FMLA
TECHNICAL CORRECTIONS COALITION

May 28,2002

Dr. John Morrall
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB
Room 10235
725 17th Street, NW
Washington, DC 20503

Deanna R. Gelak, SPHR
***Executive** Director*

References:

Name of Regulation and Guidance: The Family and Medical Leave Act of 1993 & Wage and Hour Opinion Letter FMLA-86 (12/12/96)
Regulating Agency: U.S. Department of Labor, Wage and Hour Division
Citation: Code of Federal Regulations 29 CFR part 825 (1/6/95) and Wage Hour Opinion Letter, FMLA-86 (12/12/96)
Authority: The Family and Medical Leave Act of 1993 (5 USC 6381 et seq. & 29 USC 2601 et seq.)

Additionally:

Name of Regulation and Guidance: Birth and Adoption Unemployment Compensation (BAA-UC)
Regulating Agency: U.S. Department of Labor, Employment and Training Administration
Citation: June 13, 2000 Federal Register, Volume 65, Number 114 [Page 37209-37227]
Authority: None

Dear Dr. Morrall:

The **FMLA** Technical Corrections Coalition is a diverse, broad-based nonpartisan group of approximately 300 leading associations and companies. Members of the Coalition are fully committed to complying with both the spirit and the letter of the Family and Medical Leave **Act (FMLA) of** 1993 and strongly believe that employers should provide policies and programs to accommodate the individual work-life needs of their employees. At the same time, members of the Coalition believe that the **FMLA** should be fixed to protect those employees that Congress aimed to assist while streamlining administrative problems that have arisen.

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Section I – Purpose of Nominations

In the March 18,2001 Draft Office of Management and Budget Memo on "The Costs and Benefits of Federal Regulations and Paperwork", **OMB** requested that the regulated public identify and comment on problematic regulations and guidance documents.
The FMLA Technical Corrections Coalition would like to nominate the Department of Labor's Family and Medical Leave Act implementing regulations and associated non-regulatory guidance for review and revision in order to address compliance problems and to allow for more effective implementation of **FMLA** protections:

1. The FMLA's medical leave has not worked as intended due to the Department of Labor's implementing regulations and interpretations. **A** detailed discussion of areas which should be reviewed and revised is provided in these comments along with suggestions for improvement.
2. The FMLA Technical Corrections Coalition would also like to nominate Wage Hour Opinion Letter, FMLA-86 (12/12/96) to be withdrawn. A discussion of the letter is included in Section 111 and Opinion Letter FMLA-86 is attached.
3. Finally, the Coalition would like to nominate the illegal Birth and Adoption Unemployment Compensation (BAA-UC) regulations to be rescinded *(June 13, 2000 Federal Register, Volume 65, Number 114 [Page 37209-37227])*. A discussion of this issue is included at the end of these comments.

Section II -- General Discussion and Justification for Nominations

A. The Intent:

The Family and Medical Leave Act (FMLA) was sold to Congress and the American people as requiring job protection for up to twelve weeks of unpaid leave for families for birth or adoption (family leave) and leave to care for a child, spouse, or one's own "serious medical condition" (medical leave). The focus of the original FMLA debate was on the "family leave" part of the Family and Medical Leave Act. Most employers had provided leave for maternity and more were moving into paternity leave, so it was not seen as much of a policy change. Little public reference was made to the bill's "medical leave" provisions for an employee's own "serious health condition". Congressional intent for medical leave was spelled out in the then Democratic majority's committee report:

> The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only **a** brief recovery period. . . (**U.S.** Congress Committee on Education and Labor, Family and Medical Leave Act of 1993, H. Rept. 103-8, February *2,* 1993, **p.** 40.)

Congress drafted the FMLA to allow employees to take leave in less than full-day increments. The intent was to address situations when an employee might need to take leave for intermittent treatments, e.g. for chemotherapy or radiation treatments or other medical appointments. Granting leave for these conditions had not been a significant problem for employers previously.

B. The Reality:

1. Family Leave: The "family" leave part of the **FMLA** has not been problematic in the workplace. It is generally anticipated by the employer, scheduled by the employee and taken continuously.

2. Medical Leave: Because of vague and expansive interpretations by the prior Administration's Department of Labor, most of the leave taken under the FMLA has been for employees' own illnesses, most of which were previously covered under sick leave policies. Contrary to the strong assertions of the FMLA's original supporters, the FMLA has become a national sick leave program. The regulatory definition and interpretations of "serious health condition" for the Act's "medical leave" are a lesson in complexity, stretching the term "serious health condition" far away from Congressional intent. The Department has been inconsistent and vague in its opinion letters leaving employers and workers guessing as to what the agency and the courts will deem to be "serious." One year, the DOL issued an opinion letter stating that the cold, the flu and non-migraine headaches were not serious health conditions (Wage and Hour Opinion Letter, FMLA-57, April 7, 1995). The next year, the Department of Labor issued an opinion letter stating that they might be (Wage and Hour Opinion Letter, FMLA-86, December 12, 1996). This has been extraordinarily confusing to both employers and employees. As a result, the misinterpretations have:

*fostered polarization in the workforce,
*caused dramatic increases in absenteeism rates in companies where paid family and medical leave were provided prior to the enactment of the FMLA,
*led to resentment from colleagues,
*sprung forth unnecessary litigation and provided temptation for the mischaracterization of leave,
*required otherwise productive resources to be consumed by minute counting and other administrivia,
*led to the explosion of a large FMLA industry to help employers and employees wrestle through the vague and changing interpretations, and
*had a chilling effect on the expansion of employers' progressive policies, including paid leave.

The Department of Labor's intermittent leave regulations (for leave taken in separate blocks of time due to a single qualifying reason) are unnecessarily difficult to administer. The regulations provide that an employer "may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it **is** one hour or

less." (29 U.S.C. 825.203(d)) Since some employers track time in increments as small as single minutes, the regulations have resulted in a host of problems related to tracking leave and in maintaining attendance control policies.

A survey conducted by former President Clinton's Department of Labor confirmed FMLA implementation problems. The DOL report found that the share of covered establishments reporting that it was somewhat or very easy to comply with the FMLA has declined 2 1.5% from 1995 to 2000.

Unfortunately, the greatest cost of the unintended consequences is to employees themselves. Two Department of Labor studies as well as the Society for Human Resource Management Surveys have all confirmed that by far the most prevalent method that employers use to cover work during FMLA leaves is to assign it temporarily to other co-workers. The FMLA interpretations allow for little or no advance notice of unscheduled leaves and inevitably require unscheduled overtime by coworkers that is sometimes unwelcome. Work coverage for questionable unscheduled absences has been especially challenging in industries where health care, critical services or safety issues are at stake.

C. A Solid Record Has Been Established: A sea of evidence has been presented in **six** Congressional hearings, numerous letters and comments and hundreds of press pieces (electronic, print and trade press). The six Congressional hearings have documented the serious and extensive nature of the Department of Labor's FMLA misinterpretations. Witnesses from companies of all types, sizes and geographic locations, including individuals who strongly supported the FMLA prior to its enactment, have provided extensive documentation of the problems which need to be fixed. In addition, some politicians instrumental in the Act's original passage have also strongly urged the Department to **fix** these problems.

These problems are also documented in a review of FMLA litigation. For example, the Spencer Fan Britt & Browne LLP litigation survey[1] revealed that there have been 58 reported court decisions in which the validity of an FMLA regulation was challenged (Attachment #2).

On March 19,2002, the Supreme Court struck down a portion of the existing DOL regulations in the first **FMLA** case before the Supreme Court (*Ragsdale v. Wolverine Worldwide, Inc.*). Although the Court only focused on one particular DOL regulation, there are a number of other DOL regulations that impose "across the board" penalties that will not meet the Court's standard which should be addressed by the Department. Consequently, other DOL regulations that include penalty provisions are now in question will probably not withstand judicial scrutiny, and will probably be held invalid by various courts unless the DOL amends the regulations to be consistent with the Supreme Court's recent decision.

[1] "Reported Court Cases in Which the Validity of an FMLA Regulation has been Challenged", Spencer Fane Britt & Browne UP, review of cases through March 20,2002.

In light of the historic *Ragsdale* decision and the fact that many other parts of the Department of Labor regulations are similarly inconsistent with Congressional intent, an increasing number of lawsuits challenging FMLA regulations are expected. Had the Department of Labor more closely reflected the intent of Congress in its FMLA implementing regulations in the first place, this litigation and confusion could have been avoided. If the DOL does not amend its other problematic interpretations, continued adherence with these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions and the courts) additional time, effort and money. This would be a regrettable waste of resources—a waste that is avoidable if the DOL restores its regulatory interpretations to properly reflect the original Congressional intent.

Despite this sea of evidence and despite numerous direct requests to take,action, the past Administration was unwilling to address these problems.

D. Action Is Needed: Take away the rhetoric and one simple reason for reform stands out: The law has not worked as intended. The fact that implementation is becoming more difficult not easier, nearly nine years after it has been in place is of great concern and makes the case for FMLA clarifications.

E. Action Would Allow for More Voluntarily Provided Paid Leave: The Family and Medical Leave Act of **1993** requires the following:

> ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES
>
> Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.[2]

These misapplications have penalized employers with the most generous leave policies and had a chilling effect on the expansion of paid leave. This problem is being recognized by the courts where numerous Department of Labor FMLA interpretations continue to be struck down and challenged. In order to facilitate the expansion of paid leave policies, current problems with the **FMLA** interpretations need to be addressed.

We believe that the FMLA implementing regulations and interpretations could be revised to be more efficient and effective without undermining the intent of the statute. More employers would establish and expand paid leave policies if the current FMLA misinterpretations--which currently foster misapplication, create confusion and invite litigation--are addressed.

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[2] **The** Family and Medical Leave **Act** of 1993, Public **Law** 103-3, Sec. 403.

