

April 10, 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: 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*. I am writing on behalf of the International Public Management Association for Human Resources (IPMA-HR) and the International Municipal Lawyers Association (IMLA). We applaud the Department of Labor for issuing this notice of proposed rulemaking and appreciate the department's efforts to clarify the law for both employers and employees.

IPMA-HR and IMLA are associations whose members work in the public sector. IPMA-HR's members are human resource professionals working for local, state and federal government. IPMA-HR members are the ones with direct responsibility for implementing the FMLA and therefore have a strong interest in the regulations. IMLA members are lawyers representing municipalities and local government entities and also have the responsibility for implementing and advising public agencies on the regulation.

Below are our comments to the proposed rule as well as a summary of a member survey conducted on the military leave provisions that 270 IPMA-HR members completed during the month of March 2008. The survey results track the questions the Department of Labor asked in the Notice of Proposed Rulemaking.

**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. The associations 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 this by eliminating any breaks in service except for military service or because the employer expressed a commitment 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.

The associations 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 a long enough time that there could actually exist two separate illnesses that are combined to qualify for FMLA leave. 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)**

The associations 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.

### **Intermittent Leave (Sections 825.203 and 825.204)**

The associations also support the Department's clarification in Section 825.203 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.

Section 825.204 allows employers to transfer employees on scheduled intermittent leave to other positions. The associations suggest that the Department also allow employers to transfer employees on unscheduled intermittent leave to other positions. Allowing employers to transfer employees on both scheduled and unscheduled intermittent leave will make it easier for employers to manage the occasional absence.

### **Substitution of Paid Leave (Section 825.207)**

The associations 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)**

The associations also support the proposal to allow employers to award bonuses for perfect attendance or the achievement of a goal where 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)**

The associations 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, when 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 the associations urge the Department to establish 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)**

The associations are again appreciative of the Department's efforts to clarify the FMLA. In particular, the associations 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. The associations also support the proposed changes to section 825.307 that allow employers to obtain authentication of the medical certification without first obtaining employee permission. The associations also support removing the requirement that employer's contact with the health care provider take place only through the employer's provider.

### **Recertification (section 825.308)**

The associations 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)**

The associations 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. The associations 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**

In preparation for filing comments IPMA-HR surveyed its members on several of the questions asked by the Department in the NPRM. Two hundred and seventy members responded. One theme of the survey responses was that employers need certainty. They can work with different time frames or different definitions as long as they understand what is expected. Therefore, the associations would urge the Department in finalizing the regulations to be mindful of the need for certainty while balancing the interests of employees needing leave.

**Should there be a direct nexus between the exigency and the servicemember's active duty status?**

Survey respondents were not sharply divided on this issue with 60 percent saying that there must be a direct nexus and 40 percent saying that some nexus is sufficient as long as it arose because the servicemember is on active duty.

**Should exigency be defined as items of an urgent or one-time nature or should it be broader and include routine, everyday life occurrences?**

Survey respondents were more divided on this question with 70 percent responding that an exigency should be limited to items of an urgent or one-time nature and 30 percent saying an exigency should be broader and include routine, every-day life occurrences. Several respondents suggested that while it should be somewhat urgent, it should not necessarily be limited to one-time only.

**Should the Department of Labor create a list of pre-deployment, deployment, and post-deployment exigencies?**

Survey respondents felt strongly that the Department should create a list of exigencies (86 percent). Only 14 percent answered this question in the negative. Several respondents wrote comments noting that an exhaustive list of exigencies would be impossible to develop but that a non-exhaustive list could be helpful in providing employers with examples of the types of leave that are meant to be covered by the law. Other commentators suggested that a list of criteria for making the decision would be more helpful.

**Should employers be entitled to documentation showing that the servicemember has been called to active duty?**

Nearly all survey respondents (98.2 percent) answered this question in the affirmative.

**What type of documentation, if any, should an employee be required to show that the leave is FMLA qualifying?**

Seventy-one percent of respondents said that third party documentation should be required when appropriate – e.g. from a child care provider-while 29 percent said that a simple written statement of the need for leave by the employee should be sufficient. Several respondents commented that third-party documentation will depend on the definition of exigency and that third party documentation may not always be possible. One suggestion in this case would be to require third-party documentation, as with other types of FMLA leave, except under unusual circumstances.

