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Report RL31760

*The Family and Medical Leave Act: Current Legislative and
Regulatory Activity*

Linda Levine, Domestic Social Policy Division

November 26, 2008

Abstract. This report begins with an overview of the major features of the FMLA and its regulations (at 29 C.F.R. Part 825 for most employers and employees subject to the act). The various proposals that have been made to amend the act since its inception more than a decade ago are then categorized and discussed. It closes with a review of legislative activity - enactment of military family and caregiver leave - and regulatory activity - major revision of FMLA regulations effective on January 16, 2009.

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The Family and Medical Leave Act: Current Legislative and Regulatory Activity

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November 26, 2008

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Summary

Time off to care for one's own health problems or those of family members is not a job-protected entitlement. Thus, employees sometimes have jeopardized their continued employment to be away from the workplace to address health-related matters. With passage of the Family and Medical Leave Act of 1993 (FMLA, P.L. 103-3), Congress mandated that private employers with at least 50 employees and public employers of any size provide *job-protected unpaid* leave for 12 workweeks in a 12-month period to employees who meet the length-of-service and hours-of-work eligibility requirement in order to care for their own, a child's, spouse's, or parent's serious health condition; to care for a newborn, newly adopted, or newly placed foster child; and upon the birth or placement of an adopted or foster child.

After the Department of Labor (DOL) had included revision of FMLA regulations in its semiannual regulatory agenda since 2003 and published in the *Federal Register* (June 28, 2007) a summary of the issues raised by commentators in response to its request for information (RFI) on possible changes to the act, DOL issued a proposed rule on February 11, 2008. The proposal contained many changes to the existing FMLA regulation that reflect the RFI, court rulings, and other input. It also addressed regulatory issues raised by enactment of FMLA amendments in the FY2008 Department of Defense (DOD) authorization bill (see following paragraph).

Military operations involving members of the National Guard and Reserves initially prompted congressional interest in modifying the FMLA. In May 2007, the House included in the DOD authorization bill (H.R. 1585, Section 675) an amendment to make eligible for 12 workweeks of FMLA leave spouses, children, or parents of persons on or notified of an impending call to active duty in the Armed Forces in support of a contingency operation. The conference report included Section 675 and substituted a modified S. 1975/H.R. 3481, one of several bills to amend the FMLA introduced in response to a recommendation of the Dole-Shalala Commission, for the language contained in the Senate-passed version of H.R. 1585. The bill entitles relatives already covered under the FMLA and next of kin caring for seriously injured or ill service members (including members of the National Guard or Reserves) to 26 workweeks of FMLA leave. A revised FY2008 DOD authorization bill (H.R. 4986) was signed in January 2008. P.L. 110-181, at 585, immediately made effective 26 workweeks of FMLA leave to care for seriously injured or ill service members. FMLA leave for "any qualifying exigency" associated with an eligible family member being called to active duty would go into effect after final regulations were issued.

The final rule, effective on January 16, 2009, was published in the *Federal Register* on November 17, 2008 (pp. 67934-68133).

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Introduction

Congress passed the Family and Medical Leave Act of 1993 (FMLA) as a means of helping individuals more easily balance their family and work obligations. Over the past few decades, married mothers with young children increasingly have strived to fulfill both workplace and child-rearing obligations. With the enactment of welfare reform legislation, greater numbers of single parents also have had to meet the challenge of caring for their children while holding down jobs. Further, the aging of the population and lengthening life spans have made it more likely that workers will assume caregiving duties for elderly relatives, friends, and neighbors.

Time off to care for one's own health problems or those of family members is *not* a job-protected entitlement. That is to say, employees sometimes have jeopardized their continued employment to take time away from work to deal with health-related matters. In the latter half of the 1990s, according to the latest data available from the U.S. Bureau of Labor Statistics, state and local governments voluntarily provided paid sick leave to 51% of their employees.¹ In 2006, firms in the private sector voluntarily provided paid sick leave to 57% of their employees, and paid family leave to 8% of their employees.² With passage of P.L. 103-3, Congress mandated that some of those employers who did not provide employees with paid sick or family leave offer them *job-protected unpaid leave* to attend to their own serious medical problems as well as those of certain family members; to care for a newborn, newly adopted, or newly placed foster child; and upon the birth or placement of an adopted or foster child.

The FMLA prescribes a minimum benefit. Employees in jurisdictions that have enacted more comprehensive family and medical leave statutes (e.g., provide leave for reasons beyond those in P.L. 103-3) and those who work for employers that offer more expansive family and medical leave (e.g., provide a longer period of absence) are entitled to the more generous benefits.

This report begins with a brief overview of the major features of the FMLA and its regulations (at 29 C.F.R. Part 825 for most employers and employees subject to the act).³ The various proposals that have been made to amend the act since its inception more than a decade ago are then categorized and discussed. It closes with a review of legislative activity—enactment of military family and caregiver leave—and regulatory activity—major revision of FMLA regulations effective on January 16, 2009.

The Act's Major Provisions and Regulations

The Wage and Hour Division in the U.S. Department of Labor (DOL) operates a nationwide toll-free referral service at 1-866-487-9243. Those who call with questions about the FMLA, among other statutes administered by the division, are connected to the appropriate federal Wage and Hour district office. The DOL representative provides other information as well, such as the

¹ William J. Wiatrowski, "Documenting Benefits Coverage for All Workers," *Compensation and Working Conditions Online*. Available at <http://stats.bls.gov/opub/cwc/print/cm20040518ar01p1.htm>.

² U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006*, Summary 06-05 August 2006.

³ For a more detailed explanation of the FMLA see CRS Report RL30893, *Explanation of and Experience Under the Family and Medical Leave Act*, by Linda Levine.

telephone number for the agency responsible for family leave legislation, if any, in the caller's state.

