

Hearing on
H.R. 4885, the “Work-Life Balance Award Act”

Before the
U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections

Washington, D.C.

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THE HONORABLE VICTORIA A. LIPNIC

Testimony of the Honorable Victoria A. Lipnic

Before the

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Good morning Chairwoman Woolsey, Ranking Member McMorris Rodgers and distinguished members of the subcommittee. Thank you for inviting me to testify before the subcommittee today. My name is Victoria Lipnic. I am, as of two days ago, a Commissioner with the U.S. Equal Employment Opportunity Commission. Just prior to my appointment to the Commission, I was an attorney with the national law firm Seyfarth Shaw LLP, resident in the Washington, D.C. office, where I regularly counseled clients on a variety of labor and employment issues. For nearly 18 years, I have practiced labor and employment law in many forums: in private practice; as in-house counsel; and in government service. I served as the Assistant Secretary of Labor for Employment Standards at the U.S. Department of Labor, where I was responsible for the administration and enforcement of numerous federal labor standards, including the Family and Medical Leave Act and the Fair Labor Standards Act and the

equal employment opportunity and affirmative action obligations of federal contractors.

I am appearing before you today to offer my perspective on the recently introduced H.R. 4855, the “Work-Life Balance Award Act.” I want to make clear that I am not in any way testifying in my official capacity as a Commissioner of the EEOC and my testimony does not represent a position of the EEOC or the Obama Administration.

First, I want to commend you Madame Chairwoman and Congresswoman McMorris Rodgers for your commitment to issues facing America’s working families.

Second, as you may know, I have also served as counsel to this committee. It is always a special honor for me to be asked to appear here.

Third, I would like to point out that I offer my testimony today with full recognition of the extraordinary distress facing the American workforce in terms of the jobs situation. One in six Americans is out of work; we’ve lost 8 million jobs in the past two years and many American families are struggling to find (and keep) work. I am very cognizant of that situation and would not want any discussion about workplace flexibility policies to diminish the priority of job creation.

Like many practitioners and policymakers involved in the labor and employment legal and policy field, I have studied much of the research that has been done in the area of work life flexibility over the past nearly three decades. I have spent the better part of nearly 20 years studying this research, and I had a

unique opportunity as Assistant Secretary of Labor to do so. Much of the research in the area of the work-life relationship evolved from the national conversation that began with the introduction of the first Family and Medical Leave Act proposal in the 1980's. At that time the conversation was focused on the choice that often faced workers who were dealing with a personal illness or caring for an ill family member: do I choose my (or my loved one's) health care or my job. With the passage of the Family and Medical Leave Act and the numerous state equivalents, the conversation has moved away from that central question and now includes a wide variety of issues related to the intersection of a worker's work life and home life. Today, the discussion incorporates much more than the concerns about the time for work and care-giving (whether that is child care or elder care). In fact, society, in general and many workers, in particular, have changing attitudes about how much time people want to spend at work, to earn a decent living, and how much time those same people want to spend pursuing other interests. So, as an initial matter, I think the title of your bill -- "Work-Life" balance is appropriate given how that national conversation, and the research that has gone into it has evolved -- and will continue to evolve.

The desire for some balance between work and family has been with us since the Industrial Revolution. People moved off of family farms to manufacturing and other industrial settings, then moved to corporate workplaces. At each step, people left their homes and families to earn their livelihood. At each step the desire -- and in many cases, the need -- for balance has increased. It

has continued, also, as the labor force participation rate of women has increased.¹ And certainly this desire for workplace flexibility -- to help workers achieve that better balance for their families and careers -- is well-documented in all of the research and employee surveys.

