

February 16, 2007

VIA ELECTRONIC MAIL AND FACSIMILE

Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Department of Labor Request for Information on the Family and Medical Leave Act

Dear Mr. Brennan:

I. Introduction

Thank you for the opportunity to respond to the Department of Labor's Request for Information on the Family and Medical Leave Act of 1993 ("RFI"). As the nation's largest civil rights organization working towards gay, lesbian, bisexual and transgender equality, the Human Rights Campaign supports the expansion of the FMLA to cover equally all American families, including those headed by same sex couples.

The Human Rights Campaign, the largest national gay, lesbian, bisexual and transgender (GLBT) advocacy organization, envisions an America where GLBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has close to 600,000 members – all committed to making this vision of equality a reality.

Founded in 1980, HRC effectively lobbies Congress, provides campaign support to fair-minded candidates, and works to educate the public on a wide array of topics affecting GLBT Americans, including relationship recognition, workplace, family, and health issues. The HRC Foundation – an HRC-affiliated organization – engages in research and provides public education and programming.

The passage of the Family and Medical Leave Act ("FMLA") which provides workers with up to twelve weeks of leave each year to care for certain close family members or to address serious personal health concerns, was a groundbreaking step forward for millions of Americans. However, FMLA coverage is still incomplete. Under current law, millions of gay, lesbian, bisexual and transgender (GLBT) Americans in committed, long-term relationships are unable to take leave to care for a same-sex partner. While some states and private employers have filled this gap in coverage by offering family medical leave for workers to care for a domestic partner, an expansion of the FMLA is needed in order to cover millions more American families.

Detailed below are comments in response to the questions posed in the RFI. We preface these comments, however, by noting that we have not responded directly to each question

but rather are providing comment and information regarding the need to expand the FMLA to cover all American families – including those made up of gay, lesbian, bisexual and transgender citizens and their family members.

II. Public Comments Solicited

A. Substitution of Paid Leave

The RFI asks about the interaction between paid leave and FMLA leave in covered employers. For many families headed by same-sex couples, using the employer's paid leave structure is their only option when tending to the long-term illness of a partner or other family member. Many employers attempt to fill this crucial gap in coverage for their GLBT employees by offering their own FMLA type leave benefits. Employers have recognized that providing these types of benefits is crucial in attracting and retaining the best employees. However the dual accounting structure required to do so imposes additional and unnecessary burdens, including administrative costs, on the employers.¹

B. Employee Turnover and Retention

1. How does the availability of FMLA leave affect employee morale and productivity?

There is persuasive evidence that the FMLA and FMLA type benefits have a positive effect. The 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or neutral effect on employee morale.² The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive.³

As persuasive as these statistics are, the true effect of FMLA and FMLA type leave on employee moral is likely even higher. Many companies and states know from experience that providing a safety net for all families is a good business decision. As one business executive stated, "Employers just want a healthy workforce."⁴ This principle applies equally to employees in committed same-sex relationships as to other families.

2. Is there any evidence that FMLA leave increases employee retention, thereby reducing employee turnover and the associated costs?

¹ "It would be a significant administrative relief to the company 'if everyone was treated the same way.'" Jill Elswick, *Employer coalition seeks benefits tax equity for domestic partners*, Employee Benefit News, Jan. 1, 2006, <http://www.benefitnews.com/detail.cfm?id=8444> (quoting E.J. Bernacki, spokesman of Levi Strauss, regarding providing domestic partner medical benefits).

² Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* Table § 6.2.3, Table 6.5 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>. Of these employers, 24% reported a positive effect on morale, and 65% reported no noticeable effect on morale. *Id.*

³ *Id.* § 4.7, Table 4.23.

⁴ Elswick, *supra* note 1 (quoting Sandy VanGilder, senior V.P. of JP Morgan Chase & Co.).

Ninety-eight percent of employees who take FMLA leave subsequently return to work.⁵ Of the employers who experienced cost savings due to the FMLA, more than three-quarters attributed their savings to decreased turnover.⁶ Additionally, 84% of covered employers reported that the FMLA either had no effect or a positive effect on productivity.⁷ These findings provide compelling evidence of the FMLA's important role in helping employers maintain a stable workforce, but they do not protect all families equally. Members of same-sex couples must decide between neglecting their familial obligations or quitting their jobs; forcing their employer to bear the cost of finding and training a replacement.

Simply put, excluding same-sex couples can cause employees to leave their jobs, causing employers to accrue turnover-related costs. These costs include, but are not limited to: costs of advertising for replacement workers; costs involved in interviewing, orientation, training, and processing; and costs associated with losing employees' knowledge of both the firm and its customers, as well as costs of decreased morale and efficiency.⁸ According to the Employment Policy Foundation, the average cost of employee turnover is 25% of an employee's total compensation.⁹

The HRC Foundation tracks employers that provide domestic partner-inclusive FMLA-like benefits, COBRA-like benefits and other health benefits extended to employees with same-sex domestic partners. As of January 1, 2007, the HRC Foundation was aware of 291 large employers that extended FMLA benefits to include leave on behalf of a same-sex partner and 327 large employers that offered COBRA-like benefits for an employee's same-sex partner. As J.D. Piro, Chair of the health law group at Hewitt Associates explained, "employers are continuing to do what's necessary to attract the employee they need" and providing domestic partner benefits is "just one tool in the tool box to do so."¹⁰ In interview after interview, employers such as Sandy VanGilder, senior V.P. of JP Morgan Chase & Co express the view that employers believe "[i]n order to attract and retain the best talent, [they] have to create the most equitable environment [they] can."¹¹ The inability to provide such benefits can result in employers losing key people.¹²

Currently thirteen states offer some type of health benefits to domestic partners and seven states include unmarried partners in state family and medical leave acts. The following states under their respective state FMLAs extend benefits that include same-sex couples:

⁵ Westat, *supra* note 2, at § 3.5.3, Table 3.9.