Coverage and Reasons for Leave

The act requires employers in the private sector (a) who have had 50 or more employees on their payrolls for at least 20 workweeks in the current or preceding calendar year and (b) who are engaged directly or indirectly in commerce, to extend job-protected,⁴ unpaid leave to employees who have worked for them for at least 12 (not necessarily consecutive) months,

- a minimum of 1,250 hours (excluding paid or unpaid leave time) in the 12 months preceding the start of their FMLA leave, and
- who work at a facility where 50 or more persons are employed by the employer within 75 miles

for the following reasons:

- the birth of a child of the employee and to care for the newborn child,
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child,
- to care for an immediate family member—spouse, child under age 18 (or of any age if incapable of self-care due to an activity-limiting disability), or parent—with a “serious health condition”⁵ that necessitates the employee's presence, or
- to care for the employee's own serious health condition (including maternity-related disability) that makes them unable to perform the functions of their position.

(The term “serious health condition” is discussed in detail in the “FMLA Policy Issues” section of this report.)

Employers in the public sector (i.e., federal, state, and local governments, including local education agencies) also must provide FMLA leave, regardless of the size of their organizations. To be eligible for leave, public employees must fulfill the act's requirements concerning length of service, hours of work, and proximity to the employer's other facilities, at which at least 50 employees must work.

Employees may elect, and employers may require, substitution of accrued paid vacation and personal leave for leave taken under the statute. Employees may substitute accrued paid family and sick leave subject to the employer's policy concerning the use of these benefits.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994, the time members of the National Guard and Reserves spend absent from civilian employment due to

⁴ Generally, employees returning from FMLA leave must be restored to their original jobs or to jobs equivalent in pay, benefits, and other terms/conditions of employment.

⁵ If the need for leave is related to a serious health condition, employers may require employees to obtain multiple certifications from health care providers.

military service is not deemed a break in employment. Thus, reemployed National Guard and Reserve members are eligible for leave under the FMLA

if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniform service, meet FMLA's [12 months and 1,250 hours] eligibility requirements.⁶

Length and Form of Leave

The maximum length of leave that can be taken under the statute is 12 workweeks in a 12-month period. Employees caring for their own or an eligible relative's serious health condition can take their leave time intermittently or work a reduced schedule (e.g., fewer hours per day). They must obtain their employers' agreement to use their leave in this manner for the two other FMLA-qualifying reasons.

In those cases where the need for intermittent or reduced schedule leave is foreseeable, employees must cooperate with their employers to schedule it to avoid disrupting business operations. Employers must grant and account for intermittent leave in the shortest increment that their payroll systems use for other types of leave, so long as it is one hour or less.

Notification

When the need for leave is foreseeable, employees are to provide their employers with 30 days' notice. If the need for leave is unanticipated, employees are to provide notice "as soon as practicable," which the Labor Department has interpreted to mean within two business days of employees' realizing the need for time off.

Employees should provide employers with enough information to allow them to determine whether the leave is for a FMLA-qualifying reason, but employees do not have to refer to the FMLA when notifying employers. In those cases in which employees did not make employers aware that they were absent from work for an FMLA reason and in which employees want the absence to be counted toward their entitlement, employees are to give employers timely notice of their desire (i.e., within two business days of returning to work).

Employers must, within two business days of having received an employee's notice of need for leave, provide them with written notice stating that the leave will count against their FMLA entitlement; detailing whether the employee must furnish medical certification; and, among other things, explaining the employee's right to substitute accrued paid leave for unpaid FMLA leave and whether the employer is requiring such substitution, the employee's right to job restoration upon returning from leave, and the employee's obligation to make their share of premium payments for maintenance of employer-provided group health insurance. (The only fringe benefit that employers are required to continue providing to FMLA leave-takers is group health insurance.)

⁶ U.S. Department of Labor, "Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules," 70 *Federal Register* 75308, December 19, 2005.

Enforcement

If private sector, state and local government, and some federal employees believe their employer has violated the law (e.g., by denying them leave under the statute or retaliating against them for having taken FMLA leave), they may file a complaint with DOL's Wage and Hour Division.⁷ These employees also may bring a private civil action without filing a complaint. (The right of state employees to sue their employers for violations of the FMLA was affirmed by the Supreme Court in May 2003, when it decided that state governments are subject to the act due to their history of sex discrimination.)⁸ If, after investigating a complaint, the Wage and Hour Division cannot resolve the matter to its satisfaction, the Department's Office of the Solicitor may seek to compel compliance through the courts.

Federal courts have considered the application of various aspects of the FMLA, including determination of employee eligibility and designation of leave under the act. The Supreme Court decided in *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 81 (2002), for example, that the appropriate remedy for an employer's failure to designate leave as falling under the FMLA is not the automatic provision of an additional 12 weeks of time off. The divided court held that employees have to prove they were harmed by the employer's failure to notify them that their absence would be subtracted from their FMLA entitlement. In this instance, the employee had taken the maximum amount of leave allowed by the company (30 weeks), which is more than twice the act's mandated minimum. The Supreme Court's decision overrides the DOL's regulation at 29 C.F.R. § 825.700(a), which states that if employees take leave but the employer does not designate it as FMLA leave, the leave does not count against the 12-week FMLA entitlement. The court noted that the duration of FMLA leave was a carefully balanced compromise which the regulation would have extended for some employees, and that a contrary ruling might have prompted employers with more generous leave policies to curtail them which would have been antithetical to the stated intent of lawmakers. It is in part because of this ruling that the Labor Department put the FMLA on its regulatory agenda.

FMLA Policy Issues

Since its inception, proponents and opponents of the FMLA have suggested ways to change the statute to make it more employee-friendly or more employer-friendly. Some of the proposals are examined below.

⁷ In the case of Congress and some congressional agencies (e.g., the Congressional Budget Office), the Office of Compliance handles FMLA enforcement. Some other legislative branch agencies (e.g., the Government Accountability Office and the Library of Congress) handle FMLA enforcement internally. The Office of Personnel Management issues the FMLA regulations that cover executive branch employees; they are not entitled to sue and can only obtain appellate judicial review of Merit Systems Protection Board decisions in the federal circuit.