III. Detailed Discussion of FM

This section provides a walk through for the following FMLA regulatory and interpretive irregularities which the coalition is nominating for review and revision. In the case of item **#8,** the coalition recommends that the Birth and Adoption Unemployment Compensation regulations be rescinded:

1. Definition of Serious Health Condition ***(Note: This improvement is especially critical since it has a ripple effect on many aspects of FMLA administration.)***
2. Intermittent Leave
3. Request for Leave and Two Day Notice Requirement
4. Substitution of Paid Leave
5. Definition of "Unable to Perform"
6. Health Care Provider Certification
7. Address Across the Board Penalties that will not Meet the Supreme Court's Standard (i.e. as Manifest in Ragsdale v. Wolverine Worldwide, Inc.)
8. Perfect Attendance Awards
9. Birth and Adoption Unemployment Compensation Regulations

The following brief discussion sections are provided for each nomination:

*Regulatory References
*Why this Clarification is Necessary
*Examples
*Summary

NOMINATION #1 -- DEFINITION OF "SERIOUS HEALTH CONDITION"

Revise Regulation 29 CFR 825.114(c) and Rescind Wage and Hour Opinion Letter FMLA-86 (12/12/96)

Why this Clarification is Necessary:

In passing the FMLA, Congress stated that the term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief, recognizing that "it is expected that such condition will fall within the most modest sick leave policies."[3] The Department of Labor's current regulations are extremely expansive, defining the term "serious health condition" as including, among other things, any absence of more that three days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor's visit, or a prescription, or a referral to a physical therapist) – such a broad definition potentially mandates FMLA leave where an employee sees a health care

[3] H.R. REP. NO. 103-8 at p. 40 (1993).

provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve; the regulations also define as a "serious health condition" any absence for a chronic health problem, such as arthritis, asthma, diabetes, etc., even if the employee does not see a doctor for that absence and is absent for less than three days.

Most of the leave taken under the **FMLA** has been for employees' own illnesses, most of which were previously covered under sick leave policies. The **FMLA** has become a national sick leave program – contrary to the strong assertions of the bill's original supporters.[4]

The Department of Labor has been inconsistent and vague in its opinion letters, leaving employers and workers guessing as to what DOL and the Courts will deem to be "serious":

- April 7, 1995 DOL opinion letter No. 57 said that "The fact that an employee **is** incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider **does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications)."**

- December 12, 1996 DOL opinion letter No. 86 then said letter No. 57 "expresses an incorrect view," that, in fact, with respect to **"the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.,"** if "any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment (continuing treatment by a health care provider), **"then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs**

[4] Proponents of the FMLA insisted the Act would be utilized only in times of real emergency. For example, Rep. Bill Clay, D-Mo.: "enables workers to provide necessary, crucial care at times of family crisis without jeopardizing the economic livelihood of the family" (Nov. 7, 1991); Rep. Marge Roukema, R-N.J.: "And by family medical crisis I don't mean a child with the sniffles or the flu – but an illness serious enough to require hospitalization or extended home convalescence. I mean a child or employee who has cancer and needs time for chemotherapy treatments. Serious illness means an elderly parent who suffers a broken hip and whose employed child needs time from work to assist their parent with home cam Serious illness means the employee who is in a car accident and requires hospitalization beyond the standard 2 weeks of paid sick leave typically given to employees ... What we are talking about here are severe medical emergencies" (Nov. 13, 1991); Rep. Waters, D-Cal.: "The likelihood of anyone taking any form of unpaid leave, especially extended unpaid leave, except under serious circumstances, is ridiculous" (Nov. 13, 1991); Sen. Deconcini, D-AZ: "We are not talking about a parent with the flu. We are talking about a child with cancer who must have radiation treatments. We are talking about an elderly parent recovering from a stroke who needs home care" (Oct. 2, 1991).

like antibiotics, the individual has a qualifying 'serious health condition" for purposes of FMLA."

Inclusion of all these various absences in the definition of "serious health condition" loses sight of what the FMLA statute was meant to do – protect employees who had serious medical problems in their families from losing their jobs.

- Since confusion over the definition of "serious health condition" has a ripple effect on many other aspects of the FMLA's medical leave administration, e.g. intermittent leave tracking issues, it is no surprise that serious health condition misapplications have been central to Congressional criticism of FMLA misinterpretation.

Examples:

- "Because of the overly broad nature of the definition of what constitutes a 'serious health condition' under the Act's implementing regulations, an inordinate amount of difficulty has resulted. I have seen the following situations certified by physicians as serious health conditions under the FMLA: P.M.S., various respiratory infections, asthma, ear aches, and emotional problems. Unfortunately, several marginal employees with absentee problems have learned that by characterizing situations as "chronic" conditions, they can avoid disciplinary action. Almost any situation can become a federally protected "serious health condition" qualifying for the FMLA by allowing the absence to continue more than three consecutive days and by seeking treatment more than one time. This treatment could include one doctor's visit and a prescription." Senate testimony of Libby Sartain, vice president for people, Southwest Airlines, May 9, 1996, p. 19.

- **A** Lake Charles, Louisiana employer had to settle with an employee for $20,000, after spending more than $50,000 on legal fees after a machine operator took a month off for an infected ingrown toenail. [the employee often called in sick – 49 days one year; once took off four days because her cat died]. Since the employee never mentioned needing medical leave, a district court granted summary judgment in favor of the employer after the employee sued following her firing, but the 5th Circuit ruled an employee need not expressly invoke the FMLA when notifying employer of need for leave. [Manuel v. Westlake Polymers Corp. 66 F.3d 758 (5th Cir. 1995); story featured by Forbes Magazine, May 5, 1997 and highlighted in the ***NBC Nightly News*** "In Focus" piece, "The High Cost of Good Intentions," May *3*, 1997. The ***NBC Nightly News*** piece was played by the U.**S.** House Subcommittee on Oversight and Investigations at the beginning of the June 10, 1997 hearing, Report No. 105-44, **p.** 35-38].

- "The aspect of determining whether the event is a "serious health condition" under the FMLA has been extremely difficult for our company. In fact, up to this point we have felt compelled to approve all requests as long as there is a physician willing to complete the certification form" Testimony of Dixie Dugan, Cardinal Service Management, House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs February 15,2000, p. **2.**

- " ▾▾ E XCorporation experienced a 42 percent increase in the percentage of incidental absences in the period 1992 to 1995, despite a reduction in the work force of 7,000 employees. Incidental absences are those of seven days or less for an employee's own illness. Annual costs increased 41 percent from $21 million to $30 million in just three years. ▾▾ **E X**also experienced a dramatic increase in the duration of these illnesses. In 1989, the average absence for employees was 2.8 days. That figure has increased to over five days in 1994 after the FMLA went into effect." House testimony of Thomas Burns, corporate director of benefits and compensation, ▾▾ **E X**, N.Y, June 10, 1997, p. 14.

- "Extremely broad Department of Labor regulations and guidance on the definition result in employers being required to certify all kinds of mild or minor conditions as FMLA-protected, including such things as bad colds, simple outpatient procedures not contemplated by the Congress which do not require extensive recovery times, and vague diagnoses of "depression", "stress", or "back pain". Despite an original opinion letter from the Department of Labor indicating that the cold, flu and non-migraine headaches were not serious health conditions, the Department issued a contradictory opinion letter the following year saying they could be. (These opinion letters are attached to my statement.) The conclusion of many employers is that the loose definition currently in use makes the Act a target for abuse. Many Connecticut employers have experienced the situation where an employee facing disciplinary action promptly brings in a doctor's form verifying an often-vague condition requiring immediate time off. This is extremely frustrating to employers, but it is equally disturbing to coworkers who are left with the work. One of the biggest frustrations I hear from supervisors is their inability to effectively address employee concerns about a coworker whose manipulation of well-intentioned leave provisions leaves them with extra work and additional stress." House Testimony of Kimberly Hostetler, Human Resources Subcommittee, Committee on Ways and Means, March 9, 2000, Report No. 106-114, p. 65.

These problems have placed the worst of all factors into companies' decision-making process regarding expanding paid leave policies -- growing legal uncertainties. **Unfortunately, this has had a chilling effect on the expansion of paid leave policies:**

- "Ironically, as a result of the FMLA, some employers are moving toward eliminating pre-FMLA generous programs and other companies are being discouraged by consultants from adopting them." Senate Testimony of Deanna R. Gelak, SPHR on behalf of the **FMLA** Technical Corrections Coalition and the Society for Human Resource Management, July 14, 1999, **p.** 22.

- "To address the need for some employees for paid family leave: First and foremost, address current problems with the FMLA's regulations and interpretations that are actually serving as a disincentive for companies to offer or expand paid leave policies." Testimony of Kimberly Hostetler, Human Resources Subcommittee, Committee on Ways and Means, March 9,2000, Report No. 106-1**14,** p. 70.

Summary:

- A strong case has been established on the need for the Department of Labor to address confusion over interpretations with what constitutes a "serious health condition" for medical leave under the FMLA. The record has identified that it is important to alleviate this current state of interpretive and legal confusion which is actually serving as a disincentive for companies to offer or expand paid leave policies.

- This is merely clarifying the Department of Labor's mixed signals from conflicting interpretations over the definition of "serious health condition" which has led to enormous confusion and unnecessary litigation, will result in employment policies which are more fair to all employees and which still achieve and protect the intent of the original FMLA law.

- Workers as well as employers should have more consistency (regardless of which legal circuit they reside in) in terms of what conditions are expected to be protected as FMLA leave.

- This addresses unintended consequences which have affected people like Dixie Dugan who utilized the **FMLA** herself, but explained to Congress how contradictory interpretations are hurting people. She stated the following:

  "Personally, I utilized the Family and Medical Leave Act during the last few months of my mother's terminal cancer. . .Cardinal Service Management provided generous paid leave benefits to accommodate our employees before the law was enacted. Especially in this time of a tight labor market, we have to be concerned with meeting the needs of all of our employees. We have every interest in following existing laws but hope that some clarification and definition of the Department of Labor's "serious health condition" interpretations will allow us to do so within the letter of the law. I am glad that the FMLA is here to stay, but the

Department of Labor's regulations and interpretations have broadened the Act and made compliance difficult. We are concerned that DOL opinion letters are 1) not readily available to all employers and **2)** going beyond the original intent of the law." Testimony of Dixie Dugan, Cardinal Service Management, Government Reform Committee, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs February 15, 2000, p. 1.

Basic Statement of Corrective Action Needed:

- Reverse the detrimental impact of 1996 opinion letters which expanded the scope of the FMLA to include minor illnesses which were not intended by Congress to be subject to the protections of FMLA.

- Reaffirm that incapacity for three days and continuing treatment by a health care provider do not convert a minor illness into a "serious health condition" covered by the FMLA.

