

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:

On behalf of the International Franchise Association (IFA), I write to comment on the Department of Labor's Notice of Proposed Rulemaking on the Family and Medical Leave Act (FMLA), published in the *Federal Register* on Feb. 11, 2008. IFA is the largest and oldest franchising trade group, representing more than 85 industries, including more than 10,000 franchisee, 1,200 franchisor and 470 supplier members nationwide. IFA protects, enhances and promotes franchising by advancing the values of integrity, respect, trust, commitment to excellence, honesty and diversity. According to a 2008 study conducted by PricewaterhouseCoopers, there are more than 900,000 franchised establishments in the U.S. that are responsible for creating 21 million American jobs and generating \$2.3 trillion in economic output.

On behalf of our members, I respectfully submit these comments and I appreciate the opportunity to share our views on how to improve the implementation of the FMLA. Members of the IFA strongly support the original intent of the FMLA. However, over the past 15 years we have experienced unintended consequences of a well-intentioned and important employee benefit. The IFA believes that the improvements recommended here will benefit both employees and employers alike. We also strongly support the comments submitted by the National Coalition to Protect Family Leave, which address in greater detail every aspect of the DOL's proposal from the experience of employers.

Eligibility (Section 825.110)

The IFA recommends revisions regarding eligibility that would make the regulations more reasonable and workable. The DOL should reconsider its proposed section 825.110(d) that was amended so that any period of employment within five years would be considered in determining if an employee had worked for an employer for 12 months, since that 12-month period need not be consecutive. In the franchise system, a five-year period is unrealistic and will create an undue recordkeeping burden causing administrative headaches for employers,

especially since current FMLA and FLSA regulations only require that an employer keep certain employment records for three years. At a maximum, the final rule should call for a three-year look-back period, since that is equal to the record retention period in current law.

In addition, in proposed section 825.110, the Department should harmonize the point at which an employee's eligibility for FMLA leave is determined—at the point when leave begins, or when an employee informs his or her employer of a need for leave. One current regulation requires that determination of whether an employee meets the 12-month and 1,250-hour requirements be made as of when the leave begins. This language is retained in proposed section 825.110(d). Another regulation says determination of eligibility for an employee who ostensibly meets the 12-month and 1,250-hour requirements, and who works for an employer with at least 50 employees, must be made when the employee gives notice of the need for leave. That language is retained in proposed section 825.110(e).

Serious Health Condition (Section 825.113)

IFA members were quite pleased that the Department suggested clarifications for many elements of the FMLA regulations, but we were very disappointed to see that the definition of a serious health condition was not addressed. Unfortunately, the definition retained in the proposed regulation remains ambiguous and difficult for employers to administer. We will continue to press both the Department and lawmakers in the future to address and correct this glaring definitional oversight that leads to a large majority of the confusion employers' face when administering leave. In light of this lack of clarity, we agree with the Department's recommendation to retain the list of what are considered by regulation to not be serious health conditions. For instance, Wage and Hour Opinion Letter FMLA-57 correctly states the law, and it should be given a very narrow construction. However, the language regarding mental illness "resulting from stress" should be removed from the last sentence of Section 825.113(d).

Continuing Treatment (Section 825.115)

Due to the proposal's failure to address the ambiguous definition of a serious health condition, we must disagree with the Department's decision to not require an employee to make more than two visits to a health care provider during the period of incapacity. When administering leave due to the chronic serious health conditions of employees, IFA believes employees should be required to see their provider at least four times per year.

It is entirely reasonable to expect that employees with actual and ongoing chronic illnesses would be actively managing their condition with the close consultation of their doctor. Requiring employees with a chronic condition to make more than two visits will not only reduce misuse of intermittent FMLA leave, it will improve public health and safety. By encouraging employees to actively address their healthcare needs, employers, co-workers and the general public can expect to have healthy and safe places to work, patronize and enjoy.

If an increase in required health care provider visits is not made, then we suggest that the second visit or treatment must occur within one week of the initial treatment, and the

regulation should require follow-up treatment. Accommodations should be made for clearly defined extenuating circumstances, such as instances where an employee, despite good faith efforts, is unable to secure an appointment within the applicable period. The regulation should state that the applicable period begins with the date of the incapacity.

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

The Department has also asked for comments on whether a 30-day time frame should be added to Section 825.115(a)(2), which allows for treatment on one occasion followed by a “regimen of continuing treatment.” IFA agrees with the Department that this language should *not* be added.

Intermittent Leave (Sections 825.202 – 825.205)

The IFA and its members are universally dismayed that the Department failed to propose improvements to the FMLA that would increase the minimum increment of intermittent leave (section 825.205). One of the greatest FMLA compliance challenges that every employer faces is when an employee takes leave on an unscheduled or unforeseeable basis. When Congress passed the FMLA in 1993, they thought that by allowing employers to grant leave in the smallest increments their payroll system would allow they were providing a way to have as minimal disruption to the workday as possible. We respectfully submit that after 15 years, nearly everyone involved in administering this benefit find the case to be *opposite* what Congress intended.

