productive as usual due to stress, depression, injury, or illness], I would submit that additional analysis and research needs to be undertaken regarding this workplace issue. For example, the most frequently cited illnesses on which the presenteeism studies' cost estimates are based are depression (approximately $36 billion), and other chronic conditions such as back problems, arthritis, headaches, and stress (approximately $47 billion). An employee's inability to work productively because of depression or arthritis is unlikely to be resolved by 7 days of paid sick leave. Further, the Journal of Occupational and Environmental Medicine reports that family health-related work absence accounted for only 6% of all health-related productivity loss.[2] The same article also states that because costs vary significantly by worker characteristics,

[2] Stewart, Walter F., Ricci, Judith A., Chee, Elsbeth, Morganstein, David, Lost Productive Work Time Costs from Health Conditions in the United States: Results from the American Productivity Audit, J. Occup. Environ. Med., vol. 45, no. 12, pp. 1234-1246 (2003).

intervention needs vary by specific subgroups. Additionally, if lost productivity is a true cost of presenteeism, employers will no doubt conduct their own cost benefit analysis and will, if appropriate, adjust their leave policies to correct for lost productivity. This will ensure that employers receive the full benefit of enacting such a program (without offsetting such a benefit with compliance and record-keeping costs associated with the HFA). Finally, to the extent presenteeism is a problem in the work place there are other solutions. For example, many employers already provide employees with alternatives to working five day weeks and nine-to-five schedules. Specifically, many employers permit employees to telecommute, provide flexible work arrangements, and compensation time. These alternatives are more likely to effectively address the chronic conditions (headaches, arthritis, etc.) that impact presenteeism issues.

In addition to the above outlined concerns and issues, HFA as drafted in the last Congress presents numerous ambiguities and questionable policy and legal conclusions. Certain of these policy and legislative drafting issues include the following:

Section 2: Findings.

- Discrimination

  - Subsections 13 through 15 discuss the gender stereotypes associated with family caretaking responsibilities. It is debatable that the HFA would assist in any meaningful manner the present regulatory scheme and related statutes that prohibit gender stereotyping. For example, employers are already subject to civil rights laws, such as Title VII of the Civil Rights Act of 1964, that effectively address these issues. For example, an employer that penalizes men who take leave for caretaking purposes, or denies men such leave while granting women a similar accommodation are in violation of Title VII, which specifically prohibits evaluating employees by assuming or insisting that they match a certain gender stereotype.[3]

Section 4: Definitions.

- **"Applicant"**

  – Why is an applicant contained in the definition of "employee" in Section 4? Are applicants for employment to be covered by this legislation? If so, on what basis? How would an applicant for employment qualify for HFA leave and how much paid leave time would an applicant be entitled to receive?

[3] See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'") (internal citations omitted).

- **"Covered Employee"**

  – How long does an employee have to be employed to be covered by this legislation? If applicants are covered, presumably there is no minimal employment period. Seemingly, an employee or applicant could start work on Monday and be eligible for some number of paid leave days on Tuesday.[4] In contrast, under FMLA an employee is required to be employed by an employer for twelve (12) months and have at least 1250 hours of service with such employer before the employee is eligible for the Act's benefits and coverage. 29 U.S.C. § 2611(2)(A). The FMLA approach would appear to be a more appropriate eligibility requirement.

- **"Employer"**

  – The definition of "employer" under the HFA includes entities that employ fifteen (15) or more employees for each working day during each of twenty (20) or more calendar work weeks in the preceding calendar year. By contrast, before FMLA is applicable, an employer must employ at least fifty (50) employees within seventy-five (75) miles of a worksite. 29 U.S.C. § 2611(2)(B)(ii). Why should the HFA be applicable to business entities that are quite small and may have difficulty in being compliant? The FMLA definition of "employer" would appear to be more appropriate.

Section 5: Provision of Paid Sick Leave.

- This section mandates that seven (7) days of sick leave with pay shall be annually provided for employees working thirty (30) or more hours per week and that a pro rata number of days of paid sick leave be available with pay on an annual basis for employees working less than thirty (30) hours per week or 1500 hours throughout the year involved. The financial impact of such an unfunded mandate on employers should be carefully and thoroughly researched. Although, as noted above, many employers in this country provide paid leave in excess of such seven-day requirement, employers with workforces in the 15-50 category may experience financial difficulty in complying with such requirement. Further, even those employers that have the resources to be compliant may experience considerable additional costs of compliance if the HFA is enacted, especially depending on how the HFA "equivalency" test is applied.