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Revise Regulation ***29*** *CFR 203(d)*

Why a Correction is Necessary:

Congress drafted the **FMLA** to allow employees to take leave in less than full day increments. The intent was to address situations when an employee may need to take leave for intermittent treatments, e.g., for chemotherapy or radiation treatments, or other medical appointments. Granting leave for these conditions has not been a significant problem. However, the regulations provide that an employer "may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." 825.203(d). Since some employers track in increments of as small as six or eight minutes, the regulations have resulted in a host of problems related to tracking the leave and in maintaining attendance control policies. In many situations, it is difficult to know when the employee will be at work, and in many positions, an employee who has frequent, unpredictable absences can play havoc with the productivity and scheduling of an entire department when employers do not know if certain employees will be at work. Allowing an employer to require an employee to take intermittent leave in increments of up to one-half of a work day would ease the burden significantly for employers, both in terms of necessary paperwork and with respect to being able to cover efficiently for absent employees.

Examples:

- Even the earliest research conducted by the **U.S.** Commission on Leave found that approximately 40 percent (39.2 percent) of employers were experiencing serious difficulties attempting to comply with the intermittent leave provisions. These problems are exacerbated by the FMLA's vague definition of serious health condition and the fact that no penalty exists for employees who fail to provide advance notice to the employer of their need for leave. Approximately three-quarters *(76* percent) of respondents to a 2000 survey by the Society for Human Resource Management said they would find compliance easier if the Department of Labor allowed covered leave to be offered and tracked in half-day increments rather than minutes. The SHRM® 2000 FMLA Survey which is referenced in H.R. 2366, the Family and Medical Leave Clarification Act.

- "The use of intermittent leave for chronic illnesses of an unpredictable nature, such as migraines, asthma, and other conditions, sometimes results in the employee being gone unpredictably as often as every week." House testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Inc., Kansas City, Missouri, June 10, 1997, p. 71.

- "An employee, for example, can be absent every week for one day, or every day for 1.5 hours, and never exhaust FMLA leave time. Hallmark has had several employees turn in medical certifications for migraines or other chronic conditions, and then be absent on a weekly basis for a day or two." Hupp House testimony, Id. at p. 81.

- "We have one intermittent leave taker who basically comes and goes as she pleases, attributing this to her FMLA-covered condition, a condition which I believe to be genuine. But as other employees witness the goings and comings of this leave taker, the stage is being set for other employees to manipulate the system and utilize FMLA leave to arrive and depart as they please. Employers should have the right to require that intermittent leave be taken in minimum blocks of **4** hours. This would minimize the misuse of FMLA by employees to excuse tardiness and justify early departures before the end of a work shift." House testimony of George Daniels, president, Daniels Manufacturing Company, Orlando, Florida, June 10, 1997, p. 8.

- "The intermittent leave provisions of the FMLA may be the most problematic part of the Act. ***An*** employee can have regular tardiness and never run out of FMLA leave time. ***[An*** example from my hospital]: ***An*** employee who is scheduled to work a shift that begins at 7 a.m. and ends at 3:30 p.m. has a child with cerebral palsy. The employee is consistently tardy, although the amount of time she is tardy fluctuates, due to problems getting her child situated in the morning. Her department felt it would be easier for her to have a shift that started later in the day and easier for her department since a night shift employee has to stay until he is relieved by this individual. She was offered the exact same job at the exact same rate of pay on a shift starting later. She did not want to do this, saying it would cause her daycare

Department of Labor's regulations and interpretations have broadened the Act and made compliance difficult. We are concerned that DOL opinion letters are 1) not readily available to all employers and 2) going beyond the original intent of the law." Testimony of Dixie Dugan, Cardinal Service Management, Government Reform Committee, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs February 15,2000, p. 1.

Basic Statement of Corrective Action Needed:

- Reverse the detrimental impact of 1996 opinion letters which expanded the scope of the FMLA to include minor illnesses which were not intended by Congress to be subject to the protections of FMLA.
- Reaffirm that incapacity for three days and continuing treatment by a health care provider do not convert a minor illness into a "serious health condition" covered by the **FMLA.**

NOMINATION #2--MINIMUM INCREMENTS OF INTERMITTENT LEAVE

*Revise Regulation **29** CFR 203(d)*

Why a Correction is Necessary:

Congress drafted the **FMLA** to allow employees to take leave in less than full day increments. The intent was to address situations when an employee may need to take leave for intermittent treatments, e.g., for chemotherapy or radiation treatments, or other medical appointments. Granting leave for these conditions has not been a significant problem. However, the regulations provide that an employer "may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." 825.203(d). Since some employers track in increments of as small as six or eight minutes, the regulations have resulted in a host of problems related to tracking the leave and in maintaining attendance control policies. In many situations, it is difficult to know when the employee will be at work, and in many positions, an employee who has frequent, unpredictable absences can play havoc with the productivity and scheduling of an entire department when employers do not know if certain employees will be at work. Allowing an employer to require an employee to take intermittent leave in increments of up to one-half of a work day would ease the burden significantly for employers, both in terms of necessary paperwork and with respect to being able to cover efficiently for absent employees.

Examples:

- Even the earliest research conducted by the U.S. Commission on Leave found that approximately 40 percent (39.2 percent) of employers were experiencing serious difficulties attempting to comply with the intermittent leave provisions. These problems are exacerbated by the FMLA's vague definition of serious health condition and the fact that no penalty exists for employees who fail to provide advance notice to the employer of their need for leave. Approximately three-quarters (76 percent) of respondents to a 2000 survey by the Society for Human Resource Management said they would find compliance easier if the Department of Labor allowed covered leave to be offered and tracked in half-day increments rather than minutes. The SHRM® 2000 FMLA Survey which is referenced in H.R. 2366, the Family and Medical Leave Clarification Act.

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- "An employee, for example, can be absent every week for one day, or every day for 1.5 hours, and never exhaust FMLA leave time. Hallmark has had several employees turn in medical certifications for migraines or other chronic conditions, and then be absent on a weekly basis for a day or two." Hupp House testimony, Id. at p. 81.

- "We have one intermittent leave taker who basically comes and goes as she pleases, attributing this to her FMLA-covered condition, a condition which I believe to be genuine. But as other employees witness the goings and comings of this leave taker, the stage is being set for other employees to manipulate the system and utilize FMLA leave to arrive and depart as they please. Employers should have the right to require that intermittent leave be taken in minimum blocks of 4 hours. This would minimize the misuse of FMLA by employees to excuse tardiness and justify early departures before the end of a work shift." House testimony of George Daniels, president, Daniels Manufacturing Company, Orlando, Florida, June 10, 1997, p. 8.

- "The intermittent leave provisions of the FMLA may be the most problematic part of the Act. An employee can have regular tardiness and never run out of FMLA leave time. [An example from my hospital]: An employee who is scheduled to work a shift that begins at 7 a.m. and ends at 3:30 p.m. has a child with cerebral palsy. The employee is consistently tardy, although the amount of time she is tardy fluctuates, due to problems getting her child situated in the morning. Her department felt it would be easier for her to have a shift that started later in the day and easier for her department since a night shift employee has to stay until he is relieved by this

individual. She was offered the exact same job at the exact same rate of pay on a shift starting later. She did not want to do this, saying it would cause her daycare problems at the end of the day. We solicited an opinion from the area DOL office and were told that requiring the employee to change her shift to a later time would not be substantially the same job and therefore would not be allowable. The DOL also said that the change in shift start time would likely constitute a denial of her rights to FMLA leave and would also be another basis for a violation. Since her child's cerebral palsy is a permanent condition, this employee is seemingly forever immunized from tardiness." House testimony of Laura Avakian, senior vice president, human resources, Beth Israel Deaconess Medical Center and Caregroup, Boston, Mass., June 10, 1997, House Report, No. 105-44, p. 188-89.

- "And now, people are characterizing short-term illnesses as chronic conditions. That, coupled with the intermittent leave, you have to let people off for the shortest period of time your payroll system will calculate. One-third of our employees travel in an airplane, and it is very difficult – as you can imagine, it is impossible – and we cannot comply with that, because if we let a flight attendant off the plane, obviously, he or she cannot continue to work the rest of the week. So they miss the whole rest of the work week if they go off for even 15 minutes, because the flight leaves without them." Senate testimony of Libby Sartain, vice president, people, Southwest Airlines, May 9, 1996, p. 17.

- "In the healthcare industry, managing intermittent leave is particularly difficult. Given the expansive definition of "serious health condition" and the broad entitlement to intermittent leave, employers are put in a very difficult position when employees use intermittent leave. For example, ailments such as migraine headaches, allergies, asthma, and back pain have all recently been the subject of intermittent certification in our organization. In this situation, we must allow the employee up to 480 hours off of work to tend to these conditions. More often than not, the time off comes without any advance notice. It may come moments before a shift begins, during a shift or at the end of the day. The regulations prohibit us from requiring a note from the employee once we've received an initial certification for an ongoing condition. For example, a certification for intermittent leave for migraine headaches may say, "employee may be absent intermittently, 3-4 times per month." As a result, we must arrange to cover the employee's patient care responsibilities without advance notice and without adversely impacting our patients or our other valued employees. Additionally, none of the intermittent absences subject the employee to any coaching or counseling on absenteeism until after the expiration of the 480 hours, or 60 days. Even then, the employer's policy on unscheduled absenteeism would not be implicated until the unprotected absences have already reached an intolerable level." House Testimony of Kenneth A. Buback, April 11 2002, pp. 7-8.

- Intermittent leave **is** an important component of the FMLA; however, the expansive definition of serious health condition has changed the nature of most types of intermittent leave. Treatments such as chemotherapy, radiation, and kidney dialysis were the types of conditions contemplated by Congress, but are among the more infrequent uses of FMLA intermittent leave. It is much more common to have multiple employees in a single department or work unit certified for intermittent leave for conditions such as migraine headaches, back aches, allergies, etc. which Congress assumed would be covered under an employer's sick leave plan rather than the FMLA. The nature of these conditions makes advance planning for staffing virtually impossible. Id., p. 8.

Summary:

- Minimize unnecessarily convoluted tracking and administrative burdens ("administrivia") while maintaining the original intent of the law, by permitting employers to require employees to take "intermittent" leave (FMLA leave taken in separate blocks of time due to a single qualifying reason) in increments of **up** to one-half of a work day.

Basic Statement of Corrective Action Needed:

- Reduce the tracking difficulties and scheduling disruption caused by employees taking FMLA leave in frequent, small increments.