For many years now, many employers have been looking for ways to provide more flexibility in the working lives of their employees. They do this for many reasons including recruiting and, in particular, for retaining workers. Just to offer some private sector experience, for example, my prior law firm, Seyfarth Shaw, offers a well-established Alternative Work Schedule for attorneys. This program was specifically created with the recognition that the firm did not want to lose talent in whom it had invested significant time and energy, but that not everyone necessarily wants or is able to meet the demands of a full-time schedule or a full-time legal practice. The firm also has policies which allow exempt employees to make use of technology and work from home depending on the business needs. And, the firm encourages both legal and non-legal staff to take time to participate in community service, offering yet another recognition of the desire for work-life balance. Many firms have similar programs. The same is true with my now current employer, the federal government, which offers flexible schedules depending on the operational needs of a particular office. Also, the federal government, particularly in the Washington, D.C. metropolitan area has been encouraged by members of Congress for quite some time to provide telecommuting options to many employees where such work can appropriately be done.

¹ As of February 2010, the labor force participation rate of women is 58.6%.

So, any initiative that encourages voluntary efforts for employers to offer work-life policies that work best for their employees and meet their operational needs at the same time is worthwhile. I support such initiatives by private entities and as a matter of public policy. The ability of employers to have the creativity to adopt policies that work in their workplaces is critical to their ability to compete in our global economy.

Turning specifically to H.R. 4855, my approach generally on any proposed legislation, as a first principle of inquiry is: does the government need to do this?

Certainly, there are private sector organizations who provide similar recognition to what the Work-Life Balance Award would provide. The Alfred P. Sloan Award for Business Excellence in Workplace Flexibility (in conjunction with the U.S. Chamber of Commerce's Institute for a Competitive Workforce) has been around for many years. That award is backed by years of well-developed research and nationally representative data from the Families and Work Institute and uses benchmarked criteria. *Working Mother* magazine also has a well-established award where they name the "100 Best Companies to Work For" every year. Work-life balance policies are a part of that assessment. *Fortune* magazine names the "100 Best Companies" every year in partnership with the Great Place to Work Institute and conducts an extensive employee survey in corporate America. And there are many local chambers of commerce who give awards every year. A few years ago, I participated in a conference in conjunction with a similar benchmarked award about "great places to work" in Omaha, Nebraska.

On a local level, the cover story of the November 2009 edition of *The Washingtonian* magazine featured that magazine's biannual "Great Places to Work," after considering more than 200 employers and 13,000 employee surveys.

With so many similar awards already out in the marketplace, it is fair to ask whether this award will serve a worthwhile purpose? I think the answer to that is yes. Let me give you a couple of perspectives on that.

I have worked for three cabinet secretaries in my career. Two Secretaries of Commerce, Malcolm Baldrige and William Verity and Secretary of Labor Elaine Chao. In my tenure at the Department of Commerce, I played a small role in the establishment of the Malcolm Baldrige National Quality Award.² That award, established by Congress in 1987 and still around today, is an annual award that recognizes U.S. organizations in the business, health care, education, and nonprofit sectors for performance excellence. Up to 18 awards may be given annually across six eligibility categories. As of 2009, 84 organizations had received this prestigious award; since 1988, 1,394 applications have been received from a wide variety of types and sizes of organizations. That award involves an extensive application and review process with very rigorous criteria to be met.

Testimonials from many winners of the award in the past tell us that the mere

² The Malcolm Baldrige National Quality Award, given annually, is the only formal recognition of the performance excellence of U.S. organizations given by the President of the United States. It is administered by the Baldrige National Quality Program, which is based at and managed by the National Institute of Standards and Technology, an agency of the U.S. Department of Commerce. The Baldrige criteria for performance excellence are designed to help organizations improve their performance by focusing on two goals: delivering ever improving value to customers and improving the organization's overall performance. To apply for the award, organizations must submit details showing their achievements and improvements in seven key areas: leadership; strategic planning; customer and market focus; measurement, analysis, and knowledge management; workforce focus; process management; and results. See http://www.nist.gov/public_affairs/factsheet/mbnqa.

process of applying for the award caused their organizations to evaluate and enhance and improve their business quality processes in ways they may not have done had they not aspired to win the Baldrige Award.