⁸ For more information, see CRS Report RL31604, *Suits Against State Employers Under the Family and Medical Leave Act: Analysis of Nevada Department of Human Resources v. Hibbs*, by Jody Feder.

Expanding the FMLA

Coverage and Eligibility

DOL last surveyed employees and employers about their experience with the FMLA in the 1999-2000 period. According to the surveys, almost 90 million out of 144 million public and private sector employees worked at covered establishments and met the act's eligibility criteria in 1999-2000.⁹ That left 33.6 million who did not work at covered establishments and 21.5 million workers who, although working for covered employers, did not fulfill P.L. 103-3's hours-of-work and length-of-service requirements. In other words, almost two out of every five employees were not entitled to leave under the FMLA during the survey period.

Proponents of the FMLA's approach to work-family balance would like to extend it to additional workers. To make the leave entitlement an option for more employees, it has been suggested that the threshold for coverage of private sector employers be lowered from at least 50, to at least 25, employees. Other suggested ways to afford more employees the opportunity to take FMLA leave include (1) eliminating the requirement that employees must have worked 1,250 hours in the preceding 12 months, (2) prorating the 12-week leave entitlement based on the number of hours worked by part-time employees, and (3) eliminating or reducing the requirement that employees must have been on an employer's payroll for 12 months.

Reasons for Leave

Broadening the situations for which FMLA leave can be taken could well increase what some view as the law's low utilization rate. According to the DOL survey of employees, those who took FMLA leave in 1999-2000 accounted for 11.7% of all leave-takers and 1.9% of all employees.¹⁰ The rate of leave-taking under P.L. 103-3, according to DOL's survey of employers, was 6.5 FMLA leave-takers per 100 covered employees.

A health-related problem was the explanation most often provided by employees in one study who took time off to care for family members. Nonetheless, the reason accounted for a minority (29%) of employees' absences associated with family caregiving.¹¹ Another 26% of caregiving absences from work was related to the provision of transportation or other instrumental support for family members; 22%, to school/child care problems; 15%, to the provision of emotional or other support for family members; 5%, to the provision of elder care; and 3%, to coping with a family member's death. Thus, some members of the public policy community have suggested that employees be able to use FMLA leave for such reasons as attending parent-teacher conferences, participating in children's educational and extracurricular activities, taking children or elderly relatives to routine medical or dental appointments, and participating in activities that result from domestic violence.

⁹ U.S. Department of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. A summary of the results appears in CRS Report RL30893, *Explanation of and Experience Under the Family and Medical Leave Act*, by Linda Levine.

¹⁰ Leave-takers were defined as individuals, regardless of their status under the FMLA, who took leave during the survey period for FMLA-qualifying reasons.

¹¹ Jody S. Heymann, *The Widening Gap: Why American Working Families are in Jeopardy and What Can be Done About It* (New York: Basic Books, 2000). (Hereafter cited as Heymann, *The Widening Gap*.)

Care Recipient Groups

According to the same study by Heymann, 15% of employee absences resulted from caring for parents; 12%, for spouses or partners; 7%, for grandchildren; and 24%, for other family members. The remaining 42% of employee absences were linked to caring for not only a child's health, but also for a child's educational, childcare, and other needs.¹² Reflecting the broad range of individuals to whom employees provide assistance, it has been proposed that the care recipient groups under the statute be extended to include elderly relatives besides the employee's own parents (e.g., a parent-in-law or grandparent), domestic partners, and non-disabled children age 18 or older.

Employers could well oppose loosening firm coverage or employee eligibility requirements, broadening the qualifying reasons, or increasing the care recipient groups. If these expansions were to increase utilization of the statute, it would impose a greater administrative and operational burden on more employers (e.g., determining whether leave qualifies under the FMLA and arranging for leave-takers' duties to be accomplished while they are absent).

Paid Leave

About two-thirds of employees who took leave for FMLA reasons received some compensation during their absence, principally through an employer's sick leave plan, according to the DOL employee survey. Most paid leave-takers (72%) received their full paychecks for the whole period, but 58% of leave-takers who received no or partial pay reported difficulty making ends meet. "Lack of money" was the reason offered most often by those who needed but did not take leave in 1999-2000 for FMLA reasons.

Three approaches have been advanced to provide employees with paid time off for all or some FMLA-qualifying reasons. They are briefly described below but not discussed further in this report. (See CRS Report RL34088, *Leave Benefits in the United States*, by Linda Levine, for further information.)

- One approach would amend the Fair Labor Standards Act of 1938, which requires private sector employers to pay an overtime premium to hourly employees who work more than 40 hours in a week. Instead of giving employees their overtime in cash, private employers would be allowed to offer them compensatory time off which employees could use for whatever reasons they saw fit (e.g., for family-related reasons).¹³
- Another alternative would initiate a demonstration grant program to assist states interested in supplementing the income of parents who take leave for such reasons as the birth or adoption of a child, or to care for a newly born or adopted child, or who leave their jobs to care for a seriously ill infant. (See H.R. 1369, *The Family and Medical Leave Expansion Act*, for example.)
- The approach most recently advanced would require employers to provide leave with pay to employees caring for their own health and the health of other eligible

¹² Ibid. Note: "Children" included those of preschool and school age as well as adult children.

¹³ For additional information, see CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?*, by William G. Whittaker.

individuals. Two different methods have been proposed: one mandating employers to offer their employees a paid sick leave benefit (broadly defined); the other imposing a payroll tax to establish a trust fund from which the government would compensate eligible employees while on leave for FMLA-qualifying reasons. (See H.R. 1542/S. 910<http://www.congress.gov/cgi-bin/bdquery/z?d110:S.910>,; The Healthy Families Act; S. 1681, The Family Leave Insurance Act; and H.R. 5873, The Family Leave Insurance Act.)