NOMINATION #3 -- REQUEST FOR LEAVE AND TWO DAY NOTICE REQUIREMENT

Revised Regulation 29 CFR 825.302(d)

Why a Correction is Necessary:

Shifting the burden to the employee to request leave be designated as **FMLA** leave eliminates the need for the employer to question the employee and **pry** into the employee's and the employee's family's private matters, as required under current law, and helps eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations which even attorneys have a difficult time understanding. Under current law, it is the employer's responsibility in all circumstances to designate leave, paid or unpaid, as FMLA-qualifying. 825.208. ***An*** employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice. Sections 825.302(c) and 825.208(2). ***An*** employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by the FMLA, does not need to assert such right either. Id. Employees often call in sick and

supervisors are unaware that the mere mention of illness triggers obligations to determine FMLA coverage and to notify the employee of rights and obligations under the Act. This has led to supervisors being held personally liable for incorrect decisions.

Examples:

- Mistakenly ignoring or misreading the complex FMLA regulations can put employers in court or out of business. The courts have held that there is personal liability for employers under the FMLA and that an individual manager may be sued and held individually liable for acts taken based upon or relating to the FMLA. See Freemon v. Folev, 911 F. Supp. 326 (N.D. Ill. 1995) (in case of first impression in 7th Circuit, court stated, "We believe the FMLA extends to all those who controlled 'in whole or in part' [plaintiffs] ability to take leave of absence and return to her position").

- "Individual supervisors are personally liable under FMLA ... It is really unfair for a supervisor to lose his or her home and life savings for having made a mistake in the administration of a law as complicated as FMLA. FMLA requires activities prohibited by the Americans with Disabilities Act . . .The FMLA (Sec. 825.302) actually requires employers to interrogate employees, not only about the employee's own medical conditions, but also about the medical conditions of some of the employee's relatives which might trigger FMLA leave eligibility on the part of the employee. Many of our supervisors find conducting such interrogations to be personally distasteful ... Our supervisors literally are put in the position of having to violate one law in order to comply with another law. No one should be put in this position." House testimony of George Daniels, president, Daniels Manufacturing Company, Orlando, Florida, June 10, 1997, p. **8.**

- Potential liability for individual supervisor liability is increased by court decisions like Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995), which hold that employees need not mention the FMLA and employers are left guessing as to whether an employee needs FMLA leave. This case involved an ingrown toenail and company settled for $20,000 after spending more than $50,000 on attorney's fees.

Certainly, the two-day notice reauirement is not practical and needs to be expanded:

"The law provides employers two days to designate employee absences as FMLA time off once the employer knows the leave is needed for an FMLA required reason. However, in many organizations, determining if absence is FMLA time most frequently occurs when time records are submitted for payroll processing - generally once a week or once every other week; the result is that the employer representative responsible for providing FMLA notice doesn't learn of the situation until well after the two day notice period has expired, and the employer cannot correct these entries

retroactively." House Testimony of Kimberly Hostetler, Ways and Means Committee, Subcommittee on Human Resources, Report No. 106-114 p. 65

"For most companies, it is almost impossible for employers to provide written guidance to the employee within 2 days all of the employee's rights and obligations under the FMLA in addition to a notification as to whether or not the leave that they have taken appears to be covered by the FMLA. Given the various certification processes it may be weeks before employers can confirm that the leave actually qualifies under the FMLA. Also, physicians and employees often refuse to provide the necessary information on a timely basis. In fact, many physicians are so irritated by the excessive paperwork requirements of the **FMLA** that they are now charging employees, or employers for this certification (on a per page rate)." House Oversight and Investigations Subcommittee, Testimony of Lynn Outwater, Report No. 105-44, pp. 52-53.

- "One recent example involved a health care employee with a significant history of absenteeism. This employee was told that she could not have any unexcused absences for the next 90 days. This employee knew that absences due to her asthma, which had previously been certified as intermittent leave, and absences due to her workers' compensation injury would not be counted against her. On the 89th day, the employee called up and said she wouldn't be at work because her back hurt and she would be going to the doctor. After confirming that the absence was not due to her asthma or workers' compensation leave, the employer counseled this employee. The employee saw her physician who gave her anti-inflammatory medication and told her to alternate between ice and heat when her back hurt. As a result, the employee was eligible for **FMLA** and the employer's counseling had violated the FMLA." House Testimony of Kenneth A. Buback, April 11,2002, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, p. 9.

Summary:

Where the employer does not exercise its right to require the employee to substitute other employer-provided leave under the FMLA, shifts to the employee the need to request leave be designated as FMLA leave, and requires the employee to provide written application within five working days of providing notice to the employer for foreseeable leave, and within a time period extended as necessary for unforeseeable leave, if the employee is physically or mentally incapable of providing notice or submitting the application.

Basic Statement of Corrective Action Needed:

- Allow employers to plan coverage for employees' absences by requiring employees to apply for FMLA leave as they would apply for any other employer-provided leave.

NOMINATION #4 -- SUBSTITUTION OF PAID LEAVE

Support Legislation to:

Amend Section 102(d)(2) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(d)(2)) as follows:

Add at the end the following: "(C) PAID ABSENCE- Notwithstanding subparagraphs (A) and (B), with respect to leave provided under subparagraph (D) of subsection (a)(1), where an employer provides a paid absence under the employer's collective bargaining agreement, a welfare benefit plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), or under any other sick leave, sick pay, or disability plan, program, or policy of the employer, the employer may require the employee to choose between the paid absence and unpaid leave provided under this title.".

Why a Correction is Necessary:

Despite the common belief that leave under the **FMLA** is necessarily unpaid, most **FMLA** leave has become paid leave. This is due to employers' generous sick leave policies or employee-friendly sick leave programs which have been worked out with unions in collective bargaining agreements. Department of Labor regulation 825.700 states that an employer must observe any employment benefit program or plan than provides greater rights than the **FMLA.** The regulations also provide that either employees or employers can substitute any category of paid leave for **FMLA** leave (Section 825.207). To further complicate the situation, DOL regulation 825.220(c) states that employers cannot use the taking of **FMLA** leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can **FMLA** leave be counted under "no fault" attendance policies. Thus, the DOL regulations prohibit employers from using disciplinary attendance policies to manage employees' absences, even though employers are required to pay for the absences under their short-term disability programs if either the employee or the employer elects to substitute paid leave.

Examples:

- "It was assumed that the **FMLA's** leave entitlement would not lead to overuse because it was unpaid, and only those employees truly in need would exercise this right. However, because of many employers' existing paid leave policies and collective bargaining agreements, the leave under the **FMLA** is fully paid in many instances. According to the U.S. Commission on Leave, **66.3** percent of **FMLA** leave is paid (**46.7** percent fully paid). This existing paid leave sandwiched on top of the broad, yet vague, FMLA definitions has resulted in employees requesting or characterizing a variety of minor situations as **FMLA** leave." House testimony of

Lynn Outwater, on behalf of the Society for Human Resource Management and the **FMLA** Technical Corrections Coalition, June 10, 1997, p. **48.**

- "In 1996, approximately 79 percent of the **FMLA** leave time at Hallmark was paid. Paid absence at Hallmark has increased at least 35 percent since 1993." House testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Kansas City, Missouri, June 10, 1997, p. 8.

- "Hallmark offers paid sick leave (short-term disability) at full pay for up to six months. Under the DOL regulations, employees can choose to substitute this paid leave for their own serious health conditions. There is no incentive for employees to choose unpaid leave instead of paid leave, because by choosing paid leave, the employee get all the benefits of the FMLA (job protection and protection from any discipline for being absent) and also gets paid." House testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Kansas City, Missouri, June 10, 1997.

- "Prior to the FMLA, an employee who repeatedly was absent for more than three days at a time would likely have faced disciplinary consequences; today, most absences of more than three days are protected by the FMLA. Hallmark has lost the flexibility to address employee absences since the effective date of the **FMLA** ... Employers cannot manage any absence that qualifies as a 'serious health condition' under the broad definition in the DOL regulations." June 27, 1997 statement by M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, submitted for record of June 10, 1997 House hearing.

- "Would it be [Congress'] intent that employers should go back and limit the amount of benefits that they offer? The problem has been that we had a system in place that we could work with employees to discuss with them what was an acceptable attendance standard and what was not. Now we are paying them for the 12 weeks that they can take off under FMLA." Hupp's House testimony, Id., p. 23.

- " " E X Corporation's sickness disability benefit plan provides up to 52 weeks of paid salary continuation for each illness. Since the FMLA was enacted, " E X has experienced a **42** percent increase in the percentage of incidental absences from 1992 to 1995, despite a reduction in the work force of 7,000 employees. Incidental absences are those of seven days or less for an employee's own illnesses. As a result, annual costs increased 41 percent from $21 million to $30 million in just three years." House testimony of Thomas E. Burns, corporate director of benefits and compensation, **" E X** Corporation, New York, ***NY*,** June 10, 1997, p. 14.

- "Two things have happened since the enactment of FMLA. First, the definition of 'serious health condition' has enabled practically all absences to qualify for the

FMLA. Second, " E X can no longer use its absence control program to monitor absences if an employee successfully qualifies for FMLA. " E X does not have a sick bank that uses a certain number of sick days to give employees time off Instead, we have unlimited sick leave. If an employee is sick, we want that individual to stay home from work until he or she has recuperated. At the same time, we will keep track of these absences. We have established standards for punctuality and attendance. Before the FMLA, these standards were generally met by employees. Since FMLA ... the absence control plan has been useless." Burns' House testimony, Id., p. 15.

- "We had paid leave long before FMLA was contemplated, and what we paid for is sickness also, up to a year. And what has really happened is that we have intermingled the requirements of FMLA so that if a person claims under FMLA, we are in the unintended result of having to pay for FMLA, because you couldn't, under the law, take away the benefits that you previously had given to employees because of the imposition of FMLA." Burns' House testimony, Id., p. 19-20.

- "Unfortunately, the generous companies that provided paid leave long before FMLA was enacted are experiencing many disastrous results. Because of the vague and overly broad FMLA definitions, these companies are now finding paid-leave programs to be most difficult to administer and sometimes unaffordable. Ironically, as a result of the FMLA, some employers are moving toward eliminating pre-existing generous programs and other companies are being discouraged by consultants from adopting them." House testimony of Lynn Outwater, SHRM and FMLA Technical Corrections Coalition, June 10, 1997, p. 55-56.