- **Full Time Employee Definition**

  – Why is the definition of full time employees under the HFA at thirty (30) hours per week when the traditional work week in this country is forty (40) hours? Indeed, this is the definition generally utilized under the Fair

[4] It is not clear under Section 5(b)(1) how much "accrual" an employee is required to receive in a given calendar quarter.

Labor Standards Act. Further, the HFA's requirement of providing paid sick leave for employees working less than thirty (30) hours per week, even on a pro rata basis, is inconsistent with many employer leave plans and would appear to be unreasonable in many employment settings. For example, is there a minimum number of hours that an employee must work to qualify for HFA coverage? Presumably, an employee could work only one hour a week and still qualify for fractional paid leave benefit. Would an employee working for multiple employers be entitled to more than seven (7) paid sick leave days annually? How would employees working multiple part-time jobs be treated under the HFA?

- **Definition of Pay**

  – The HFA does not define the word "pay" in either Section 4 or Section 5. Does this term include all types of compensation associated with a given work day even though the employee would not be present and working? For example, would it include such compensation as incentive pay, differential pay, specialty pay, weekend bonus pay, night shift differential, bonus pay, and other similar compensation arrangements that generally only result in an employee receiving such additional compensation if and when such a employee appears for and completes a work day? Does the term "pay" include all benefits that would otherwise be applicable from working such day? For example, would the employee receive accrual credit for pension and other like benefits when a mandated paid sick leave day situation arises and the employee does not work on such day? Stated alternatively, many employer paid sick leave and PTO plans only pay an employee on leave their straight time hourly rate without payment of differentials or other compensation tied directly to the employee working his or her shift. Arguably, under the HFA this approach may not meet the equivalency requirement and such employers, therefore, would be required to increase the amount of compensation an employee would receive while on paid sick leave. There is obviously considerable ambiguity in this area and there is mandated in this Section of HFA alone the potential to place millions of dollars of additional paid leave expenses on our nation's employers.

- **Intermittent Use**

  – The calculation of how the paid sick leave system would work is particularly troubling. Section 5(c), the calculation section, would permit paid leave to be on an hourly basis or in the smallest "increment that the employer's payroll system uses to account for absences or use of leave." This literally could be in minute increments as many employers track absences in such minute incremental amounts. Indeed, as discussed above, this concept is already a tremendous problem area under FMLA.

- **Use Standards**

  – Section 5(d) is extremely broad in defining when a worker could qualify for sick leave and would no doubt result in considerable disagreement and potential litigation. For example, an absence resulting from obtaining medical diagnoses or care, or preventive medical care is very broad and is in need of considerable additional specificity. Again, this is a problem area under FMLA which has an analogous open-ended definition of "serious health condition." 29 CFR § 825.114.

- **Definition of Family**

  – Equally troubling under Section 5(d) is the potential for use of the mandated paid sick leave for an individual that has an "affinity whose close association with the employee is the equivalent of a family relationship." What does this mean? This phrase is obviously susceptible to a very broad inclusion of a variety of individuals. Does it include frequent visitors to a household? Does it include domestic partners? Does it include "friends" living together, for example, while away at college?

- **Scheduling**

  – Section 5(e) would only require an employee to make a "reasonable effort to schedule leave." This open-ended and minimal requirement of notice to an employer for unscheduled leave will pose significant practical and operational problems.

- **Foreseeability**

  – Section 5(f) regarding notification procedures is similarly deficient as it only requires oral and written notice seven (7) days in advance of any leave that is foreseeable. This period is too short and will pose considerable problems for many employers. By contrast, FMLA requires in most instances thirty (30) days advance notice for qualified foreseeable leave. 29 U.S.C. § 2612(e)(1).

- **No Dispute Resolution Mechanism**

  – The HFA contains no mechanism for an employer to question or challenge a certification that an employee may receive to qualify for the required paid leave. By contrast, under FMLA employers may require the employee to obtain a second medical certification from a health care provider selected by the employer. 29 U.S.C. § 2613.

- **Certification**

  – Section 5(f) requires certification only if the employee takes leave for more than three (3) consecutive workdays. This very "loose" standard will no doubt impede the employer's ability to curb abuse. Further, under Section 5(f)(2) an employee is given up to thirty (30) days before a certification would need to be provided to an employer. This period is too long. Finally, Section 5(f)(2)(B)(ii) states that "a health care provider shall make reasonable efforts to limit the medical facts described in clause (i)(III) that are disclosed in the certification to the minimum necessary to establish a need for the employee to utilize paid sick leave." What does this mean? It would appear to severely limit an employer's ability to use the certification requirements (such as they are) to prevent abuses of paid sick leave.