Clarifying or Tightening the FMLA

Serious Health Condition

At 29 C.F.R. § 825.114, a “serious health condition” is defined as an illness, impairment, injury or mental/physical condition that involves

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential mental facility;
- a period of incapacity requiring absence of more than three consecutive days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider;¹⁴
- any period of incapacity due to pregnancy or for prenatal care;
- a period of incapacity that is permanent or long-term due to a chronic condition for which treatment may not be effective (e.g., Alzheimer’s disease, severe stroke, and the terminal stages of a disease); or
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on a referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy and radiation for cancer, physical therapy for severe arthritis, and dialysis for kidney disease).

Some have argued that the DOL expanded the meaning of the term beyond the kinds of health problems envisioned by lawmakers.¹⁵ At a February 15, 2000 oversight hearing of the House Government Reform Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, it was asserted that a DOL non regulatory guidance (opinion) letter effectively said that the underlying medical condition (e.g., a cold or an earache) did not matter if other requirements were met (e.g., an absence of at least three consecutive days that involves continuing treatment from a health care provider). It has been claimed that, as a result, employees are able to use their FMLA entitlement for minor health problems and to thereby abuse their employer’s sick leave policy.¹⁶ According to a survey conducted by the Society for Human Resource Management (SHRM), almost two-thirds of the human resources (HR) professionals

¹⁴ Continuing treatment means treatment at least twice by a health care provider or once if it results in a continuing regimen of care.

¹⁵ Deborah Billings, “Business Groups Tell OMB Manufacturers Would Benefit From Overhaul of FMLA Rules,” *Daily Labor Report*, August 5, 2004. (Hereafter cited as Billings, *Business Groups Tell OMB*.)

¹⁶ Cindy Skrzycki, “The Regulators: Businesses Sore About Medical Leave,” *Washington Post*, February 4, 2003. (Hereafter cited as Skrzycki, *The Regulators*.)

who responded indicated that the FMLA entitlement had caused their firms to retain employees who otherwise would have been terminated for poor attendance.¹⁷ Others have countered that not all employees work for firms that offer sick leave as part of their benefit package.

In recognition of the charge that employees may take FMLA leave for something other than a serious condition, the DOL's employee survey asked individuals who gave health-related reasons for taking leave under the act (excluding disability due to pregnancy) whether their condition required care from a doctor or an overnight stay in a hospital. Virtually all (99%) those who took leave in 1999-2000 to deal with their own or a family member's illness responded that a doctor's care was required. About two-thirds reported that they or a family member had to be hospitalized overnight.

To remedy the perceived problem—which allegedly permits abuse of the act, increases employers' administrative burden, and sparks litigation—it has been proposed that the regulation be clarified. One idea that has been advanced would explicitly state in the statute that an illness, injury, impairment or condition for which treatment and recovery are brief (e.g., fewer than seven or 14 days) does not constitute a serious health condition.

It further has been suggested that the law be revised to list specific examples of serious health conditions. In responding to questions posed during a hearing held by the Subcommittee on Children and Families of the Senate Committee on Health, Education, Labor, and Pensions on July 14, 1999, the Deputy Administrator of the DOL's Wage and Hour Division expressed concern that such a list might imply that illnesses that "everyone would agree are normally not serious conditions" could never warrant FMLA leave. He pointed out that the flu—an often-used example of a non serious condition for which FMLA leave currently can be taken if it lasts more than three days and requires the continuing treatment of a health care provider—kills tens of thousands of people each year. He also mentioned that examples of serious health conditions are included in the regulations.

Intermittent Leave

As previously noted, the DOL regulation states at 29 C.F.R. § 825.203 that employers must account for intermittent leave in the smallest increment that their payroll systems use to account for other absences, as long as it is 1 hour or less. It has been argued that keeping track of such short segments of time is burdensome, particularly if the firm's payroll and attendance systems are not integrated or if the system for recording leave is not automated. However, a minority of employees take leave on an intermittent basis under the statute: according to the DOL's employee survey, about one-fifth of FMLA leaves were taken on an intermittent basis in 1999-2000. And, HR professionals reported a statistically significant decline between the SHRM's 2000 and 2003 FMLA surveys in the degree of difficulty scheduling intermittent leave in minutes.¹⁸

In order to lessen the record-keeping burden, a suggestion has been made to extend the minimum increment of leave under the act.¹⁹ Others have countered that lengthening the increment would substantially penalize leave-takers by withholding, for example, half a day's pay when the

¹⁷ Society for Human Resource Management, *SHRM 2000 FMLA Survey*.

¹⁸ Communication between CRS and SHRM about its 2000 and 2003 surveys.

¹⁹ Billings, *Business Groups Tell OMB*.

employee only needed to be absent for 30 minutes. The size of the penalty could potentially discourage some employees from taking leave intermittently.

One argument that has been put forth against intermittent leave—particularly when employees provide little notice—is that it deprives employers of the ability to mitigate work disruptions, and consequently, can have significant negative effects on the duties and schedules of a leave-taker’s co-workers who typically must pick up the slack. This, in turn, could adversely affect labor productivity and the morale of a leave-taker’s co-workers. HR professionals who participated in a SHRM survey noted that fewer than half of FMLA leave-takers scheduled it in advance (48%),²⁰ but DOL’s employee survey found that co-workers of leave-takers generally did not think the act adversely affected them. If the use of intermittent leave remains unchanged despite extension of the minimum increment and instead, leave-takers were absent for four hours rather than 30 minutes, for example, then the act’s reported burden on co-workers might worsen.