- "Because of the problems associated with leaves under the FMLA for minor conditions, many employers' 'perfect attendance' programs have come to be viewed as meaningless by those employees who earn the awards without any absences. Several employers have discontinued their award programs for this reason." House testimony of Lynn Outwater, Id., June 10, 1997, p. 52.

- "At Southwest Airlines, three employees have come back to the company as much as two years later asking for leave to be counted retroactively as FMLA leave, in order to avoid being terminated for attendance issues." Libby Sartain's Senate Testimony, May 9, 1996.

Summarv:

With respect to leave taken because of the employee's own serious health condition, legislation could permit an employer to require the employee to choose between taking unpaid leave provided by the FMLA or paid absence under an employer's collective bargaining agreement or other sick leave, sick pay, or disability plan, program, or policy of the employer. This change

would **provide an incentive for employers to continue their generous sick leave policies** while **providing a disincentive to employers considering getting rid of such employee-friendly plans, including those negotiated by the employer and the employees' union representative.** Paid leave would be subject to the employer's normal work rules and procedures for taking such leave, including work rules and procedures dealing with attendance requirements.

Basic Statement of Corrective Action Needed:

- Eliminate conflict between FMLA and employers' voluntary paid sick leave policies.
- Avoid converting unpaid FMLA leave entitlement into an entitlement to paid FMLA leave.

NOMINATION #5 – DEFINITION OF "UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION"

Revise Regulation (29 CFR 825.115)

Why a Correction is Necessary: An employee is able to take FMLA leave whenever the employee is restricted from performing just one of the job's essential functions (as opposed to situations where the employee is unable to perform the majority of the functions of the employee's position).

Examples:

- An employee has a job in a warehouse that requires lifting **up** to 75 lb. The employee is medically restricted from lifting over 30 lb. The employer is willing to have the employee come to work and do the light lifting, assigning all the over-30-lb. lifting to coworkers. Today, the employee can stay home on FMLA leave.
- Same employee is restricted from any lifting. Employer is willing to have him do clerical work until he can lift again. Today, the employee can stay home on **FMLA** leave. We think that's wrong. People who can work should be at work if their employers are willing to honor their medical restrictions.

Summary:

- Consistent with other employment law and back-to-work practice, employers should be permitted to provide "light duty" or other alternative work to employees who are unable to perform their regular jobs.

Basic Statement of Corrective Action Needed:

- Limit FMLA leave to situations where the employee is unable to perform the majority of the functions of the employee's position, rather than allowing an employee to take FMLA leave whenever the employee is restricted from performing just one of the job's essential functions.

- Permit employers to provide "light duty" or other alternative work to employees who are unable to perform their regular jobs.

NOMINATION #6 -- HEALTH CARE PROVIDER CERTIFICATION

Revise Regulation 29 CFR 825.306 and 29 CFR 825.307(a)

Why a Correction is Necessary: Health care providers are accustomed to responding to telephone inquiries from employers and the information they provide on the FMLA certification form is often internally inconsistent or does not support a finding of incapacity. Due to the limits imposed by the Department of Labor's regulations, the employer's health care provider cannot even call the employee's health care provider if the employee declines to give permission. Nor can the employer's health care provider obtain the usual documentary support for a disability. These limitations either lead the employer to deny FMLA coverage due to lack of sufficient certification, or to grant FMLA coverage despite the lack of sufficient factual support just to avoid a dispute. This clarification would simply give the employer more information upon which to determine whether or not a leave request qualifies under the FMLA.

Examples:

- "Under the Department of Labor's regulations, a certification form is the only way that the employer can verify the leave. The employer cannot call and speak to the doctor or caregiver." Testimony of Dixie Dugan, Cardinal Service Management, Government Reform Committee, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, February 15, 2000, Report No. 106-171, **p.** 84. Note: Ms. Dugan attached a copy of the Department of Labor's Certification of Health Care Provider Form to her testimony (Testimony Attachment #1, found on pp. 89-92 of Committee Report 106-171).

- "The medical certification process as defined by the DOL is cumbersome. Employers have little means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense ... Each of these steps is likely to take at least an additional 15 days ... It could easily be two months or more before the employer has sufficient information to determine whether an absence should be covered by the FMLA." Senate testimony of

M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Inc., Kansas City, Missouri, May 9, 1996, p. 67.

- "Further compounding the problems caused by the DOL regulations is the fact that many doctors are unfamiliar with the FMLA and the requirements that employees submit medical certification forms. Hallmark has had several doctors in the Kansas city metropolitan area complain that Hallmark has imposed the lengthy medical certification form on the medical community; they simply do not recognize that this is a federal regulatory requirement." Id.

- "Under the regulations, employers have little or no means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense ... The second and third opinion process is extremely expensive. Hallmark has had quotes of more than $1,000 from physicians for providing second opinions. Hallmark has actually incurred costs of more than $700 for a physician to provide a second opinion on an absence for a back injury, and more than $600 for a second opinion on an absence for a mental illness. Hallmark had over 1,900 employees take **FMLA** leave during 1996. With this rate of FMLA usage, the cost of obtaining second and third opinions is a real deterrent to Hallmark's attempts to manage FMLA leaves. If each second opinion were to cost $600, Hallmark would spend over $1 million just on second opinions, quite apart from the cost of third opinions where the first and second opinions disagreed." House testimony of Ms. Hupp, June 10, 1997, p. 78-79.

- "In one recent situation we had an employee who returned with a fitness for duty evaluation from her physician following back surgery. The note indicated that she was fit to "return to full duty." This employee was a nurse in the Critical Care unit and had various lifting, pushing and pulling requirements that we questioned. The employee refused to allow us to talk with her physician. Under the FMLA regulations, this employee needed to be returned to her position without delay. Subsequent observations of this employee indicated that she was unable to perform her job duties and she was subsequently removed from patient care pending an evaluation." House testimony of Kenneth **A.** Buback, April 11, 2002, p. *9*.

The following line of questioning from Human Resources Committee Chairperson Nancy Johnson to Hearing Witness Kimberly Hostetler also documents this problem:

> "Chairperson JOHNSON. **Is** there any form—you know, workman's comp, you have a form. You can have a doctor evaluate.
> Ms. HOSTETLER. No, there is not. You can't talk to the doctor. The employer is not even able to discuss with the physician, not ask any questions. That is prohibited by the regulations. The employer is also prohibited from using their own physician—if they've got a company doctor, so to speak, that they've used for worker's comp or some of these

other statutory requirements they're not allowed to use that provider in the case of family medical leave. That seems another odd twist that makes it more difficult for employers.
Chairperson JOHNSON. This is really quite a different system in every way than either our unemployment comp or our workman's comp system.
MS. HOSTETLER. Completely.
Chairperson JOHNSON. This really makes my point. I know I was pretty tough on the guy from the Department of Labor but to do this ***[propose the Baby UI rule—clarification added]*** without looking at what has been happening and how we might need to refine or amend former law to provide paid leave when you don't even have the tools to determine whether the person was really sick, this is unheard of, unprecedented, and I am—I'm a moderate Republican." Exchange between Chairperson Nancy Johnson and Witness Kimberly Hostetler, March 9, 2000, Report No. 106-114, p. 100.

Summarv:

- Problems faced in determining the validity of an employee's **FMLA** certification need to be addressed by clarifying that sufficient certification under the **FMLA** must allow employers to verify **FMLA** leaves the same way they verify other employee absences for illness.
- This will allow employers and health care providers to communicate so that health care providers understand the requirements of the employee's job.

Basic Statement of Corrective Action Needed:

- Allow employers to verify **FMLA** leaves the same way they verify other employee absences for illness.

- Permit employers to communicate with health care providers to ensure that they understand the requirements of the employee's job and the employer's willingness to make alternative work (such as "light duty") available to the employee.

NOMINATION #7 -- ADDRESS ACROSS THE BOARD PENALTIES THAT WILL NOT MEET THE SUPREME COURT'S STANDARD (I.E., AS MANIFEST IN *RAGSDALE V. WOLVERINE WORLDWIDE, INC.*)

(REFLECTIONS ON [illegible] E

Whv a Correction is Necessarv:

On March 19,2002, the Supreme Court struck down a portion of the existing DOL regulations in the first **FMLA** case before the Supreme Court ***(Ragsdale v. Wolverine Worldwide, Inc.).*** The Court reviewed one particular regulation (one sentence) promulgated by the DOL, which states as follows:

> "If an employee takes paid or unpaid leave and the employer does not designate the leave as **FMLA** leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR Section 825.700(a).

The Court decided that this regulation is invalid because it contradicts the remedy provisions provided by Congress in the FMLA Act itself. In essence, the Court said that the DOL regulation contains a remedy that contradicts the remedies passed by Congress.

Although the Court only focused on one particular DOL regulation, there are a number of other DOL regulations that impose "across the board" penalties that will not meet the Court's standard. The Court did not decide whether any other penalty provisions contained in the DOL regulations are invalid. However in light of the rationale used by the Court in reaching its decision, it is likely that other penalty provisions in the DOL regulations will be invalidated using the same rationale. Consequently, other DOL regulations that include penalty provisions are now in question will probably not withstand judicial scrutiny, and will probably be held invalid by various courts unless the DOL amends the regulations to be consistent with the Supreme Court's recent decision.

In light of the historic *Ragsdale* decision and the fact that many other parts of the Department of Labor regulations are similarly inconsistent with Congressional intent, an increasing number of lawsuits challenging FMLA regulations are expected. Had the Department of Labor more closely reflected the intent of Congress in its **FMLA** implementing regulations in the first place, this litigation and confusion could have been avoided. If the DOL does not amend its other problematic interpretations, continued adherence with these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions and the courts) additional time, effort and money. This would be a regrettable waste of resources—a waste that is avoidable if the DOL restores its regulatory interpretations to properly reflect the original Congressional intent.

Summary:

- The Department of Labor should address the various penalty provisions that go beyond Congressional intent and have been challenged in court while eliminating the erroneous rules struck down by the Supreme Court (permitting employees to claim more than 12 workweeks of FMLA leave per year even if they have not been harmed by the employer's late designation of FMLA leave).

NOMINATION #8 -- PERFECT ATTENDANCE AWARDS

Revise Regulation 29 CFR 825.215 (c)(2) and Revise 29 CFR 825.220

Whv a Correction is Necessarv:

The time an employee takes away from work under the Family and Medical Leave Act may not be counted against the employee for the purpose of perfect attendance awards.