⁶ *Id.* at § 6.2.4, Table A2-6.19.

⁷ *Id.* § 6.2.3, Table 6.5.

⁸ Randy Albelda & Alan Clayton-Matthews, The Future of Work Paper No. 2, *Sharing the Costs, Reaping the Benefits: Paid Family and Medical Leave in Massachusetts* 5 (2006), <http://www.cpcs.umb.edu/lrc/documents/LRCreport5-06Final.pdf>.

⁹ Employment Policy Foundation, *Turnover Costs* 1 (2004), <http://www.super-solutions.com/pdfs/EmployeeTurnoverExpensive2004.pdf>.

¹⁰ Susanna Moon, *Making a business case for domestic partner benefits*, Employee Benefit News, July 1, 2005, <http://www.benefitnews.com/subscriber/Article.cfm?id=37881964> (quoting J.D. Piro, chairman of the health law group at Hewitt Associates).

¹¹ Elswick, *supra* note 4.

¹² *REGENTS TO CONSIDER FORMALLY OPPOSING PROPOSED MARRIAGE AMENDMENT*, U.S. State News, Oct. 5, 2006 (quoting Carrie Madison, Human Resources V.P. for Foot Locker.com/Eastbay, who indicated that the company lost quality employees when it was briefly unable to offer its domestic partner benefits).

California¹³ and the District of Columbia¹⁴ extend benefits to registered domestic partners; Connecticut¹⁵, New Jersey¹⁶, and Vermont¹⁷ provide benefits to parties in a civil union; Hawaii¹⁸ provides benefits to reciprocal beneficiaries; and Oregon¹⁹ provides benefits to family members which includes same-sex domestic partners.

III. FMLA Coverage and Usage Estimates

The RFI provides estimates regarding the numbers of employees eligible for FMLA and FMLA usage. We agree the accuracy of these numbers could be improved. The inherent inaccuracy between employees “eligible” in one sense and not “eligible” in another cannot produce truly accurate results. Thousands of American families are not covered by current law. Should an illness befall their partner or partner’s child, they are not eligible to receive their FMLA leave to provide assistance in the same manner in which an employee in an opposite-sex marriage would be eligible.

We agree that the distinction between leave taken for family and medical reasons and leave that qualifies as FMLA leave is important. To assist in remedying this inherent inaccuracy, we suggest additional questions regarding the true “eligibility” of an employee to take full advantage of FMLA leave.

IV. Conclusion

For millions of workers, the FMLA has been an unprecedented success. It has proven essential to achieving greater employee retention and reducing employee turnover. However, the FMLA leaves a large portion of the American workforce unprotected. Because workers are not guaranteed up to twelve weeks of family or medical leave to care for a partner or partner’s child without fear of losing their job; the FMLA does not does not fulfill its purpose of protecting working families.

We strongly encourage expansion of the FMLA to cover all American families, straight, gay, lesbian, bisexual and transgender. As ARUP Laboratories realizes, “[t]here are many

¹³ Cal Gov Code § 12945.2(3)(B) (2006) (defining family leave to include caring for a spouse); Cal Fam Code § 297.5 (2006) (providing registered domestic partners with the same statutory rights enjoyed by spouses).

¹⁴ D.C. Code § 32-501 (2006) (defining family member to include “A person with whom the employee shares or has shared, within the last year, a mutual residence and with whom the employee maintains a committed relationship.”); *Id.* at § 32-502.

¹⁵ Conn. Gen. Stat. § 46b-38nn (2006) (providing parties to a civil union with all of the rights enjoyed by spouses).

¹⁶ N.J. STAT. ANN. § 37:1-32(l) (2006)(entitling parties to a civil union to the same family leave benefits as married persons).

¹⁷ 15 VT. STAT. ANN. Tit. 15 § 1204(a)-(b)(2006) (“A party to a civil union shall be included in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote the spousal relationship, as those terms are used throughout the law.”).

¹⁸ HAW. REV. STAT. ANN. § 398-3(a)(2006); § 502C-3(defining reciprocal beneficiaries as same sex couples who declare their intent to the state to enter into a relationship).

¹⁹ Or. Admin. R. 839-009-0210(5)(2007) (defining family member to include same-sex domestic partners under the Oregon Family Leave Act).

different ways to have a family and we need to support [our employees] and the way they balance their lives, both at work and away.”²⁰

Many state government and employers have already included families headed by same-sex couples for purposes of family leave, recognizing that an inclusive workforce is a competitive workforce. These employers and state governments realize that not applying the FMLA protections to these workers greatly limits the Act’s purpose and effect of providing a stable and continuous workforce by helping employees retain their jobs when a family emergency strikes.

We strongly oppose any effort to roll back FMLA coverage and support the expansion of the act to cover families headed by same-sex couples as well as an expansion of survey questions to cover those employees uniquely situated to qualify for partial FMLA benefits. We urge DOL to use this RFI process to affirm its unwavering commitment to uphold, enforce and where appropriate, expand the FMLA. Thank you for the opportunity to comment on the RFI and the important role of the FMLA.

Human Rights Campaign
National Partnership for Women & Families

²⁰ Rosemary Winters , *More companies, even in Utah, cover domestic partners ; Partner benefits make headway, even in Utah*, The Salt Lake Tribune, Oct. 30, 2005, at E1 (quoting Von Madsen, V.P. of Human Resources with the ARUP Laboratories).