

**International Public Management Association for Human Resources (IPMA-HR)
International Municipal Lawyers Association (IMLA)**

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

Dear Mr. Brennan:

The above named associations are writing in response to the Wage and Hour Division's request for information on the Family and Medical Leave Act of 1993 that was issued on December 1, 2006. Our associations represent government employers working at all levels of municipal and state government.

IPMA-HR is an association representing the interests of public sector human resources professionals. The association has approximately 8,000 members working in local, state and federal governments across the country. Association members are frequently the ones responsible for administering the FMLA in a public sector environment.

The International Municipal Lawyers Association (IMLA) is the oldest and largest professional organization for local government lawyers throughout the United States and Canada. IMLA serves more than 1,400 member municipalities and local government entities, and has advocated the national interests and views of local governments on legal issues since it was founded in 1935.

Statement of Interest

IPMA-HR staff has heard for many years that implementing the FMLA is a struggle and despite numerous court decisions and opinion letters, specific parts of the law and regulations remain problematic. In the public sector, this often impacts the ability to deliver services to citizens.

In anticipation of filing comments, IPMA-HR conducted a survey of its members between December 18, 2006 and January 5, 2007, 356 people responded. The results showed that 59 percent of respondents have experienced problems implementing the law and 54 percent said that the law has impacted the productivity of their agency. This letter outlines the results of the survey, a statement of some of the specific problems as relayed by members, and suggestions identified by some members on how to address the problem.

The top concerns of survey respondents were the use of intermittent leave, the definition of a serious health condition, and medical documentation. When asked how productivity was impacted, respondents said that the use of intermittent leave increases the workload on others, time is wasted tracking hours, and there is negative impact on employee morale.

When asked what they would change about the FMLA, many respondents indicated they would change the way intermittent leave is calculated or reduce its availability, that they would like a clearer definition of a serious health condition, and clearer guidelines on administering the FMLA.

When asked about the effectiveness of the FMLA, many said that overall they believe the law is effective and that its purpose is good, although it can be burdensome and confusing and subject to abuse by employees. Below is a description of each issue and recommendations for clarification.

1. Definition of “Serious Health Condition”

The definition of “serious health condition” should be clarified. Several survey respondents mentioned that because of the fear of lawsuits and the vague language, they grant all FMLA requests even if they are questionable. Because the definition is so broad some employers felt that it is subject to abuse by employees who claim the protection of the FMLA for very questionable “serious health conditions.”

The FMLA defines a serious health condition as “an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility, or continuing treatment by a health care provider.” The law further provides that an employee can show a serious health condition if she or he requires: (1) inpatient care, or (2) continuing treatment by a health care provider.

DOL regulations provide that an employee can meet the continuing treatment requirement if s/he has an incapacity in excess of three calendar days plus treatment. Further DOL regulations state that unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. are examples of conditions that do not meet the definition of a serious health condition. Title 29 C.F.R. Section 825.114(c).

Unfortunately, confusion arose after the Department issued an opinion letter, Op. FMLA-86 (December 12, 1996) stating that employees with the common cold or flu would be entitled to FMLA protection if they met the requirements of Section 825.114. The opinion letter also stated that employees would not have to show complications associated with these conditions to meet the definition of a serious health condition.

As a result, relatively minor conditions, that are not “serious” are covered by the FMLA, this contradicts the language of the FMLA as passed by Congress. Therefore, the associations recommend that the opinion letter, Op. FMLA-86 be withdrawn.

Another problem is the definition of a serious health condition in Title 29 Section 825.114(a)(2)(i) that covers conditions that involve incapacity of more than three consecutive days combined with continuing treatment by a health care provider. Treatment by a health care provider means, according to the regulations, either two or more treatments from a health care provider or one treatment from a health care provider along with a regimen of continuing treatment.

Because this standard is relatively easy to meet, even for non-serious health conditions, such as the common cold, the above associations would recommend that the two or more treatments by a health care provider be required to fall within a relatively short time frame and while the employee is still incapacitated.

Further, the associations recommend that the period of incapacity be lengthened to a minimum of five consecutive days and that “a regimen of continuing treatment” exclude the prescription of antibiotic medication, because many very minor conditions, including an earache, can result in a visit to a healthcare provider followed by a prescription for an antibiotic.

2. Unscheduled Intermittent Leave

Intermittent leave, particularly unscheduled intermittent leave was reported as the number one issue of survey respondents. Unscheduled leave means that employers, and especially those with 24/7 operations such as public safety and corrections, have to struggle to find qualified individuals to cover for the person who takes unscheduled leave.

Unlike an office environment, where a temporary employee may be able to fill the absence, absences of trained public safety officers or health care workers must be filled by similarly trained individuals, often coworkers. Public employers then have to pay costly overtime to fill the absence. Planned absences are less problematic because shifts can be rearranged.

Several survey respondents suggested that allowing up to 480 hours of intermittent leave per year is simply too burdensome. One survey respondent suggested that an ADA-type exception be made if the need for intermittent leave will pose an undue hardship on the employer. In addition, some employees abuse intermittent leave by using the protection of the FMLA to avoid discipline for excessive absences.

Currently, employees may take intermittent leave in increments as small as 15 minutes or in some cases, even 6 minutes. One solution to the problem of unscheduled, intermittent leave abuse would be to require employees to take the leave in ½ day increments.

3. Medical Certification

Medical certifications cause problems in a number of ways. Several survey respondents complained that doctors provide vague information in response to the questions on the forms and that many health care providers are charging employees to fill out these forms. One solution to the problem of vague information being provided would be to allow employers to communicate directly with health care providers. As the Department noted in its request for information, the Americans with Disabilities Act (ADA) does not restrict employer contact with employees' health care providers.

4. Recertification

The regulations provide that medical recertification can be requested no more often than every 30 days and only in connection with the absence of the employee. In the case of permanent/long-term conditions (such as those that result in unscheduled intermittent leave) recertification may not be requested more frequently than every 30 days unless circumstances described in the initial certification have changed significantly, or the employer receives information that casts doubt on the initial certification. If the time period specified by the health care provider is longer than 30 days, an employer may not request recertification until the minimum duration has passed, unless circumstances described in the initial certification have changed significantly or the employer receives information that casts doubt on the initial certification. Title 29 Section 825.308.

The associations believe that this is too restrictive. If abuse of the FMLA is suspected, employers should be allowed to request recertification after every absence. And, to address the problems associated with unscheduled intermittent leave, the responsibility for showing the need for continued unscheduled absences should fall on the employee. The employee should have to provide certification every 30 days showing that he or she still needs to take unscheduled intermittent leave.

To further assist in addressing the case of abuse of the FMLA by employees who frequently request unscheduled intermittent leave, employers should be allowed to request a second or third opinion for recertification as well as for the initial certification. Currently Title 29 Section 825.308(e) prohibits second/third opinions for all but the initial certification.

5. Employee Turnover and Retention

Employee morale can be harmed if an employee is abusing the FMLA and the employer cannot act to stop it. Morale can also be harmed when employees are required to fill in for absent employees.

Thank you for considering the comments and suggestions of the undersigned groups.

Sincerely,

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