The FMLA states "the taking of leave shall not result in the loss of any employment benefit accrued prior to the date of the leave". Employment benefits are defined as "all benefits provided or made available to an employee by an employer". The Department of Labor regulations have interpreted that to mean attendance awards, but the benefits contemplated in the law are "group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions" - clearly Congress was concerned about the loss or reduction of significant health and welfare benefits.

Examples:

- "An employee who has taken three months off under FMLA - or missed 38 days intermittently due to a chronic condition - may still be eligible for a perfect attendance award. Coworkers find this impossible to understand. Morale is affected when those rewarded for perfect attendance are recognized together with colleagues who no one has seen in months. To include perfect attendance programs - when attendance is the essence of the program - seems to go beyond congressional intent. Not only is such an interpretation unfair to employees who do have perfect attendance, but it is also unfair to employees who may need to miss time for equally compelling reasons that may not qualify for FMLA (such as having to take time for the funeral of a family member). We are not suggesting that absences covered by FMLA be counted for. attendance control purposes or for performance evaluation, but only in the single instance of attendance award programs where it would make so much sense to employees and employers alike." House Testimony of Kimberly Hostetler, Ways and Means Committee, Subcommittee on Human Resources, Report No. 106-114, p. 55-56.

- "Because of the problems associated with leaves under the FMLA for minor conditions, many employers' 'perfect attendance' programs have come to be viewed as meaningless by those employees who earn the awards without any absences. Several employers have discontinued their award programs for this reason." House testimony of Lynn Outwater, SHRM and the FMLA Technical Corrections Coalition, June 10, 1997, p. 52.

- "Unfortunately, the FMLA has also forced many employers to abandon their attendance reward policies, because the Act prohibits them from successfully administering such policies. Because of the problems associated with leaves under the FMLA for minor conditions, many employers' 'perfect attendance' programs have come to be viewed as meaningless by those employees who earn the awards without any absences." Testimony of Lynn Outwater, SHRM and the FMLA Technical Corrections Coalition, House Subcommittee on Oversight and Investigations, June 10, 1997, Report No. 105-44, p. 52.

- "Some employers have eliminated perfect attendance awards." House Testimony of Kimberly Hostetler, Ways and Means Committee, Subcommittee on Human Resources, Report No. 106-114, p. 66.

Summarv:

- Addresses an incorrect interpretation which has been counter intuitive and unfair to workers who earn perfect attendance awards.
- Addresses an unintended conflict between the FMLA and attendance recognition programs.
- Employees who work hard to earn perfect attendance awards without any absences will be better served.

Basic Statement of Corrective Action Needed:

- Clarify that employers may record FMLA leaves as absences for purposes of perfect attendance awards only (the only "employeebenefit" that could be so affected by FMLA use).

Nomination #9—Rescind the th and Adoption Unemployment Compensation (BAA UC) Regulations issued on 13,2000

Rescind the BAA-UC Regulation (65 Fed. Reg. 37,211).

Why Rescinding the BAA-UC Regulations is Necessary:

While the members of the FMLA Technical Corrections Coalition believe that paid leave is a desirable benefit and encourages its members to provide a whole host of work-life benefits to employees, including leave for the birth or adoption of a child, we strongly urge the Administration to begin rulemaking to rescind the Birth and Adoption Unemployment Compensation Rule.

The illegal BAA-UC rule established by the previous Administration inappropriately allows the authorized use of funds from state unemployment insurance trust accounts for workers who take leave for the birth or adoption of a child. The rule ignores Congress' action regarding the FMLA and Unemployment Insurance laws and is a back door attempt to create a government funded paid leave system which was not authorized by Congress. Ultimately, the BAA-UC regulations will shred the unemployment safety net that is established for the purpose of assisting unemployed individuals who are out of work.

The continuation of the ill advised BAA-UC program will jeopardize the security of the unemployment safety net and will result in employers paying higher unemployment compensation taxes for a program completely unrelated to unemployment. In these difficult economic times, many states with once full reserves are drawing down those reserves to pay benefits due to increased unemployment. Ultimately, there is increased pressure to raise payroll taxes to replenish UI trust funds. The federal government and taxpayers are likewise affected since the federal government is the guarantor for state UI benefits.

The BAA-UC regulations represent a back door **FMLA** expansion that will create a huge tracking mechanism in state systems and foster tremendous confusion between BAA-UC and the Family and Medical Leave Act and other employer-provided leaves. By executive fiat, the previous Administration selected one delivery mechanism to address the issue of paid leave at the exclusion of others. Public airing of alternative proposals was precluded. No public policy debate was held on whether a government mandate or private sector-initiated policies would best achieve the BAA-UC's stated goals.

Parents' bonds with their children are lifelong and ongoing issues. Employees have a host of family and other personal reasons for needing flexibility and leave. The BAA-UC singles out one type of leave, at the exclusion of others and arbitrarily chooses the unrelated Unemployment Insurance system as a fbnding source. The proposal's simplistic "one-size fits all" government approach will ultimately conflict with and discourage many tailored benefits and accommodations that the private sector is equipped and willing to offer, depending on the unique needs of its workforce.

Allowing the illegal BAA-UC regulations to stay in effect for years until they are eventually struck down in court essentially invites states to move forward in this unwise direction. While the regulations are being challenged in the United States District Court for the District of Columbia, no decision has been issued on the motion to dismiss or the underlying merits of the case. **As** a result, several states are pushing initiatives related to the use of UI funds for birth and adoption paid leave through UI systems. The previous Administration grossly underestimated the cost of the proposal. For specific comments regarding the costs and administrative problems with the rule, please see the FMLA Technical Corrections Coalition's Comments submitted to the US Department of Labor on BAA-UC (available at http://www.workingforthefuture.org/coalition_comment.html).

Once a state enacts a BAA-UC program, it will be difficult, if not impossible, to undo the administration of the unwise program. The conditions for the BAA-UC "experiment" have now changed making the initiative particularly unwise in current economic conditions.

Section III – Conclusion

The costs of the FMLA interpretive problems and the associated confusion and costs to society, employers, employees and the paid leave system are enormous. We therefore respectfully urge OMB to review and revise the FMLA regulations and interpretations detailed in these comments and recommend that the BAA-UC rule be rescinded. We urge the Department of Labor to begin the rulemaking process to accomplish this objective as soon as possible.

In conclusion, the members of the FMLA Technical Corrections Coalition urge you to designate FMLA implementing regulations and associated non-regulatory guidance as discussed in these comments as "high priority" for review and revision in order to address compliance problems and to allow for more effective implementation of FMLA protections. Along those lines, the Coalition urges you to designate withdrawal of Wage Hour Opinion Letter, FMLA-86 (12/12/96) as a "high priority". Finally the Coalition urges you designate the illegal Birth and Adoption Unemployment Compensation (BAA-UC) regulations to be rescinded as a "high priority".

As the Coalition testified before Congress, "Technical corrections do not need to be polarizing, combative or controversial, but they do need to be done as soon as possible so that the Family and Medical Leave Act operates in the manner and in the spirit that Congress intended." (July 14, 1999, U.S. Senate Subcommittee on Children and Families.) The members of the FMLA Technical Corrections Coalition hope that these comments, which provide specific FMLA nominations for improvement, are useful to that end.

Please contact me directly at (703) 256-0829 if we can be helpful as you review these critical nominations.

Sincerely,

Deanna R. Gelak, SPHR
Executive Director
FMLA Technical Corrections Coalition

Attachments:
1) Wage and Hour Opinion Letter FMLA-86
2) Reported Court Cases in Which the Validity of an FMLA Regulation has been Challenged by Spencer Fane Britt & Browne LLP
3) Summary of Congressional Hearings Documenting Problems with the Department of Labor's FMLA Interpretations

Wage and Hour Division
Washington, D.C. 20210

FMLA - 86

December 12, 1996

This is in reference to our letter to you dated April 7,1995, in connection with an inquiry you received from ———, Human Resources Manager for ———, in which we expressed the view that an employee who has been incapacitated for more than *three* days and *treated* at least once by a health care provider, which results *in* a regimen *of* continuing treatment prescribed by the health care provider, *may* not have a qualifying 'serious health condition' within the meaning of the Family and Medical Leave *Act* (FMLA). Upon further review of this issue and of the conclusion expressed in *our* letter, we have determined that our letter expresses an incorrect View, being inconsistent with the Department's established interpretation of qualifying 'serious health conditions" under *the* FMLA regulations, *29* CFR Section 825.114.

As you know, "eligible employees" (those who have worked *at* least 12 months for their employer. at least 1,250 hours over the previous 12 months, and who work at a location where the employer employs *at* least *50* employees within *75* miles) may take qualifying leave under the FMLA for. among other reasons, their own serious health conditions that make them unable to perform the essential functions of their job, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition *that* involves either inpatient care in a hospital. hospice, or residential medical care facility, or continuing treatment by a health care provider.

The FMLA regulations, at section 825.114(a)(2)(i), define 'serious health conditions" to include a period of incapacity (i.e., inability to work attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

> (A) Treatment two or more *times* by a heatth care provider, by a nurse or physician's *assistant* under direct supervision *of* a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

Working for America's Workforce

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(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The FMLA regulations also provide examples, in section 825.114(c), of conditions that ordinarily, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses * * * into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. The regulations reflect the view that, ordinarily, conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

FMLA 86

We regret any confusion or misunderstanding our earlier correspondence may have caused. If you have further questions or we may provide additional assistance, please have a member of your staff contact Mr. Howard Ostmann of our FMLA Team, at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

FMLA Technical Corrections Coalition
Attachment #2

SPENCER FANE
BRITT & BROWNE LLP

ATTORNEYS & COUNSELORS AT LAW

REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED

Final Report
March 20,2002

Prepared By:

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INTRODUCTION

In 1993, Congress enacted the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6, codified at 29 U.S.C. § 2601, et seq. and 5 U.S.C. 6381, et seq. (the Act or the FMLA). The FMLA became effective on August 5, 1993. The Act requires covered employers to allow eligible employees twelve weeks of leave during a twelve-month period to attend to certain medical and family situations, including the birth of a child, the adoption or foster care of a child, and the need to care for one's self, spouse, child or parent with a serious health condition.