Unscheduled intermittent leave continues to be one of its most controversial features of the law, according to comments made by business and employee representatives during a June 2005 roundtable discussion convened by the Senate Health, Education, Labor, and Pensions Committee. A hospital’s HR director stated that “on any given day, 25 people [medical assistants who had obtained certifications from doctors that their chronic conditions required use of intermittent leave] could call in, and there’s nothing you can do about it,” and a manufacturer’s representative asserted that employees utilized the FMLA to circumvent disciplinary procedures in their collective bargaining agreement.²¹ In contrast, an employee described how her ability to take intermittent leave for the years during which her child was being treated for cancer also enabled her to continue working and receiving paychecks. Jody Heymann, Director of Harvard University’s Center for Society and Health Policy, noted that with the prevalence of chronic health conditions increasing and hospitalizations decreasing, access to intermittent leave “allows the worker to miss as little work as possible.”²²

On the basis of surveys conducted by SHRM in 2006 and 2007, it appears that HR professionals continue to have difficulty administering the act and report negative consequences more often when leave is taken intermittently for chronic health conditions as opposed to catastrophic health conditions or when leave is taken to care for a newborn or newly placed adopted or foster child. The short notice (less than one week) employees often give for taking time off for episodic conditions—which reportedly makes it difficult for companies to deal with absences—may partly be the cause of these findings.²³

Employer Response Time to Notification of Need for Leave

Employers must respond in writing within two business days to an employee’s notification of the need for leave, as stated at 29 C.F.R. § 825.208. Some have asserted that this is an extremely short period in which to determine whether the leave falls under the FMLA and to provide further

²⁰ Society for Human Resource Management, *SHRM 2003 FMLA Survey*.

²¹ Fawn H. Johnson, “‘Roundtable’ Panel Debates Usefulness of ‘Intermittent Leave’ in Family Leave Law,” *Daily Labor Report*, June 24, 2005, p. A-10.

²² *Ibid.*, p. A-11.

²³ Society for Human Resource Management, *FMLA: An Overview of the 2007 FMLA Survey*, May 2007. See also *Family Medical Leave*, SHRM Weekly Online Survey, January 9, 2007, and *Leave Administration under the FMLA*, SHRM Weekly Online Surveys, November 7 and 15, 2006.

guidance to employees, particularly as employees do not have to mention the FMLA in their notification and especially if employees informally tell their immediate supervisors rather than directly informing the employers' HR personnel who process the paperwork.

It has been suggested that employer's response time be lengthened. It also has been urged that employees be required to request FMLA leave specifically.²⁴ In addition, some have proposed that employers be allowed to make retroactive designations of absences as having fallen under the FMLA.

Current Legislative and Regulatory Activity

Legislative Activity

Leave for Relatives of Military Servicemembers

Foreign military operations involving members of the National Guard and Reserves conducted in the last several years prompted congressional interest in modifying the FMLA. The House, in May 2007, included in the FY2008 Department of Defense (DOD) authorization bill (H.R. 1585, Section 675) an FMLA amendment that would enable employees already eligible under the act to take leave to deal with matters arising from the call to duty (e.g., making child-care arrangements). In contrast, the leave programs mandated temporarily in H.R. 1585, as passed by the Senate in October 2007, did not amend the FMLA.

The conference report (H.Rept. 110-477) includes Section 675 and substitutes a slightly modified S. 1975 for the language contained in the Senate-passed version of H.R. 1585. S. 1975 was one of several bills to amend the FMLA introduced in response to a recommendation of the President's Commission on Care for America's Returning Wounded Warriors (Dole-Shalala Commission), which was released in July 2007.²⁵ One of the recommendations contained in the commission's report is to lengthen the FMLA leave period from 12 workweeks to 6 months for otherwise FMLA-eligible spouses and parents caring for seriously injured or ill servicemembers.

The President vetoed H.R. 1585 in December 2007, but the following month, he signed a revised FY2008 DOD authorization bill (H.R. 4986) into law. P.L. 110-181, at Section 585, immediately makes effective an entitlement of 26 workweeks of FMLA leave for employees already eligible under the act and for next of kin (nearest blood relative) caring for a covered servicemember (i.e., member of the Armed Forces including those in the National Guard or Reserves) "who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability list, for a serious injury or illness."

²⁴ Skrzycki, *The Regulators*.

²⁵ S. 1975/H.R. 3481 and H.R. 3502 would have amended the FMLA to entitle current FMLA-eligible relatives and next of kin caring for recovering servicemembers to 26 workweeks of leave. Other bills to similarly amend the FMLA included S. 1894, S. 1898/H.R. 3391. S. 1885/H.R. 3993 (which did not amend the FMLA) would have entitled to 52 workweeks of job- and benefit-protected leave relatives currently eligible under the FMLA and siblings at FMLA-covered employers who are caring for recovering servicemembers.

After the Secretary of Labor issues final regulations defining “any qualifying exigency,” 12 workweeks of FMLA leave also will be available to already eligible employees if a spouse, child, or parent “is on active duty (or has been notified of an impending call to active duty) in the Armed Forces in support of a contingency operation.” As part of the proposed rule issued in February 2008, DOL sought comment on military family leave.

Other Unpaid Family Leave Bills

Other bills introduced during the 110th Congress sought to expand who is eligible for leave under the FMLA and the reasons for which leave could be taken. H.R. 2792, for example, would entitle same-sex spouses, domestic partners, parents-in-law, adult children, siblings, and grandparents to leave under the act. H.R. 2808 allows time off under the statute to employees who provide living organ donations. H.R. 1369 is a broad proposal that, in addition to lowering the firm-size threshold to 25 employees, would extend the FMLA entitlement to employees addressing domestic violence. Another wide-ranging bill, H.R. 2392, would add as reasons for taking time off under the FMLA employee attendance or participation in an activity sponsored by a school or community organization that the employee’s child or grandchild attends and meeting routine family medical care needs (e.g., transporting a grandchild for vaccinations or visiting a parent in a nursing home). The bill also adds caring for grandchildren to the act. H.R. 2392 lowers the firm-size threshold to 15 employees and the employee eligibility requirement to 1,050 hours as well. H.R. 5845 would allow victims of violent crime and domestic violence as well as their immediate family members to use FMLA leave while attending court proceedings related to these crimes.

