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On behalf of the
Society for Human Resource Management

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Introduction

Chairman Andrews, Ranking Member Kline, distinguished members of the Subcommittee, my name is Alfred B. Robinson, Jr. and I am a shareholder with Ogletree Deakins Nash Smoak & Stewart PC in Washington, D.C. I greatly appreciate the Subcommittee's invitation to testify today.

As background, I am a former acting Administrator of the United States Department of Labor (DOL) Wage and Hour Division, the federal agency that administers and enforces a variety of labor standards statutes, including at least two statutes relevant to today's hearing: the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). Prior to becoming acting Administrator, I was Deputy Administrator for Policy and as Senior Policy Advisor of the Wage and Hour Division. Before joining DOL, I was a member of the South Carolina House of Representatives from 1992 until 2002.

I appear today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest professional association devoted to human resource management. The Society's mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India. The Society's membership comprises HR professionals who are responsible for administering their employers' leave policies, including paid and unpaid time-off programs and FMLA leave.

Employer Support for Volunteer Emergency Services Personnel

Mr. Chairman, over the last several years, the nation's volunteer firefighters and emergency medical services personnel have been asked to respond to everything from natural disasters, such as the tornadoes in Arkansas and Tennessee last week and the fires in California last summer, to the terrorist attacks of September 11, 2001. The Society for Human Resource Management joins all Americans in expressing indebtedness to the service of volunteer firefighters and medical responders. I am pleased to be appearing alongside Philip Stittleburg, Chairman of the National Volunteer Fire Council, and commend his organization for doing such an outstanding job representing the critical needs of volunteer emergency responders.

The courage and bravery of volunteer firefighters and emergency medical services personnel should be deeply appreciated. Few Americans risk their lives in their given professions; there are even fewer who risk their lives in a volunteer capacity beyond their jobs. Yet, this is the life that volunteer fire and medical personnel have chosen; they answer the call to duty in response to dangerous events ranging from fires and floods to hurricanes and tornadoes and more. Each year in the U.S., dozens of official disasters and emergencies occur. According to the Federal Emergency Management Agency (FEMA), there were 62 Federally-declared disasters and 13 emergencies in 2007 alone. So far in 2008 there have been federally-declared major disasters in

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the states of Arkansas, Hawaii, Iowa, Indiana, Kansas, Missouri, Nebraska, Nevada and Tennessee. At each of these events, local volunteer agencies are invariably the first to arrive on the scene.

Legislative history

In this context, I have been asked to explore the issue of providing job-protected leave for volunteer firefighters and emergency medical services personnel who respond to an emergency or major disaster as declared by the President or a governor. In particular, the Subcommittee is considering the policy included in H.R. 1643, the Volunteer Firefighter and EMS Personnel Job Protection Act, introduced by Subcommittee Chairman Andrews and Representative Michael Castle on March 22, 2007. Companion legislation (S. 2240) was introduced by Senators Thomas Carper and Susan Collins in the U.S. Senate. The bills would provide up to 14 days per calendar year of job protection for volunteer emergency service personnel who respond to a Presidentially-declared disaster in an official capacity. I understand the Subcommittee is also considering adding state-declared emergencies to events covered by the proposal.

H.R. 1643 was incorporated into the text of H.R. 1684, the Department of Homeland Security Authorization Act for Fiscal Year 2008, and passed by the House on May 9, 2007. The Senate has taken no action on H.R. 1684.

Current employer accommodations of employees

U.S. employers provide a host of leave benefits, both voluntary and mandatory, to help employees achieve an effective work-life balance and meet their own professional and personal needs. This includes policies to help employees who serve in volunteer or service capacities. Employers generally are very generous in providing leave benefits; in fact, according to Department of Labor data, nearly 75 percent of employers voluntarily provide some form of paid leave for illness and other personal needs. As a general principle, SHRM believes that employers, not the Federal government, are best situated to know the benefit preferences of their respective employees. Yet, employers are required to provide leave according to several Federal leave statutes that are described here.

The most prominent leave law with which many employers must comply is the Family and Medical Leave Act (FMLA). The FMLA provides leave for the birth, adoption or foster care of an employee's child, as well as for the "serious health condition" of a spouse, son or daughter, or parent, or for the employee's own medical condition. The FMLA allows any covered employee who has worked at least 1,250 hours during a 12-month period in an organization of 50 or more employees to take up to 12 work weeks of unpaid leave during a 12-month period.

The Americans with Disabilities Act (ADA) of 1990 also provides leave benefits to certain qualified employees. In the employment context, the ADA prohibits covered employers from discriminating against both current employees and job applicants with disabilities. In addition, the ADA requires covered employers to provide reasonable accommodations to employees who have known disabilities. Under the ADA, an employee must cooperate in an interactive process with his or her employer to determine any needed reasonable accommodation. Employers giving time off

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from work is among the most common accommodations. Furthermore, ADA-required leave may extend beyond the 12 weeks required for employees covered by the FMLA. Indeed, the ADA provides for no time limit; the length of a leave of absence is determined by what is a reasonable accommodation. In fact, according to EEOC guidance, an indefinite leave of absence can be a required form of accommodation, unless the employer can show undue hardship.