Section 2654 of the Act directs the Secretary of Labor to promulgate regulations "as are necessary to carry out" the provisions of the Act. The Secretary of Labor accordingly issued interim final regulations on June 4, 1993 (which became effective on August 5, 1993), 58 Fed. Reg. 31,812 (1993), codified at 29 C.F.R. pt. 825, and final regulations on January 6, 1995 (which became effective on April 6, 1995), 60 Fed. Reg. 2237 (1995), replacing the interim final regulations at 29 C.F.R. pt. 825.

Over the past several years, courts have addressed the validity of these regulations in varying contexts. On March 19, 2002, the U. S. Supreme Court issued its first decision under the FMLA. In that case, the Supreme Court held that the FMLA regulation in question was invalid. ***Ragsdale v. Wolverine Worldwide, Inc.***, 122 S. Ct. 1155 (2002).

As a result of the *Ragsdale* decision, the law firm of Spencer Fane Britt & Browne LLP recently conducted a survey of all the court decisions reported by Westlaw® and/or LexisNexis™ involving challenges to the validity of the FMLA regulations. The survey covered both published and unpublished decisions reported as of March 20,2002.

This report represents the results of that survey. The information in this report does not purport to reflect all lawsuits filed in which an FMLA regulation has been challenged or all court decisions involving challenges to the validity of the regulations. Instead, the information reflects only those lawsuits in which court decisions have been rendered and the decisions were reported by Westlaw® and/or LexisNexis™ as of March 20,2002.

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A

EXECUTIVE SUMMARY

► There have been **58** reported court decisions in which the validity of an FMLA regulation was challenged. All of the underlying cases were filed and the relevant decisions were made during the period of August ***5,*** 1993 (the effective date of the Act and the Interim Final Regulations) through March 20,2002.

► These ***58*** court decisions represent **57** different court cases. (There is one more court decision than the number of court cases because a district court issued two separate opinions addressing two separate challenges in the same underlying case.) In the situation where a lower court issued a reported decision which was subsequently appealed, and the reviewing appellate court also issued a reported decision, the lower court case and the appellate court case have been treated as two separate court cases. These **58** court decisions **(57** court cases) represent **52** different underlying cases.

► Of these **58** court decisions:

(a) **51** included a ruling on the validity issue; and

(b) **7** were decided on other grounds and did not include a ruling on the validity issue.

► Of the 51 court decisions in which there was a ruling on the validity issue:

(a) 63% (32 decisions) held that the FMLA regulation in question was invalid; and

(b) 37% (19 decisions) held that the FMLA regulation in question was *valid.*

► Of the 51 court decisions in which there was a ruling on the validity issue, **4** of the decisions were overruled by the Supreme Court's decision in ***Ragsdafe.*** When this factor is taken into account, it means that:

► **71% (36** of **51** decisions) have held that the FMLA regulation in question was invalid **or** would ***have held it to be invalid*** if the case had been decided after ***Ragsdafe.***

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ANALYSIS BY REGULATION CHALLENGED

- These 51 court decisions involved challenges to 11 different FMLA regulations:
  - § 825.110
  - § 825.111
  - § 825.114
  - § 825.207
  - § 825.208
  - § 825.220
  - § 825.301
  - § 825.302
  - § 825.303
  - § 825.305
  - § 825.700
- The 3 most frequently challenged regulations were:
  - § 825.208(c)
  - § 825.110(d)
  - § 825.700(a)
- Section 825.208(c) (or a related portion of § 825.208) was the subject of 23 of the reported decisions:

  (a) 67% (12 of 18 decisions in which the validity issue was decided) held the regulation to be *invalid*;

  (b) 33% (6 of 18 decisions in which the validity issue was decided) held the regulation to be *valid*; and

  (c) 5 of the 23 cases were decided on other grounds and did not include a ruling on the validity issue.

Note: The *Ragsdale* decision involved a regulation similar (in part) to § 825.208(c). Consequently, the 6 decisions referenced above in which the regulation was found to be valid may now be questionable in light of *Ragsdale*.

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- Section 825.110(d) was the subject of 16 of the reported decisions:

    (a) 93% (13 of 14 decisions in which the validity issue was decided) held the regulation to be ***invalid;***

    (b) 7% (1 of 14 decisions in which the validity issue was decided) held the regulation to be ***valid;*** and

    (c) 2 of the 16 cases were decided on other grounds and did not include a ruling on the validity issue.

- Section 825.700(a) was the subject of 14 of the reported decisions:

    (a) 71% (10 of 14 decisions in which the validity issue was decided) held the regulation to be ***invalid;*** and

    (b) 29% (4 of 14 decisions in which the validity issue was decided) held the regulation to be ***valid.***

Note: Section 825.700(a) was the subject of the ***Ragsdale*** decision. In light of the Supreme Court's ruling that § 825.700(a) is invalid, the 4 decisions referenced above in which the regulation was held to be valid have now been overruled by ***Ragsdale.***

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ANALYSIS BY COURT AND GEOGRAPHIC AREA

- Of the 51 court decisions in which there was a ruling on the validity issue:

  (a) 1 was decided by the U. S. Supreme Court;

  (b) 17 were decided by Federal Courts of Appeal; and

  (c) 33 were decided by Federal District Courts.

- Although reported state court decisions were surveyed, there were no state court decisions involving the validity of an FMLA regulation.

- At the Supreme Court level, the Court has only decided one case involving the validity of an FMLA regulation. The Court found the regulation (§ 825.700(a)) to be ***invalid.***

- At the Federal Court of Appeals level (in which 17 decisions involved rulings on the validity issue):

  (a) 9 of the 12 Circuits of the Court of Appeals (75%) have issued rulings on the validity issue; and

  (b) 3 of the 12 Circuits of the Court of Appeals (25%) have not yet issued such a ruling (the **3rd**, 10th, and D.C. Circuits).

- Of the 17 Federal Court of Appeals decisions in which there has been a ruling on the validity issue:

  (a) 59% (10 decisions) have held that the FMLA regulation in question was ***invalid;*** and

  (b) 41% (7 decisions) have held that the FMLA regulation in question was ***valid.***

Of the **10** Federal Court of Appeals decisions holding the FMLA regulation in question ***invalid,***

(a) **4** of the decisions (**1** each by the **5th** and **11th** Circuits; **2** by the **8th** Circuit) involved the same regulation held to be invalid in ***Ragsdale;*** and

(b) in all **4** decisions, that same regulation was held to be invalid.

► At the District Court level (in which **33** decisions have involved rulings on the validity issue):

(a) **25** of the **94** District Courts **(27%)** have issued rulings on the validity issue; and

(b) **69** of the **94** District Courts **(73%)** have not yet issued such a ruling.

► Of the **33** District Court decisions in which there has been a ruling on the validity issue:

(a) **64% (21** decisions) have held that the FMLA regulation in question was ***invalid;*** and

(b) **36% (12** decisions) have held that the FMLA regulation in question was ***valid.***

► Of the **12** District Court decisions in which an FMLA regulation was held to be valid, **4** of the decisions were overruled by the Supreme Court's decision in ***Ragsdale.*** When this factor is taken into account, it means that:

► **76% (25** of **33** decisions) have held that the FMLA regulation in question was ***invalid*** or ***would have held it to be invalid*** if the case had been decided after ***Ragsdale.***

► Of the **33** District Court decisions in which there has been a ruling on the validity issue:

(a) the underlying District Courts were located within **11** of the **12** Circuits of the Court of Appeals; and

(b) only **1** Circuit of the Court of Appeals (the D.C. Circuit) has had no District Court decision involving a ruling on the validity issue.

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- Of the **33** District Court decisions in which there has been a ruling on the validity issue:

  (a) the underlying District Courts were located in 22 of the ***55*** U. S. states and territories **(40%);** and

  (b) **33 of** the **55** U. S. states and territories (60%) have not yet had a District Court decision involving the validity of an FMLA regulation.

Note: The U. S. states and territories include the **50** states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

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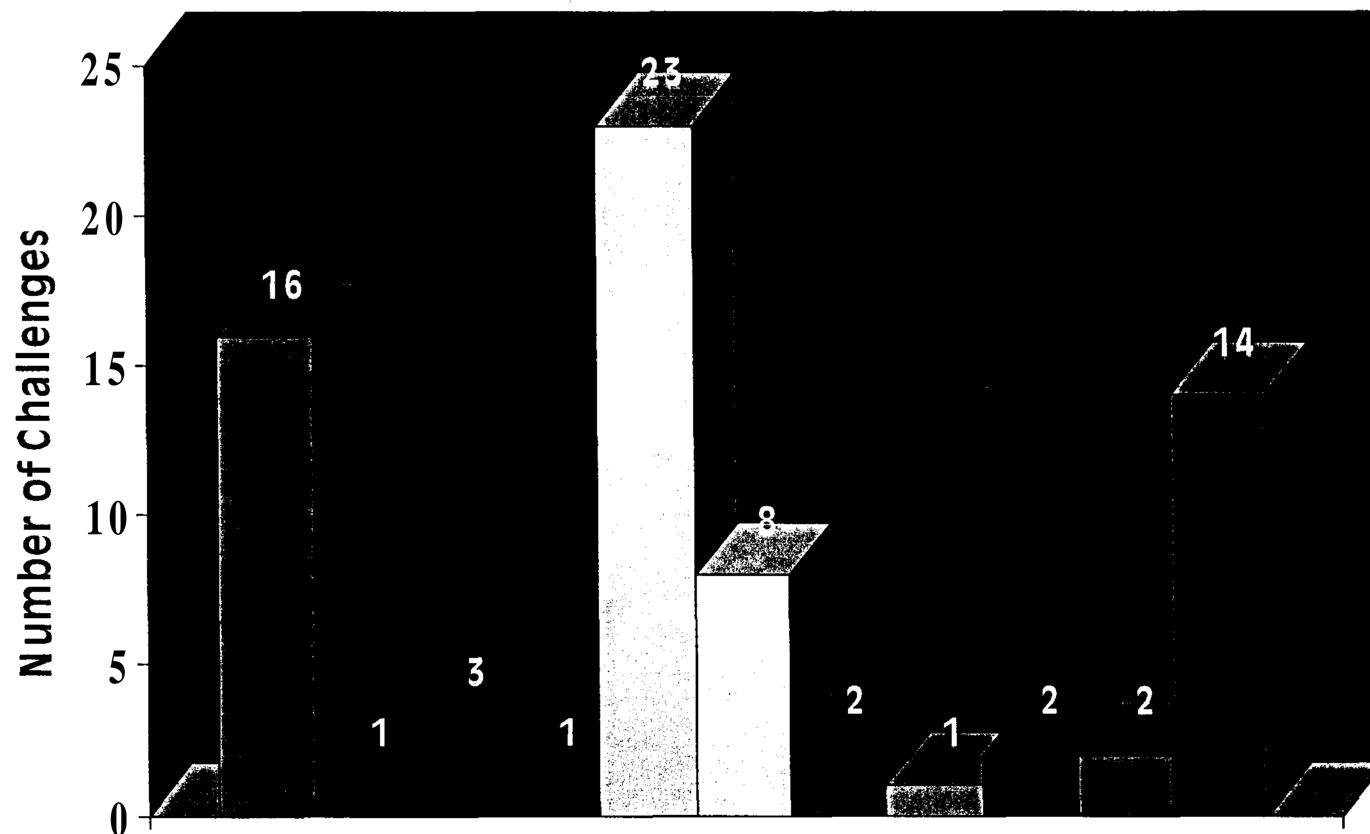

Illustration is based solely on court decisions reported by Westlaw® and/or LexisNexis™ as of March 20, 2002. Where a court decision has been appealed, the appeal has been treated as a separate challenge.