**How should "next of kin" be defined?**

Eighty-five percent of survey respondents believe that the Department should adopt the Department of Defense's list of eight potential "next of kin" for the disposition of remains/personal effects which includes: unremarried spouses, children, parents, remarried surviving spouses (except in the case of divorce), blood or adoptive relatives who have been granted legal custody by court/statute, brothers/sisters, grandparents, other relatives of legal age in order of relationship according to civil law, and persons standing in loco parentis.

Only 15 percent of respondents said that the servicemember should be able to choose the next of kin.

**In defining "next of kin" should the Department of Labor allow multiple people to have this distinction or should it be limited to one individual?**

Survey respondents were almost evenly split with 51 percent responding that "next of kin" should be limited to one individual and 49 percent saying multiple people should be allowed to have this distinction.

**Should there be a time limit from the date the illness/injury was sustained in the line of duty to the date the caregiver can take leave? For example in the case of long-term illness, could a covered employee take leave five or 10 years after the illness/injury was sustained?**

Seventy-three percent of respondents said that there should be a time limit and 27 percent said there should not be one. Several respondents wrote additional comments noting that it might depend on the circumstances; others indicated that a long-term illness/injury could be handled under the normal FMLA procedures and that this provision should only relate to recent illness/injury. Others suggested that certification by the Department of Veterans Affairs that the illness/injury was sustained in the line of duty and that there is medical verification that the person needs assistance should be sufficient.

The associations believe that because the law says that leave should be allowed for a servicemember "who is recovering from a serious illness or injury sustained in the line of duty on active duty" the leave should be allowed within a twelve month period. The associations agree with the respondent who noted that "recovering" connotes a recent event. The associations further believe that providing a time-frame will bring needed certainty to the law. For long-term recoveries, employees remain entitled to the 12 weeks of leave provided under the FMLA.

**Should leave be permitted in cases where the injury or illness was sustained in the line of duty but does not manifest itself until after the servicemember has left the military?**

Two-thirds of respondents said that yes, leave should be permitted under these circumstances and one-third said it should not. Several respondents said that this situation should fall under current FMLA provisions allowing 12 weeks of leave.

**Should there be a limit on the amount of time between when the injury or illness is sustained to the time of treatment, recuperation or therapy? For instance, a mental illness might be sustained during service but the treatment for such illness might not be obtained immediately.**

Two-thirds of respondents said yes, there should be a limit on the amount of time between when the injury/illness was sustained until the time of treatment, recuperation or therapy. One-third said there should be no time limit. Time limit suggestions ranged from 6 months to 2 or 3 years and others said a “reasonable amount of time.”

The associations believe that establishing a time frame will provide needed certainty to employers and that the current FMLA provides adequate leave when the treatment for an injury or illness is not received at the time it is sustained.

**How should the single 12-month period be calculated?**

Nearly 60 percent of respondents said that it should be calculated from the date the employee first takes leave, 27 percent said from the date the servicemember is deemed to be ill/injured if later than the date the illness or injury is sustained, and 14 percent said from the date of the servicemember’s illness/injury. A few respondents suggested that the 12 month period should be consistent with the employer’s treatment of other FMLA leave – e.g. employers can choose whether to measure from the date the employee first takes leave, the 12 month period looking back from when the employee first takes leave, or a calendar year.

**Should more than one 12-month period be allowed? For example should a covered employee be entitled to multiple 26-week periods if the injury or illness lasts for many years?**

Seventy-six percent of respondents said that only one 12-month period should be allowed while 24 percent felt that more than one should be allowed. Several respondents added comments that one 26-week period should be sufficient because the current 12-week period of FMLA would still be available in subsequent years. One respondent noted that they are a small agency and would simply not be able to provide citizens with services if employees were absent for multiple 26-week periods.

The associations agree that one 26-week period is sufficient because employees remain entitled to the 12 weeks of FMLA leave in subsequent years. The servicemember and employee’s needs must be balanced against those of the employer, and in the public sector, where employees are providing critical services to taxpayers – such as public safety and sanitation – multiple 26-week absences are likely to strain the budgets of local employers and the patience of citizens.

**Is a covered employee entitled to more than one 26-week period if that employee is a spouse/parent/child/next of kin to more than one ill/injured servicemember?**

Sixty-three percent of respondents said no, only one 26-week period should be permitted and 37 percent said yes.

Thank you for considering our comments.

Sincerely,

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International Public Management Association for Human Resources

Chuck Thompson  
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International Municipal Lawyers Association