The newest federal leave mandate on employers is a job-protected leave benefit for military family members. On January 28, 2008, President Bush signed H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, which contained the expansion of the FMLA for qualified family members of U.S. Armed Forces personnel. This new law requires employers to provide the following types of leave:

- **Active Duty Leave**—12 weeks of FMLA leave for an employee whose spouse, son, daughter or parent is called to active duty or notified of an impending call to active duty in the Armed Forces in support of a contingency operation.
- **Caregiver Leave**—26 weeks of FMLA leave during a single 12-month period for a spouse, son, daughter, parent, or nearest blood relative caring for a recovering Armed Forces member.

To underscore the importance of the interplay between these Federal statutes, employers face potential litigation and damages in the event they make incorrect decisions regarding the FMLA, the ADA and other state and federal leave laws. As the Subcommittee considers creating a new leave mandate for a specific segment of the workforce, it is imperative for Members to understand the complexity of the overlap of existing Federal and state leave statutes.

Issues surrounding volunteer emergency responder leave legislation

As mentioned, volunteer emergency response personnel give immeasurable time and energy to serving their nation, their states and their communities with distinction. In addition to serving their communities, volunteer first responders must balance the same professional and social responsibilities that all Americans do. While it may be fitting and proper that the beneficiaries of their volunteer services support them and their units, it is equally important that this support be feasible and meaningful if it includes a federally mandated leave. Accordingly, I am pleased to share my perspective on legislation that would provide a leave entitlement for volunteer firefighters and emergency medical personnel.

Congress has acknowledged that the public benefits from the generosity of volunteerism. For example, in 1985, Congress amended the definition of an employee under the Fair Labor Standards Act (FLSA) so as to exclude from that definition an individual who performs volunteer services for state and local governmental entities. In doing so, Congress promoted the spirit of *bona fide* volunteer services for charitable and public purposes and attempted to remove any obstacles that might discourage or impede true volunteer activities. At the same time, Congress took steps to minimize any potential for abuse of volunteerism, especially as a mechanism to avoid the minimum wage and overtime requirements of the FLSA. During my tenure at the Wage and

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Hour Division, we issued numerous opinion letters to effectuate Congressional intent to promote volunteerism without compromising the protections of the FLSA.

The initial policy question facing members of the Subcommittee is: should the Federal government require employers to provide a minimum of leave to volunteer emergency service personnel? Providing leave to volunteer emergency response personnel is a laudable goal; however, there are many provisions in this proposal that the Subcommittee should clarify and questions that the Subcommittee should address during the debate over this draft policy.

An overriding objective for the Subcommittee should be to ensure that both employees who volunteer as firefighters or emergency medical personnel and their employers, be they small or large, ultimately understand their rights and obligations under any legislation. When employees and employers communicate with each other and arrive at a common understanding, then the prospects for conflict, disagreement or misunderstanding are minimized and, hence, the risk of unnecessary litigation is reduced. Artfully drafted legislation will achieve your policy objectives and promote the interest of good government and mutual knowledge and understanding among employees and employers about their rights and obligations. Conversely, legislation with questionable provisions about relevant rights and responsibilities will often lead to costly litigation.

As the Subcommittee weighs the policy in question, it should take notice of other mandated leave entitlements that Congress has established and learn from the applicable experiences. A case in point is the two categories of military family leave entitlements that were established when Congress enacted the FY2008 National Defense Authorization Act. As you know, the DOL just published on Monday, February 11, its request for comments on these military family leave provisions in conjunction with its notice of proposed rule making on the existing FMLA regulations. By my count, the DOL requested comments approximately 38 separate times, either on different aspects or in response to questions related to the active duty and caregiver leaves. I would urge the Subcommittee to be more precise when it attempts to create a new leave entitlement for volunteer emergency personnel in order to promote understanding for volunteers and their employers and avoid preventable litigation.

Specific concerns

There are significant omissions in this legislative proposal. One aspect of this proposal that the Subcommittee should address is that it charges no governmental department or entity, particularly not the Secretary of Labor, with the responsibility to define by regulation any provision of the proposal. Regulatory guidance would assist employees and employers to know and understand their rights and obligations. A second omission is that the proposal provides no administrative enforcement mechanism. Instead, the only way to resolve ambiguities or unaddressed questions under the new mandated leave program is through unnecessary, costly litigation which, I submit, will not nurture the spirit of volunteerism. Rather, such litigation could discourage individuals from volunteering so that the results of this proposal could be to reduce instances of service by volunteer firefighters and emergency medical personnel rather than to promote such volunteerism through a new federally mandated leave entitlement that protects such volunteers in their employment.

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In addition, there is need for clarification of a number of provisions in this proposal. Simply stated, this proposal makes no differentiation in the characteristics of the employer to which it applies. Consequently, unlike the protections such as the FMLA, ADA or even Title VII, the proposal would apply to *any and all* employers regardless of whether they are a large employer with hundreds of employees or a small employer with one employee. Equally disconcerting, it is unclear if the legislation would cover full-time or part-time employees. Also, the proposal fails to take into consideration its impact upon any employer if an employee is a "key" employee or if a single employer must bear an undue hardship because it has multiple employees who are absent due to the protections afforded by the proposal.