Current regulations cause administrative problems for employers, and unfairly penalize other employees who must work overtime or cover for an absent employee. They lead to operational challenges for businesses that get little or no notice of the employee absence, and thus no means to plan accordingly. Of paramount importance to franchise owners and operators, is a reliable and productive workforce. By allowing FMLA leave in the smallest increments possible, the Department has allowed workers to use this important benefit as an excuse for tardiness or to alter a full-time work schedule to one that is part-time. This not only unfairly burdens co-workers, but allows individuals to work a part-time schedule and receive the benefits and privileges of full-time employees. The Department should change the size of an increment of FMLA leave, increasing it to four hours (or half-day shift) when an employee takes unforeseeable or unscheduled intermittent or reduced schedule leave.

Nevertheless, IFA commends the Department for its proposed section 825.203. It accurately implements the language of the FMLA and clarifies that an employee who needs intermittent or reduced schedule leave for planned medical treatment must make a “reasonable effort” to schedule the leave so that the leave does not unduly disrupt the employer’s business. The Department’s proposed section 825.203 is a vast improvement over the existing regulation.

We also suggest that the department extend an employer's authority to transfer an employee (section 825.204) to include an employee who takes intermittent or reduced schedule leave on an unforeseeable or unscheduled basis. Under the department's proposal, an employer may require an employee to transfer to an alternative, equivalent position when an employee needs *foreseeable* intermittent or reduced schedule leave for *planned* medical treatment.

Finally, even though the Department erred by not increasing the size of an increment of intermittent or reduced schedule leave, it has requested comments on whether there should be an exception in proposed section 825.205 for circumstances in which it is physically impossible for an employee to return to work after taking intermittent or reduced schedule leave. We encourage DOL to include such an exception. It could be limited in application to circumstances in which an employee's physical impossibility to return to work is due to the location of the work, travel associated for such work, or the ongoing nature of the work.

Essential Functions (Section 825.123)

In determining eligibility for FMLA leave, one of the criteria that an employer can currently apply is whether an employee is unable to perform "any *one*" of the essential functions of the employee's position. I recommend that the Department revise that section to read, "unable to perform the essential functions of the employee's position, unless modified by the employer to accommodate a temporary restriction." We have no objection to adding clarifying information on Form WH-380 that includes a section for employers to list an employee's essential job functions, and where a copy of the job description can be attached.

Treatment of a Holiday (Section 825.200) and Incentive Awards (Section 825.215)

We would like to thank the Department for two specific proposed changes regarding the treatment of holidays and incentive awards. First, retention of the current rule in section 825.200(f) that a holiday counts as FMLA leave when it falls within a week of that leave is reasonable and workable, as DOL notes. Also, the Department's additional clarification on a holiday that falls during FMLA leave that is for less than the week is helpful.

Similarly, we appreciate proposed section 825.215(c)(2), regarding incentive awards. Under this proposal, it would no longer be illegal for an employer to disqualify an employee from receiving a perfect attendance award or bonus if the employee does not meet the requirements for those incentives due to absences for FMLA leave. Not only is this a better and fairer interpretation of the FMLA, it will help employee morale, since employees on FMLA leave will not be treated more favorably than other employees.

Substitution of Paid Leave (Section 825.207)

Generally, IFA supports proposed revisions to 29 C.F.R. 825.207 regarding substitution of paid leave. Specifically, we support the proposal that substitution may occur only when the terms and conditions of the paid leave policy are met, unless an employer waives such terms and conditions.

Employer Notice Requirements (Sections 825.300, 825.302, 825.303)

The Department's proposal on notice requirements and communications with employees (section 825.300) should help broaden awareness of the FMLA. Specifically, we support the proposal to extend the time frame to provide such notices from two to five business days. The proposals in sections 825.302 and 825.303 on employee notice obligations make common sense. We support the proposed requirement that employees are to follow normal call-in procedures when taking FMLA leave. However, we feel the proposals should be clear that specific timing requirements required by an employer as part of its call-in procedures (e.g., by a certain time each day) also need to be followed when an employee requests FMLA leave, unless extraordinary circumstances exist.

Designation of FMLA Leave (825.301)

IFA generally concurs with DOL's approach regarding employer designation requirements and the remedy provision for failing to designate FMLA leave in section 825.301. Employers should be allowed to retroactively designate FMLA leave, absent a showing of individualized harm; that employers and employees should be able to mutually agree to retroactively designate FMLA leave; and that the penalty for not designating FMLA leave in a timely fashion should be based on an individualized showing of harm, consistent with the general statutory scheme for FMLA violations. We feel that this interpretation is consistent with the statute and the Supreme Court's interpretation of it in *Ragsdale v. Wolverine*.

