

IMPORTANT: This is a sample grassroots comment letter – please be sure to include the date below, as well as your name, address, title and name of your organization at the end of this letter.

[DATE]

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

Dear Mr. Brennan:

I am writing to comment on the Notice of Proposed Rulemaking on the Family and Medical Leave Act (FMLA) published in the February 11, 2008 *Federal Register*. As an employer, I respectfully submit these comments and I appreciate the opportunity to share my views on how to improve the implementation of this important law.

Eligibility (Section 825.110)

When determining eligibility, the 12 month period of service need not be consecutive and in section 825.110(b)(1) the department proposes allowing a break in service of up to five years. We believe that such a long break in service is burdensome to employers, whose record keeping requirements have only a three-year look back period. We would urge the Department to reconsider by eliminating any breaks in service except for military service or because the employer expressed an intent to rehire the employee either in a written agreement or under a collective bargaining agreement. Alternatively, the look back period should be no longer than the record-keeping period of three years.

Serious Health Condition (Sections 825.113 through 825.115)

We support the Department's proposal to retain the list of conditions that generally will not constitute a serious health condition in Section 825.114(c). We also support the Department's proposal to place a time frame on the two visits to a health care provider contained in Section 825.115. The current definition says that an employee will have a serious health condition if in connection with a period of incapacity of more than three consecutive calendar days, the employee (or family member) has one visit to a health

care provider and a regimen of continuing treatment, such as a prescription, or two visits to a health care provider. The Department proposes that those two visits be made within 30 days from the beginning of incapacity unless extenuating circumstances exist.

We believe that it would make more sense to require the two visits to a health care provider to occur within the period of incapacity with an exception for extenuating circumstances. Certainly 30 days is such a long time there could actually exist two separate illnesses that are combined to qualify for FMLA leave and this was not the intent of the law – to combine two non-serious illnesses. Instead, requiring the health care visits to occur during the period of incapacity provides evidence that the nature of the illness is serious – as intended by the law. The “extenuating circumstances” exception could be made for illnesses that at first appear non-serious but later, after a follow-up visit, show themselves to be serious.

Treatment of Holidays (Section 825.200)

We support the Department’s proposed treatment of holidays – if leave is being taken in a full week increment the holiday is treated as any other work day and is counted against the 12 weeks of FMLA leave permitted. If leave is being taken in less than full week increments then the holiday is not counted against the 12 weeks of leave permitted.

Scheduling Intermittent Leave (Section 825.203)

We also support the Department’s clarification that an employee who takes intermittent leave when medically necessary has a statutory obligation to make a “reasonable effort” instead of merely an “attempt” to schedule leaves so as not to disrupt unduly the employer’s operation.

Substitution of Paid Leave (Section 825.207)

We support the proposal to allow public agencies to run accrued compensatory time concurrently with unpaid FMLA leave when the leave is taken for an FMLA-qualifying reason.

Bonuses (Section 825.215)

We also support the proposal to allow employers to award bonuses for perfect attendance or the achievement of a goal if the employee does not receive the bonus due to an FMLA absence as long as all other types of leave are treated in a similar fashion. This change makes sense and will make it easier for employers to give awards for perfect attendance and goal-achievement without running afoul of the law.

Employer Notification/Medical Certification (Sections 825.300 through 825.305)

We are appreciative of the Department’s efforts to relieve the administrative burden on employers by clarifying the employer notice and certification provisions. The Department

provides a time frame of seven calendar days for insufficient/incomplete certifications to be corrected (with additional time allowed if the employee has been unable to obtain the additional information through diligent good faith efforts.) The Department does not provide a similar time frame for certifications that are never returned by the employee to the employer. It appears there are two areas of ambiguity here.

First, if an employee is unable to obtain additional information to cure an insufficient/incomplete certification within seven days and is provided additional time to cure the defect, at what point will there be a cut-off? To say it another way, at what point can an employer infer that the employee is no longer making diligent, good-faith efforts?

Second, in the case of a certification that is never returned by the employee; at what point in time can the employer deny FMLA leave without running afoul of the law? Of course, an exception for extraordinary circumstances may be needed but we urge the Department to put a date certain after which employers may deny leave, such as fifteen calendar days.

Content of Medical Certification/Authentication, Clarification and Second Opinion (Section 825.306 through 825.307)

We are again appreciative of the Departments efforts to clarify the FMLA. In particular, we support the proposal to require health care providers to certify the medical necessity for intermittent leave, which as the Department notes, is a statutory requirement for the taking of such leave. We also support the proposed changes to section 825.307 that allow employers to obtain authentication of the medical certification without first obtaining employee permission. We also support removing the requirement that employer contact with the health care provider take place only through the employer's provider.

Recertification (section 825.308)

We are generally supportive of the changes to the recertification provisions but believe that it could be improved by allowing an employer to obtain second and third opinions upon recertification and that for long-term or permanent conditions an employer should be able to obtain recertification every 30 days regardless of whether or not an absence occurred in the preceding 30-day period. Such second and third opinions as well as more frequent recertifications could remove some of the burden employers face with respect to unscheduled intermittent leave.

Fitness for Duty (section 825.310)

We support the Department's proposed changes to the fitness-for-duty process, in particular the changes that allow employers to get certification that the employee can perform all the essential functions of his or her job before returning from FMLA leave, as well as allowing for fitness-for-duty certifications in connection with intermittent leave. We would encourage the Department to allow fitness-for-duty certifications after each use of intermittent leave if significant safety concerns exist, instead of the proposed every -30-days. The reason being that if a significant safety concern exists, every 30 days may

not be often enough and could expose the employee or others to danger. While such fitness-for-duty certifications have the potential to burden employees that burden is lessened by requiring a “significant safety concern.”

Military Family Leave Provisions and Regulatory Issues

We are generally supportive of the expansion of the FMLA to cover these qualifying events but urge the Department to issue concise, complete and well-defined regulations so that employers and employees will understand what is expected of them. We would further urge the Department to provide certainty to employers whenever possible by establishing bright-line time frames.

In defining a “qualifying exigency” we urge the Department to limit it to those needs that are directly caused by military service itself and to exclude routine, everyday life occurrences. A list of sample exigencies or criteria could be helpful.

In defining the scope of the military caregiver leave, we would urge the department to consider the impact multiple 26-week periods of leave over the course of a career will have on the public sector’s ability to provide services. We also urge the Department to consider that employees remain entitled to the current 12 weeks of leave under the FMLA if a servicemember suffers from a serious health condition for many years.

Finally, in calculating the leave under the new law, the Department should allow employers to calculate the 12-month period in the same manner that it does for employees currently on FMLA leave.

Thank you for the opportunity to share my organization’s views on the implementing regulations.

Sincerely

[NAME, TITLE and ORGANIZATION]