H.R. 2744 (the Airline Flight Crew Technical Corrections Act) is the only legislation that relates to the FMLA, aside from the FY2008 DOD authorization bill, that advanced beyond committee referral during the 110th Congress. The House approved H.R. 2744 on May 20, 2008. The bill recognizes the unique calculation of the work hours of flight attendants and pilots. Because a flight crewmember’s work hours are based on in-flight time despite their spending more time at work (e.g., between flights), a full-time flight attendant or pilot usually works less than the 1,250 hours required for FMLA eligibility. H.R. 2744 states that airline flight crewmembers having worked or been paid for 60% of their monthly guarantee and having worked or been paid for at least 504 hours in the preceding 12 months fulfill the FMLA’s hours-of-work requirement.

Regulatory Activity

Citing the need to reflect the Supreme Court’s decision in *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 81 (2002), the Labor Department included the FMLA in each semiannual regulatory agenda since 2003. (See the earlier discussion of the court case in the section on “Enforcement.”) The Office of Management and Budget (OMB) next announced in March 2005 that it would look into revision of FMLA regulations, among others, in response to recommendations by industry and nonprofit groups that stemmed from a 2004 OMB request for public comment on changes to rules, guidance, etc. from DOL and other agencies. The Labor Department responded to the recommendations by stating that a proposal to revise the FMLA regulations would be issued in 2005.²⁶ However, at an April 5, 2005, hearing of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, the DOL Assistant Secretary for Employment

²⁶ “Federal Agencies to Move on 76 Suggestions by Public to Lower Costs for Manufacturers,” *Daily Labor Report*, March 11, 2005.

and Standards testified that “it is unclear when that proposal will be released or what it will contain.”²⁷ Shortly thereafter, in a letter dated April 12, 2005, House Democrats asked that DOL not make regulatory changes that would “undercut the critical protections [the law] provides.”²⁸

The Request for Information (RFI) and DOL Report

In December 2006, the department issued an RFI on the need for possible changes to the act, among many other things.²⁹ The wide-ranging request asked about serious health conditions, attendance policies, and intermittent leave among many other things.

DOL released a report in June 2007, without including proposed changes to the FMLA regulations. The report concludes that the act appears to be working well with regard to leave taken for birth or adoption and for health conditions “that require blocks of time and are undeniably ‘serious’ health conditions.” It notes that employee commentators expressed a desire for more time off, leave with pay, and coverage of additional family members—all of which are beyond the department’s statutory authority; employer commentators voiced concern about disruption to business operations and attendance problems associated with unscheduled intermittent leave taken for chronic health conditions. Neither employees nor employers nor health care providers are content with the medical certification process, according to the report. A chapter of the report is devoted to each of the following issues: the value of the FMLA to employees; the Ragsdale court decision; serious health conditions; unscheduled intermittent leave; employee rights and responsibilities; the medical certification process; relationship between the FMLA and the Americans with Disabilities Act; transfer of employees to another position to accommodate foreseeable intermittent leave or a reduced leave schedule; substitution of paid leave; joint employment; and data on FMLA coverage, usage, and economic impact.

The Proposed and Final Rule

On February 11, 2008, in the *Federal Register* (pp. 7876-8001), DOL issued a proposed rule that reflects the RFI and court rulings on the FMLA among other input. Comments were due by April 11, 2008.

Most of the more than 4,000 comments addressed those sections of the department’s proposals about unscheduled leave, serious health conditions, and medical certification. The National Coalition to Protect Family Leave (NCPFL), which is an employer organization, reportedly recommended that DOL increase the number of periodic visits in the case of a chronic serious health condition from the proposed two per year to four. Both the NCPFL and the National Small Business Association (NSBA) supported the agency’s proposal requiring employees to follow a firm’s usual call-in procedures when requesting FMLA leave. The NSBA also favored the extension of the time within which employers can request a medical certification after having

²⁷ Fawn H. Johnson, “No Deadline for FMLA Rule, Official Says,” *Daily Labor Report*, April 6, 2005, p. AA-1.

²⁸ Eric Lekus, “House Democrats Send Letter to DOL Opposing Major Changes to Family Leave Law,” *Daily Labor Report*, April 13, 2005.

²⁹ “Request for Information on the Family and Medical Leave Act of 1993,” 71 *Federal Register* 69504, December 1, 2006.

received leave notice from an employee. It supported DOL's new requirement for annual certification of chronic conditions as well.³⁰

Advocates for employees opposed those parts of the proposed rule that they believed would limit rights under the act. The AFL-CIO, for example, asserted that "requiring employees to undergo more frequent medical visits to justify FMLA leave" would "impose unnecessary [costly] burdens" on workers and that requiring employees to follow their employer's standard call-in procedures would "likely have the effect of permitting minor deviations from an employer's internal notice policy to result in wholesale denial or delay of [FMLA] rights."³¹ The Family Caregiver Alliance also was concerned about employees having to give advance notice or follow their employer's usual call-in procedures because "medical emergencies often happen unexpectedly."

Presented below is a brief description of selected portions of the FMLA final rule, which appeared in the *Federal Register* on November 17, 2008 (pp. 67934-68133). Generally, DOL integrated the two military-related leave provisions in P.L. 110-181 into the relevant sections of the final FMLA rule. Only news that address military-related unpaid family leave in the final rule are discussed in the 19 items below.

1. The First Circuit Court of Appeals held in *Rucker* that the complete separation of an employee from his or her employer does not prevent the employee from counting earlier periods (here five years) toward the 12-month FMLA eligibility requirement. In response to the court urging DOL to decide whether a continuous break of longer than five years is permissible, the department proposed that five years be the limit with exceptions for employment breaks due to fulfillment of military obligations and existence of written agreements that state the intent of employers to rehire employees away from work for child-rearing purposes, for example. The final rule retains the two exceptions and extends the period for breaks in service to seven years. The final rule also adopts the proposed rule's codification of prior guidance issued by the department: because the Uniformed Services Employment and Reemployment Rights Act (USERRA) entitles returning service members to the rights and benefits they would have had if they had been continuously employed, they are entitled to count the hours they would have worked for the employer but for National Guard or Reserve service toward their eligibility for FMLA leave. (See Section 825.110.)