At the Department of Labor, the Office of Federal Contract Compliance Programs (OFCCP), which was part of my portfolio at the Department, annually gives Secretary of Labor's Opportunity Award, the Exemplary Voluntary Efforts (EVE) Awards, and the Exemplary Public Interest Contribution Awards (EPIC) (referred to collectively as "the EVE awards").³ Those awards are given every year to organizations which exhibit best practices in equal employment opportunity. There is an extensive application process and many of the applicants will work with regional and district offices of OFCCP to assist with the application.

I participated in the EVE awards ceremony every year at the Department of Labor. The award winners send representatives of their organizations to the award ceremony. For the organization or company that received the highest award the Chief Executive Officer of the company would generally come to accept it. My experience with the OFCCP EVE awards was among the most meaningful things I participated in as Assistant Secretary. And that was because

³ Each year, the Secretary of Labor and the Director of OFCCP present these awards at a ceremony honoring federal contractors and non-profit organizations that exemplify best corporate practices. The Secretary of Labor's opportunity Award honors one federal contractor each year that has established and instituted comprehensive workforce strategies to ensure equal employment opportunity. The Exemplary Voluntary Efforts (EVE) Award honors federal contractors that have demonstrated through programs or activities, exemplary and innovative efforts to increase the employment opportunities of employees, including minorities, women, individuals with disabilities, and veterans. The Exemplary Public Interest Contribution (EPIC) Award honors public interest organizations that have supported equal employment opportunity and linked their efforts with those of federal contractors to enhance the equal employment opportunities for minorities, women, individuals with disabilities, and veterans. These awards have been given by the Department of Labor since 1988. See <http://www.dol.gov/ofccp>.

it was so evident how incredibly valuable it was to the organizations who received the award and how meaningful it was to the staff of OFCCP who participated in assisting the award winners.

There is tremendous prestige associated with winning an award from a Cabinet secretary. The prestige of receiving an award from the Secretary of Labor cannot be discounted in the analysis of whether the Work-Life Balance Award is worthwhile. In private practice, I have encountered a number of employers, clients of my former firm Seyfarth Shaw, who proudly told me they had received the Secretary of Labor's Opportunity or EVE award. My former firm encouraged employers to apply for the award as part of our affirmative action and diversity practice. Companies that may have won that award years ago, point to it as an example of how ahead of the time they were in the equal employment opportunity efforts. That award – for the organizations who receive it – I believe, is transformational. It serves a similar function to the Baldrige National Quality Award – the mere effort of applying for the award and having to raise the organization's performance level (in this case for equal employment opportunity efforts) had a major impact on the organization.

I would hope and expect that, if done well, the Secretary's Work-Life Balance Award would have the same impact.

Another important question to ask – given that there are other awards out in the marketplace – some of which get the winners on the covers of prominent magazines – is, is it worth going to the trouble of establishing it? In other words,

will companies participate in the competition? I think the answer to that is yes, as well, for many of the same reasons described above.

Let me point out a few general issues with the bill and then some specific drafting questions.

The bill may not need to specify this, but you should consider including in report language or statements for the record on the floor: the award should be housed and dedicated to a particular agency at the Department of Labor and not in the Office of the Secretary. As the bill recognizes, once the Board establishes the specific criteria for the award, it is critical to have and develop the institutional and career staff experience at the Department of Labor with the award. There is, for example, years of experience at the Department of Labor with how the Office of Federal Contract Compliance Programs administers the Secretary's EVE awards. No such institutional experience exists in the Office of the Secretary. The same applies to the Baldrige National Quality Award which is administered by the National Institute of Standards and Technology at the Department of Commerce. Given the issues addressed by the Work-Life Balance Award, the Department's Women's Bureau may be a very likely place to house this award at the Department of Labor.