- **Equivalency**

  – The Section 5(g) "equivalency requirement" in addition to the problems noted above, also contains a mandate that "an employer may not eliminate or reduce leave in existence on the date of enactment" of the HFA. This edict would appear to contradict other sections of the HFA that will require employers to substantially modify their leave policies to become compliant with the HFA.

  – Further, Section 5(g)(2) is troubling as it states "an employer may not eliminate or reduce leave in existence on the date of enactment of this Act, regardless of the type of such leave, in order to comply with the provisions of this Act." As noted above, does this subsection prohibit even minor adjustments to an employer's current leave programs? For example, would an employer that has a paid time-off program that does not specifically identify sick leave be prevented from changing in any manner how this paid time-off system works, including the eligibility and accrual levels associated with such plan?

- **Enforcement Authority**

  – Section 8 of the HFA provides the Department of Labor with broad investigative and enforcement authority. What will be the cost of such enforcement and oversight? Does the Department have the resources to carry out these new obligations?

  – This Section also provides for private lawsuits for lost wages and benefits, reinstatement and other equitable relief, and attorney fees for a prevailing employee. Given the numerous ambiguities in the HFA, this Section would appear to be an open invitation for considerable litigation, including

class action lawsuits that already are causing our nation's employers to pay millions of dollars in unnecessary legal fees and costs.

- **Effect on Other Laws (No Preemption)**

  – Section 10 of the HFA is an "anti-preemption" provision and would permit state and local laws to co-exist with, or supersede, the provisions of the HFA. If the Congress does proceed to enact further mandated leave legislation, either paid or unpaid, considerable attention must be directed to the question of whether there should be uniform national standards. The varying and often conflicting state statutes and regulations regarding leave pose significant administrative costs for employers and can result in confusion and potential error. Neither employers nor workers are well-served with such a difficult regulatory scheme. The approach taken with respect to ERISA preemption should be given serious consideration.

- **Effect on Existing Employment Benefits**

  – Section 11(a) of HFA states that its provisions shall not be read to diminish the "obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan that provides greater paid sick leave rights to employees in the rights established under this right. Subsection B states "the rights established for employees under this Act shall not be diminished by any contract, collective bargaining agreement or any employment benefit program or plan." The above subsections read together with Section 5(g)(2) — the Equivalency Section — would appear to unduly "lock in" current employer leave program provisions and make any change of same unlawful, including in collective bargaining settings. This approach is too rigid and will restrict both employers and unions in collective bargaining from having any flexibility in making even minor adjustments in benefit plan provisions.

- **Encouraging More Generous Leave Policies**

  – Section 12 of the HFA makes the following interesting policy statement:

> Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than policies that comply with the requirements of this Act.

  – Unfortunately, if the HFA is enacted based on the experience of many employers under FMLA, and the problems outlined above that can be anticipated with the enactment of the HFA, employers of all sizes may be discouraged from implementing any additional improvements in their paid leave programs — assuming after paying for their additional paid leave

> costs, administrative expenses, and litigation costs associated with the HFA that they would even have any resources left to make such improvements. Indeed, in many instances it may be that the added administrative and litigation costs and other compliance expenses associated with the HFA will drain any resources that otherwise would have been available for paid leave benefit improvements. [5]

Mr. Chairman, Senator Enzi, and other members of the Committee, thank you for permitting me to share my views with you this morning. I would be happy to answer any questions that you might have.

[5] Ironically, the testimony in a number of Congressional hearings has documented how, as a result of the FMLA, some employers are moving toward eliminating their more generous pre-FMLA programs and other companies are being urged by consultants not to adopt programs more generous than the FMLA. See Senate Testimony of Deanna R. Gelak, SPHR on behalf of the FMLA Technical Corrections Coalition and the Society for Human Resource Management, July 14, 1999, p. 22. For example, Thomas E. Burns, corporate director of compensation and benefits, NYNEX Corporation, New York, N.Y., testified before the U.S. House Subcommittee on Oversight and Investigations, at the June 10, 1997 hearing, (page 14) that "NYNEX Corporation's sickness disability benefit plan provides up to 52 weeks of paid salary continuation for each illness. Since the FMLA was enacted, NYNEX has experienced a 42% increase in the percentage of incidental absences from 1992 to 1995, despite a reduction in the workforce of 7,000 employees. Incidental absences are those of seven (7) days or less for an employee's own illness."