2. In light of the Supreme Court's *Ragsdale* decision that invalidated Section 825.700(a), DOL believes it does not have regulatory authority to deem employees who do not meet the length-of-service and hours-of-work requirements eligible for FMLA leave despite an employer's failing to provide an employee the required notice or correct information. Although the department therefore deletes the "deeming" provisions in Section 825.110, it notes in Section 825.300 that such failures may have the effect of interfering with, restraining or denying employees the right to exercise their FMLA rights and cause harm for which there are statutory remedies.

3. DOL basically retains the current definition of serious health condition in Section 825.113. However, Section 825.115 in the proposed rule, which defines continuing treatment after health care providers have told employees not to come to work for more than three consecutive calendar

³⁰ Gayle Cinquegrani, Family and Medical Leave Proposals Garner Mixed Reviews from Business, Family Groups," *Daily Labor Report*, April 25, 2008.

³¹ *Ibid.*

days due to a serious health condition, specified that the currently required two visits to providers occur within 30 days of the start of the period of incapacity (absent extenuating circumstances). The final rule adopts the proposed rule's language with clarifications that the visits must be in person and that the first visit must occur within seven days of the first day of incapacity. The definition of a chronic serious health condition is changed as well to require an employee make at least two visits for treatment per year to his or her health care provider.

4. In Section 825.126, the department addresses the new qualifying reason for leave-taking in P.L. 110-181, which permits eligible employees to take FMLA leave for a qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is on active duty or has been notified of an impending federal call or order to active duty in support of a contingency operation. Those on call or ordered to active duty are members of the Reserve components and the National Guard as well as certain retired members of the regular Armed Forces and Reserves, not members of the regular Armed Forces. Because the FMLA definition of a son or daughter³² would severely limit the availability of leave, which contradicts the intent of Congress, DOL developed a separate definition of "son or daughter on active duty or call to active duty status" as an employee's child who is of any age. Charged by statute to define "qualifying exigency," the department in the final rule does so by presenting a specific and exhaustive list of reasons for which eligible employees are entitled to exigency leave. The list is divided into seven general categories (i.e., short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, (non-medical) counseling, rest and recuperation, post-deployment activities, and additional activities).

5. In Section 825.127, the department addresses P.L. 110-181's provision of military caregiver leave to a spouse, child, parent, or next of kin of a seriously injured or ill covered service member. The length and frequency of such leave is equal to 26 workweeks *per-service member, per-injury in a single 12-month period*. DOL determined the method for establishing the single 12-month period is the date on which an employee begins military caregiver leave.

The final rule adopts P.L. 110-181's definition of a seriously ill or injured covered service member and clarifies it to include current (not former) members of the regular Armed Forces, National Guard and Reserves, and members of the regular Armed Forces, National Guard and Reserves who are on the temporary (not permanent) disability retired list.

Temporal proximity between the covered service member's injury or illness and treatment, recuperation, or therapy is not required by DOL, which reasoned that limiting the provision of care to *current* service members and those on the temporary retired disability list (where they can remain for no more than five years) was sufficient.

Because the FMLA definition of a son or daughter would severely limit the availability of leave, which contradicts the intent of Congress, DOL developed a separate definition of "son or daughter of a covered service member" as the service member's child who is of any age.

In keeping with the flexibility intended by Congress, the department defined "next of kin" to be the service member's nearest blood relative other than the service member's spouse, parent, or child, in the following order of priority: blood relatives who have been granted legal custody,

³² The act defines son or daughter to be less than 18 years old or at least 18 years old and incapable of self-care due to a mental or physical disability.

brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the service member designated in writing another blood relative as his or her nearest blood relative.

The department concludes that, as is the case with other leave under the act, it is the employer's responsibility to designate whether the leave is FMLA-qualifying. For military caregiver leave that also qualifies as leave to care for a family member with a serious health condition, the final rule states that an employer must designate such leave as military caregiver first. The final rule also prohibits an employer from counting the leave taken under these circumstances against both the 26 workweeks of military caregiver leave and the 12 workweeks of leave for other qualifying reasons.

6. DOL did not increase the minimum increment of intermittent leave, but did make organizational and other changes related to intermittent or reduced schedule leave. Although the proposed rule stated that employers must account for such leave in the smallest increments used by their payroll systems to account for absences or other leave provided it is one hour or less, the final rule states that employers must account for intermittent or reduced schedule leave "using an increment no greater than the shortest period of time that the employers uses to account for use of other forms of leave provided it is not greater than one hour." An exception is created to count an entire shift against an employee's job-protected FMLA entitlement when it is physically impossible for an employee to access a work site after the start of a shift because the department felt doing otherwise might "expose employees to disciplinary action based on the additional hours of *unprotected* non-FMLA leave that they must take." The rule incorporates discussion from the 1995 preamble about counting against the FMLA entitlement overtime hours employees would have been required to work but for use of leave under the act. (See Sections 825.202-825.205)

7. In Section 825.207 DOL makes clear that an employer's paid leave policies must be followed by employees who want to substitute any form of accrued paid leave (vacation, personal, sick) for unpaid FMLA leave. To help employees understand this interpretation, the department states that employers make employees aware of any requirements they have imposed for use of paid leave that may be used concurrently with FMLA leave (e.g., vacation days may only be taken in full-day increments).

8. Among other things, Section 825.215 replaces current language with the following: "if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee does not meet the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA leave status." The department believes this puts employees on equal footing regardless of the kind of leave they take.