This regulatory section could be improved. It should make clear at what point an employer's obligations are triggered to make follow-up inquiries, as well as what follow-up questions may be asked. Employers are routinely concerned that asking follow-up questions could expose them to liability under the Americans with Disabilities Act's medical inquiry provisions. Thus, having bright-line guidance as to what questions are appropriate will help facilitate the process and improve communications to ensure that those who are entitled to FMLA receive protections.

General Rule on Medical Certification (Section 825.305)

We support DOL's proposed changes in section 825.305 that apply to the rules for obtaining a medical certification to substantiate whether leave qualifies under the FMLA. We also support DOL's proposal to define what constitutes either an incomplete and insufficient certification, and clarifies that once an employer gives an employee seven days to correct the deficient certification (whether incomplete or insufficient), the FMLA protections do not apply. We agree with DOL's proposal that a new "initial" certification may be obtained each leave year. IFA suggests that that the proposal could be improved by: establishing that if an employee does not return the certification within the initial 15-day period, the employee is not entitled to FMLA leave, limited to extraordinary circumstances; and, defining what constitutes extraordinary circumstances, to support the delay in the return of the certification.

Content of Medical Certification (Section 825.306)

IFA members applaud the Department's proposed changes regarding what kind of information an employer can request on the medical certification form to substantiate the need for FMLA leave. In general, we agree with the proposed:

- Definition of types of medical facts required to constitute a sufficient medical certification;
- Clarification that employees must provide certification that leave is medically necessary to substantiate the need for intermittent or reduced scheduled leave;
- Clarification that employers may require greater medical information under their own paid leave policies;
- Clarification that employers can still follow the ADA guidelines for requesting medical information if the need for leave also constitutes a reasonable accommodation that must be provided under the ADA; and,
- Clarification that employees who do not sign a HIPAA release to authorize the release of medical information still have an obligation to provide sufficient medical documentation to substantiate the need for FMLA leave.

Authentication, Clarification, and Second Opinions (Section 825.307)

IFA supports DOL's proposed changes in section 825.307 regarding the authentication, clarification, and second- and third-opinion processes. We support and appreciate removal of the requirement that contact with the health care provider only take place through the employer's provider, and the requirement that relevant medical information must be provided to the health care provider performing the second opinion.

Recertification (Section 825.308)

IFA supports DOL's proposed changes with regard to the recertification process in section 825.308. Specifically, we support DOL's clarification as to what constitutes a change in circumstances, and that the recertification obtained can mirror the information required in the initial certification along with a confirmation from the health care provider that the employee's leave pattern is consistent with the employee's need for FMLA leave. The Department could improve the proposal, however, if the final regulation provides that for long-term or permanent conditions (those lasting more than 12 weeks), an employer should be able to obtain recertification every 30 days regardless of whether an absence occurs in the prior 30 day period.

Fitness for Duty (Section 825.310)

The Department's proposed changes regarding the fitness-for-duty process (section 825.310) represent a good first step at addressing this issue. We are supportive of the proposal to allow fitness-for-duty exams in connection with intermittent leave when safety and health concerns exist, and that allow an employer to get certification that the employee can perform all the essential functions of his or her job before returning from FMLA leave, as opposed to a simple statement.

Military Family Leave Provisions and Regulatory Issues

IFA and its members are generally supportive of the legislative intent of expanding the FMLA to cover these qualifying events. However, we respectfully suggest that DOL make every effort to provide complete, concise and well-defined regulations to implement this expansion of the law. Such regulatory language will be crucial to providing both employers and employees with a clear understanding of their rights and responsibilities in administering/seeking leave in response to these qualifying events.

In particular, it will be very important to craft an appropriate definition of the term "qualifying exigency." Exigency leave should be limited to needs *directly caused by* the military service itself and should specifically exclude routine, everyday life occurrences. If we do not require a close connection between the need for leave and military service, we run the risk of subjecting employers to internal complaints and claims of discrimination from other employees who believe they should also be allowed to take leave for similar occurrences.

Military leave must not appear to give greater rights to employees with family members called to active duty than those employees would otherwise have for the normal and ordinary life challenges faced by *all* employees. For example, exigency leave should be limited to non-medical situations. FMLA leave is already available for employees whose family members have serious health conditions, whether those eligible employees are affiliated with the military or not. Also, because the term "exigency" was used, we believe the leave is meant to be limited to situations that are critical, require immediate attention, and can not be addressed without taking time off during work hours.

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

Thank you for this opportunity to share the views of the International Franchise Association on how the implementing regulations of the Family and Medical Leave Act can be improved. We look forward to the promulgation of final regulations that include suggestions offered here so that employers can be assured of a reliable workforce and that employees can access the important benefits of these laws in a clear and consistent manner.

Respectfully submitted,



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