Second, I would ensure that the award comes out of existing funds at the Department. The Department of Labor received significant increases in its budget through the stimulus bill last year (the American Recovery and Reinvestment Act) along with the further resources it received through the fiscal year 2010

appropriation.⁴ The Department has requested more resources for this year's fiscal year 2011 budget. The Women's Bureau received an increase in the fiscal year 2010 budget and has asked for more resources in the proposed fiscal year 2011 budget.⁵

Finally, because this is a legislative hearing, let me turn to some specific comments about the drafting of particular provisions in the bill.

In "Sec. 2. Definitions (2)" provides that "the term 'work-life balance policy' means a workplace practice designed to enable employees to achieve a *satisfactory* work-life balance' (emphasis added.) In contrast, "Sec. 4. Work-Life Balance Advisory Board (b)" which deals with the responsibilities of the Board to set criteria to determine the recipients of the award provides in (A) that the Board should "Identify those work-life balance policies, which if properly implemented, will permit employees to achieve a work-life balance." I'm not sure what the standard is for "if properly implemented". Secondly, is there some difference between the standard set out in the definitions of "workplace practice designed to enable employees to achieve a satisfactory work-life balance" – versus the language in Sec. 4 (b)(A) as to "if properly implemented, will permit employees to achieve a work-life balance?"

⁴ The Department of Labor (DOL) received \$4.846 billion in discretionary funding in the stimulus bill (a 37.1% increase over 2009 appropriations) and \$29.521 billion in mandatory funding (mostly for unemployment insurance) for a total of \$24.367 billion (or 31.8% of their total 2009 appropriations. DOL received \$14.267 billion in discretionary funding in the fiscal year 2010 appropriations bill and \$147.736 billion in mandatory funding (mostly unemployment insurance) for a total of \$162.002 billion.

⁵ The Women's Bureau had a budget of \$10.419 million in fiscal year 2009. It received no additional funds in the stimulus bill, \$11.604 million in the fiscal year 2010 appropriations, and has requested \$12.255 million for fiscal year 2011.

In “Sec. 4, under (b) Duties” clause (B) provides that the Board shall “take into consideration an employer’s record of compliance, or noncompliance, with Federal and State labor laws.” While I understand the importance of this provision, it is potentially fraught with problems. I think it would be very important for the Board to be completely transparent about the criteria for judging an employer’s “record of compliance or noncompliance with Federal and State labor laws.” Let me give you an example – there are some very well known employers who have some of the most well-developed and ahead-of-the-curve work-life policies who are also being sued for alleged violations of the wage and hour laws, both at a federal and a state level. They may end up settling those cases for millions of dollars with no admission of liability. If they settle those cases, how will that be viewed in terms of compliance or noncompliance with Federal or State labor laws?

In “Sec. 4 (b) Duties, clause (C) provides that the Board shall “seek input from all interested parties to assist in making a determination of the recipients of the Award, including input from stakeholders.” It strikes me that the “input from interested parties . . . including input from stakeholders” should come at the beginning of the process – that is in establishing the criteria for the award, not in actually participating in judging who the recipients are. Making the decisions about the award winners, in order to ensure its objectivity, should be exclusive province of the Board, with the assistance of dedicated Department of Labor staff.

In “Sec. 4 (d) Membership,” clause “(4) Political Affiliation” -- this clause puts a limitation on the Secretary such that “not more than 4 members of the

Board appointed under paragraph (1) may be of the same political party.” I question whether that clause is necessary given that the Secretary of Labor can only appoint members to the Board based on the recommendations of “the Speaker and the minority leader of the House of Representatives” and the “majority and minority leader of the Senate.”

Finally, “Sec. 5. Regulations,” provides “The Secretary may prescribe regulations to carry out the purposes of this Act.” Even though this is written in the permissive, such that there is no requirement that the Secretary issue regulations, it seems unnecessary to me. Regulations are about controlling behaviors and specifying outcomes for enforcement purposes. In the case of this award, I do not see a reason for the Secretary to be regulating.

Again, Chairwoman Woolsey and Ranking Member McMorris Rodgers thank you for inviting me to testify. I’d be happy to take your questions.