9. In light of different circuit court decisions concerning waiver of rights under the FMLA, the department makes explicit in Section 825.220 that employees and employers are allowed to voluntarily settle or release FMLA claims based on past conduct by the employer, and they may do so without obtaining permission of the department or a court. DOL also clarifies that when an employee performs a "light duty" assignment the employee's rights under the act are not diminished (i.e., employees retain their right to job reinstatement for a full 12 weeks of leave rather than the right being reduced by time spent in a light duty job).

10. In addition to consolidating all notice requirements (e.g., eligibility notice, designation notice) in one section (825.300), DOL extends from two business days to five business days the time within which an employer must notify an employee who has requested FMLA leave that he or she

is eligible under the act. For the first time, the department specifies the information employers must provide to employees about their eligibility status (e.g., giving an employee a reason why he or she is ineligible for leave). Similarly, the department extends from two business days to five business days of receiving adequate information the time within which an employer must notify an employee that leave is designated as FMLA leave and the amount of leave so designated. To the extent this is not possible (e.g., in the case of unforeseen intermittent leave), the final rule states that employers are required to inform employees of the amount of leave designated as FMLA-qualifying only upon the employee's request and not more often than every 30 days if the employee took leave under the act during the period.

11. Section 825.302 states that when the need for FMLA leave is foreseeable, the employee must give at least 30 days' notice and, if that is not possible, then as soon as practicable. If less than 30 days' advance notice is provided, DOL requires employees to respond to requests from employers for explanation of why giving 30 days was not practicable. In the final rule, the department clarifies that its list of "sufficient information" from employees to enable employers to determine that employees are invoking their FMLA rights is not exhaustive. "Absent unusual circumstances," an employee must follow an employer's usual notice and procedural requirements for calling in absences and requesting leave.

12. In the case of the unforeseen need for FMLA leave, employees continue to have to provide notice "as soon as practicable." (See Section 825.303). The department had stated in the proposed rule that, except in extraordinary circumstances, employees must give notice of the need for leave promptly. The final rule instead states that "it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave." Although DOL applies the same meaning to "sufficient information" from employees to enable employers to determine that employees are invoking their FMLA rights when leave is foreseeable or unforeseeable, it adds that calling in "sick" in the case of unforeseen leave without providing more information will not trigger an employer's responsibilities under the act. Like foreseeable leave, employees must follow the employer's established call-in procedures for leave except under unusual circumstances.

13. Because the department believes that proposed Section 825.304 offers useful guidance about the consequences of an employee's failure to provide timely notice of the need for leave under the act (e.g., delay of FMLA protection), it is retained in the final rule.

14. Proposed Section 825.305 lengthened the time, from two to five business days, within which an employer should request medical certification after receiving notice of the need for leave. It also applied a 15-calendar-day time frame for the employee to provide medical certification. In light of the court's decision in *Urban v. Dolgencorp of Texas*, the department solicited comments on whether it should add language requiring an employer to notify the employee if certification is not returned by the health care provider within 15 days and to give the employee another 7 calendar days to provide medical certification. Additionally, DOL proposed defining an incomplete and insufficient certification and setting forth a procedure for rectifying same. More specifically, the employer would have to state in writing what additional information is necessary and give the employee seven calendar days to correct the deficiency. The proposed rule also would require a new medical certification annually in cases where a serious health condition lasts beyond a single leave-year; this language codifies a 2005 opinion letter issued by the department. The final rule adopts the proposed rule's language.

15. In Section 825.306 DOL proposed changes to the content of the medical certification and made clear its longstanding practice of employers *not* being allowed to require employees to sign a medical release as a condition of their taking FMLA leave. The final rule adopts this language. It also adopts Section 825.307 in the NPRM that employers be permitted to contact directly the employee's health care provider for the purpose of authenticating and clarifying a medical certification without obtaining the employee's consent; however, before contacting the health care provider, the employer must give the employee a chance to remedy any deficiencies in the certification. In response to medical privacy concerns expressed by employee groups, the final rule makes clear that the employee's direct supervisor cannot contact the health care provider.

16. Section 825.308 addresses the right of employers to request that employees obtain recertification of medical conditions (except in the case of military family leave). In those instances in which a certification states that the serious health condition is chronic (e.g., lifetime, indefinite) and the period of incapacity expected to last longer than 30 days, DOL allows employers to obtain medical recertifications no more often than at six-month intervals. Where the certification relates to a chronic serious health condition that specifies an intermittent period of incapacity lasting less than 30 days, the department does not permit employers to request recertifications until the specified period has elapsed. A 2004 opinion letter is incorporated into the regulations: the employer, as part of the recertification, may give the health care provider a record of the employee's absence pattern and ask the provider if the serious health condition and need for leave is consistent with the pattern.

17. Section 825.309 relates to certification for leave taken during a qualifying exigency. An employer may require an employee provide a copy of the covered service member's active duty orders or similar documentation issued by the military. DOL created a special optional certification form for such leave. Where leave is requested on an intermittent or reduced leave basis, the final rule requires an estimate of the frequency and duration of the qualifying exigency. Where leave is requested for a single continuous period, employees should provide the start and end dates for the absence. The section describes the process by which employers are allowed to verify information in the certification.

18. Section 825.310 relates to certification for military caregiver leave. An employer may require an employee to support the request for leave with sufficient certification from a DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized health care provider. An employer must accept as sufficient certification invitational travel orders or authorizations issued by DOD. DOL created a special optional certification form for such leave.

19. Although the final regulation at Section 825.312 keeps the basic fitness-for-duty certification procedures, it provides that to authenticate and clarify the fitness-for-duty statement the employer may contact directly the employee's health care provider. If the employer gives the employee a list of the job's essential functions, the employer can require that the fitness-for-duty certification address the employee's ability to perform them. Employers can require employees to provide such certifications once every 30 days if employees used intermittent or reduced schedule leave within the period and if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.

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