

April 9, 2008

Mr. 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: Comments on the Department of Labor's  
Notice of Proposed Rulemaking (RIN 1215-AB35)

Dear Mr. Brennan:

I am writing to comment on the Department of Labor's Notice of Proposed Rulemaking on the Family and Medical Leave Act (FMLA), published in the *Federal Register* on Feb. 11, 2008.

As a human resource professional and a member of the Society for Human Resource Management, I respectfully submit these comments and I appreciate the opportunity to share my views on how to improve the implementation of this important law.

I strongly support the original intent of the FMLA. However, over the past 15 years that this law has been administered, I have come to believe that the original regulations issued in implementing the FMLA are in need of reform. I believe that the improvements I recommend here will benefit both employees and employers alike.

My recommendations and comments focus on seven issues covered by the FMLA: serious health condition; continuing treatment; intermittent leave; substitution of paid leave, employer notice requirements; content of medical certification; and military family leave provisions.

### **Serious Health Condition**

While I was pleased that the Department suggested clarifications for many elements of the FMLA regulations, I was particularly disappointed to see that the definition of serious health condition was not addressed. Unfortunately, the definition retained in the proposed regulation remains vague and difficult for HR professionals to administer. In light of this lack of clarity, I agree with the Department's recommendation to retain the list of what are considered by regulation to not be serious health conditions. For instance, I believe that Wage and Hour Opinion Letter FMLA-57 correctly states the law, and it should be given a

very narrow construction. However, I believe that the language regarding mental illness “resulting from stress” should be removed from the last sentence of Section 825.113(d).

### **Continuing Treatment**

I strongly disagree with the Department’s decision to not require an employee to make more than two visits to a health care provider during the period of incapacity. As an HR professional who struggles with administering leave due to the chronic serious health conditions of employees, I believe an employee should be required to see such a provider at least four times per year.

It would also be helpful for DOL to include a comprehensive (but not necessarily inclusive) list of common chronic conditions and a better explanation (including concrete examples) of what the department means by a chronic serious health condition that results in an episodic period of incapacity, rather than a continuing period.

If an increase in required health care provider visits is not made, then I suggest that the second visit or treatment must occur within one week of the initial treatment, and regulation should require the provider to provide that follow-up treatment. Accommodations should be made for extenuating circumstances, such as instances where an employee, despite good faith efforts, is unable to secure an appointment within the applicable period. Regulation should state that the applicable period begins with the date of the incapacity.

Finally, regarding the period of incapacity, I suggest that the Department reconsider certain recommendations from 2007 that the number of days for incapacity plus treatment be increased from “in excess of three consecutive calendar days” to seven consecutive calendar days (or at least five consecutive scheduled work days). Also, the regulation section regarding treatment on one occasion plus a regimen of continuing treatment should be eliminated.

### **Intermittent Leave**

The greatest disappointment I have with proposed improvements to the FMLA is the failure to increase the minimum increment of intermittent leave (section 825.205). As an HR professional, I know that one of the greatest FMLA compliance challenges that employers face is when an employee takes leave on an unscheduled or unforeseeable basis. Current regulations cause administrative problems for employers, and unfairly penalize other employees who must work overtime or cover for an absent employee. They lead to operational challenges for businesses that get little or no notice of the employee absence, and thus no means to plan accordingly. The Department should change the size of an increment of FMLA leave, increasing it to two or four hours when an employee takes unforeseeable or unscheduled intermittent or reduced schedule leave.

I also suggest that the Department extend an employer’s authority to transfer an employee (section 825.204) to include an employee who takes intermittent or reduced schedule leave

on an unforeseeable or unscheduled basis. Under the Department's proposal, an employer may require an employee to transfer to an alternative, equivalent position when an employee needs *foreseeable* intermittent or reduced schedule leave for *planned* medical treatment.

### **Substitution of Paid Leave**

Generally, I support DOL's proposed revisions to 29 C.F.R. 825.207. Specifically, I support the proposal that substitution of paid leave may occur only when the terms and conditions of the paid leave policy are met, unless an employer waives such terms and conditions. I also support the Department's proposal that paid leave may be substituted to make an employee "whole" when disability benefits are received. However, I believe the proposal could be improved further by allowing substitution of paid leave to supplement the unpaid portion of leave when disability payments are made, regardless of employer and employee agreement.

### **Employer Notice Requirements**

The Department's proposal on employer notice requirements and communications with employees is a good first step. But more should be done. Specifically, I agree with the proposal to allow electronic postings of FMLA rights and responsibilities; to consolidate all notice obligations into one section; to clarify when relevant notices must be provided; and to extend the time frame to provide such notices from two to five business days. However, I believe that some new notice requirements that the proposal imposes on employers when an employee requests leave are extremely burdensome and not consistent with employers' statutory obligations under the Act. I urge the Department to eliminate the requirement that employees be told why they are not eligible for or otherwise not entitled to FMLA coverage for their leave.

### **Content of Medical Certification**

As an HR professional, I applaud the Department's proposed changes regarding what kind of information an employer can request on the medical certification form to substantiate the need for FMLA leave. However, I believe that the proposal could be improved even further by making the following changes: 1) Make clear that medical facts including information on symptoms, diagnosis, hospitalization, doctor visits, prescribed medication, and referrals for evaluation or treatment or other regimen of continuing treatment "must" be provided, as opposed to "may" be provided. 2) Make clear in the instructions to the health care provider that responses such as "lifetime, unknown or indeterminate" will not be sufficient, as opposed to "may" not be sufficient to establish FMLA coverage.

### **Military Family Leave Provisions and Regulatory Issues**

In most instances, I support the legislative intent of expanding the FMLA to cover these qualifying events. However, I respectfully suggest that DOL make every effort to provide complete, concise and well-defined regulations to implement this expansion of the law.

Such regulatory language will go far in affording both employers and employees with a clear understanding of their rights and responsibilities in providing/seeking leave in response to these qualifying events.

In particular, I believe it will be very important to craft an appropriate definition of the term “qualifying exigency.” I recommend that exigency leave should be limited to needs *directly caused by* the military service itself and should specifically exclude routine, everyday life occurrences. If we do not require a close causal connection between the need for leave and military service, we run the risk of subjecting employers to internal complaints and claims of discrimination from other employees who believe they should also be allowed to take leave for any occurrences. In fact, a recent SHRM survey concluded that 98 percent of HR professionals agree that there should be a demonstrable connection between the leave and the service-member’s active duty status.

I think it is generally agreed that military leave is not intended to give greater rights to employees with family members called to active duty than those employees would otherwise have for the normal and ordinary life challenges faced by *all* employees. For instance, I believe that exigency leave should be limited to non-medical situations. FMLA leave is already available for employees whose family members have serious health conditions, whether those eligible employees are affiliated with the military or not. Also, because the term “exigency” was used, I believe the leave is meant to be limited to situations that are critical, require immediate attention, and can not be addressed without taking time during work hours, a position held by 87 percent of HR professionals according to a recent survey conducted by SHRM.

Lastly, DOL should clarify the interaction of military caregiver leave and regular FMLA leave, including how the caregiver leave should be calculated. I believe the final rule should make it clear that an employer is permitted to apply its normal 12-month period in calculating caregiver leave taken during that period, and that the 26-week maximum leave entitlement during a 12-month period is measured by the employer’s normal 12-month period.

Thank you for this opportunity to share my views as a HR practitioner on how the implementing regulations of the Family and Medical Leave Act can be improved. I look forward to the issuance of final regulations soon that include suggestions such as those offered here.

Sincerely,

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