A third point for this Subcommittee to expound upon concerns the requirement that an employee "make a reasonable effort to notify" their employer that the employee may be late to or absent from work. Section 101(a)(6). The proposal fails to provide guidance as to what constitutes reasonable notice. For example, in situations where an employer has absence notification procedures for employees to follow when they will be late to or absent from work, one basic question unaddressed by the proposal is whether reasonable notice means that an employee must comply with the employer's notification procedures. As you are aware, this is an issue of ongoing concern for employees and employers under the FMLA.

Similarly, a fourth point relates to the problematic breadth of the emergencies or major disasters to which a volunteer firefighter or emergency medical staff could be deployed. While volunteers would be covered if deployed to an emergency or major disaster through a coordinated national deployment system like the Emergency Management Assistance Compact, volunteer firefighters would also be covered if deployed to such emergency or major disaster by a state emergency management agency. Yet, the definition of an "emergency" includes an "emergency declared by the governor of a State where such emergency involves the volunteer firefighter or volunteer emergency medical services." Section 101(d)(1). Thus, emergency medical personnel may also be protected if deployed by a state emergency management agency. Aside from the confusion stemming from the coverage and definition of "emergency" provisions, the inclusion of state disasters or emergencies compounds an employee's and employer's ability to determine what disasters or emergencies are covered. Bear in mind that, as mentioned earlier, official disasters and emergencies are not rare occurrences—there are dozens each year in the U.S.

A fifth area to address concerns the language that authorizes an employer to reduce an employee's regular pay for the time an employee is absent from work because the employee provided volunteer services. As you are aware, existing regulations of the DOL prohibit deductions for a partial day absence from the salary of an employee who is employed in a *bona fide* capacity as an executive, administrative or professional employee under Section 13(a)(1) of the FLSA. 29 CFR §541.602. At a minimum, Congress should clarify that an employer could dock a Section 13(a)(1) exempt employee's salary for a partial day absence without violating the salary basis requirement. Congress should also clarify that a full-day absence for volunteering as a firefighter or emergency medical personnel would constitute an absence for a personal day pursuant to section 541.602 so that an employer could choose to make a deduction from an employee's salary for a full day absence in order to minimize the risk that someone may claim that the employer has violated the salary basis requirement.

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A sixth aspect of the proposal that needs clarification involves the verification process. While it does permit an employer to require an employee to provide written notification of the employee's volunteer service, no time frames for compliance with the requirement are provided and no consequences for the failure to provide notification are spelled out. In the absence of some governmental entity that is charged with providing answers to questions such as these and enforcing the protections afforded by this proposal, then this proposal could have the opposite effect and promote more costly, unnecessary litigation rather than volunteerism.

A seventh point on the proposal—as noted earlier, the proposal protects an employee for up to 14 days against termination, demotion or other discrimination in the event the employee is late to, or absent from, work due to responding to a disaster or emergency. Yet, the proposal lacks clarity on whether such tardiness to or absence from work is limited only to the time spent actually volunteering in response to the deployment. In other words, it is unclear whether tardiness to or absence from work in a given week would be protected because an employee was deployed to provide volunteer emergency services that lasted the entire prior week. The protections apply to tardiness or absence "for the purpose of serving" as a volunteer, but the proposal does not address an absence or tardiness that results from an employee purposely serving in a previous, covered volunteer capacity. The Subcommittee may want to examine the provisions of this proposal to determine if it should clarify that its protections apply only for that time—whether it is in terms of days or hours of a day—during which the employee actually is providing the volunteer firefighter or emergency medical services or whether it can include an absence from or tardiness to work that is attributed to prior, covered volunteer service.

Finally, the proposal is unclear as to whether its leave provisions may be taken on an intermittent basis. As you are aware, one major challenge for employers who are covered by the FMLA is managing employees' unscheduled, intermittent leave requests. The Subcommittee should examine the language of this proposal to clarify that it is not mandating another federal leave requirement that allows employees to take leave in any increment with no advance notice.

Even more questions can be raised, such as are the 14 days provided by the legislation intended to be calendar days or work days? How would the proposal interact with an employer's paid leave benefits? Would the legislation include hours of service requirement before the leave benefit can be accessed by an employee? While this may not be an exhaustive list of concerns, this testimony is meant to highlight the most pressing issues with the legislative draft in question.

Conclusion

Mr. Chairman, SHRM greatly appreciates the opportunity to provide testimony on the draft proposal to guarantee job protected leave for volunteer emergency service personnel who respond to emergencies and disasters in an official capacity and appreciates the Subcommittee's interest in the issue. HR professionals and their organizations are committed to assisting their employees, including volunteer emergency services personnel, in balancing both their professional and personal demands, and SHRM believes the vast majority of employers accommodate their employees' diverse needs. I look forward to working with the Subcommittee on the issue, and would be happy to answer any of the Members' questions.

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