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Number of Cases Filed Each Year Involving Challenges*

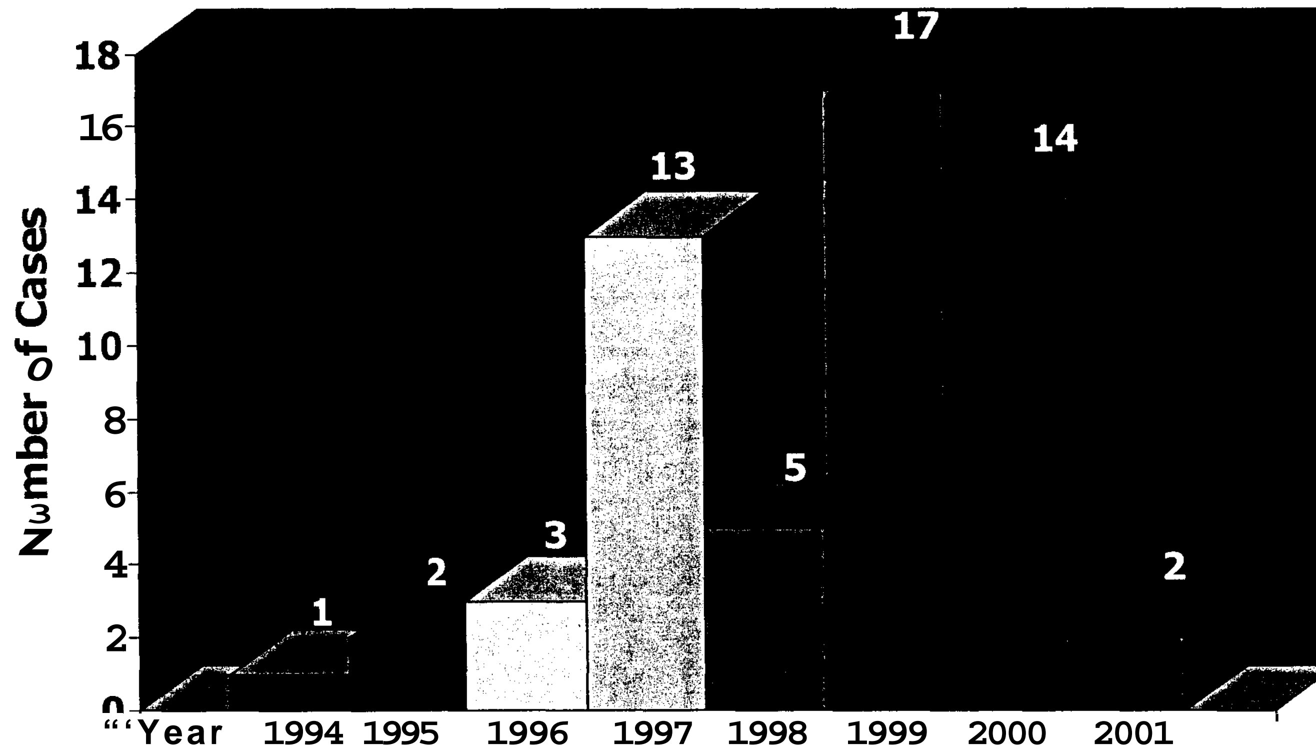

*Illustration is based solely on court decisions reported by Westlaw® and/or LexisNexis™ as of March 20, 2002. Where a court decision has been appealed, the appellate case has been treated as a separately filed case. There may be other cases filed in these years with decisions pending that are not represented.

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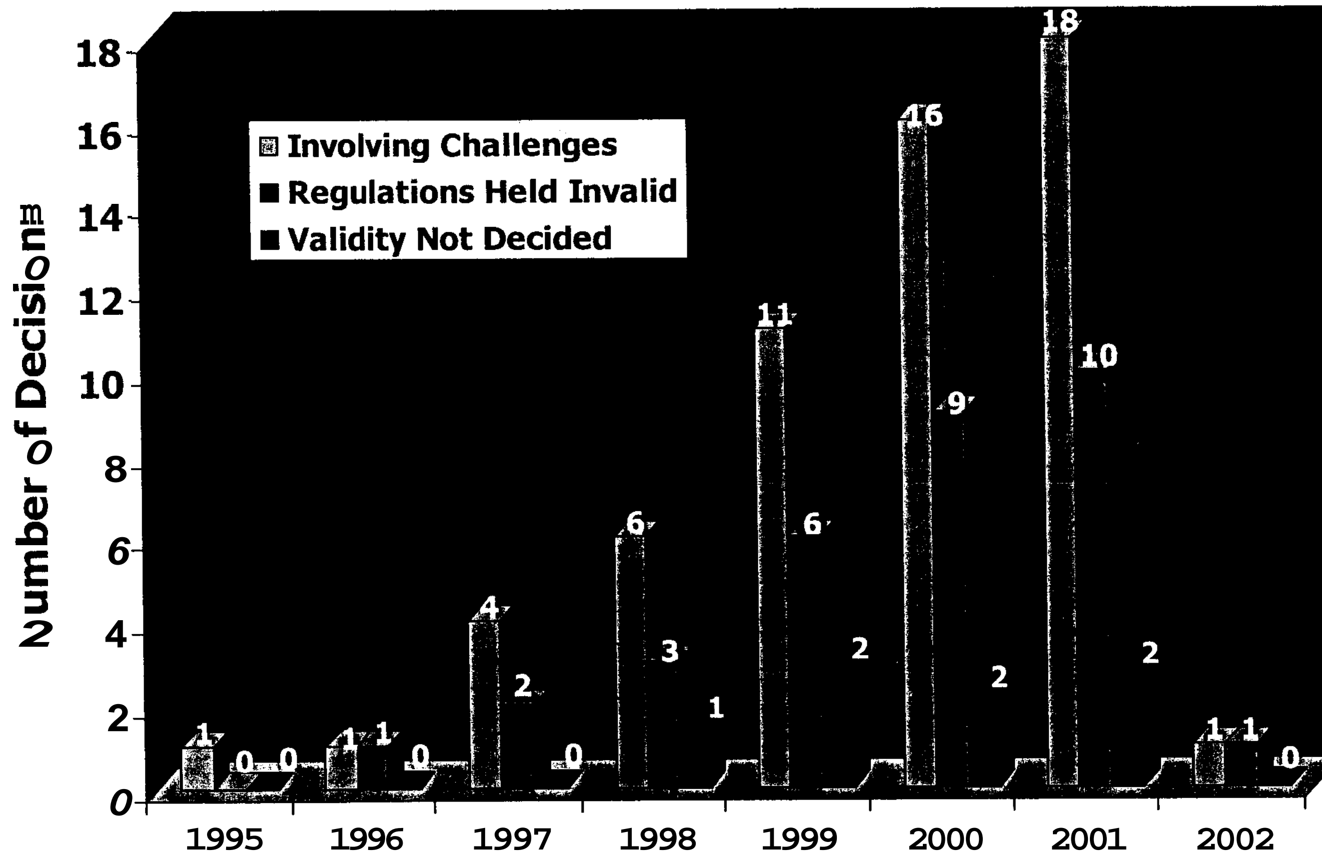
Court Decisions Involving Challenges By Year Decided*



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LIST OF REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED

March 20,2002

***Prepared By*:**

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	Case Name Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
1	*Manuel v. Westluke Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995)	1995	10/3/95	5th Cir.	825.302(c); 825.303(a) interim regulations	Valid.	Employee does not have to invoke the statute by name in order to invoke the protection of the statute.
2	*Rich v. Delta Air Lines, Inc.*, 921 F. Supp. 767 (N.D. Ga. 1996)	1994	2/7/96	N.D. Ga.	825.700(a)	Invalid.	Regulation is invalid to the extent it authorizes a private cause of action under the statute to enforce the terms of an employment program or plan that provides more than the statutorily required twelve weeks leave.
				1997			
3	*Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997)	1996	/19/97	:.D. Va.	325.110(d)	nvalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours for that employer within the immediatelv preceding twelve months.
4	*Dodgens v. Kent Manufacturing* Co., 955 F. Supp. 560 (D. S.C. 1997)	1995	!/20/97	). S.C.	;25.220(b)	/alid.	Regulation (stating that the statute's prohibition against "interfering with" the exercise of employee's rights under the FMLA prohibits employers from violating the FMLA, refusing to authorize FMLA leave, discouraging employees from taking FMLA leave, and manipulating the work force to avoid responsibilities under the [illegible] is not plainly [illegible] or i consistent with [illegible]
5	*Duckworth v. Pratt & Whitney*, 980 F. Supp. 552 (D. Me. 1997) *rev'd.* 152 F.3d 1 (1st Cir. 1998)	1997	)/26/97	). Me.	;25.220(c)	nvalid.	i (u ti t t scope of 1l s anti-discrimination protection to prospective employees) is contrary to the statute which provides a cause of action solely for employees and not for job applicants.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
6	*Miller* v. *Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997)	1997	12/12/97	N.D. Ohio	825.110(d)	Valid.	Regulation constitutes a reasonable interpretation of the statute and defendant's failure to notify plaintiff that she was not eligible within two days of receiving her request for leave violated the regulation.
				1998			
7	*Cox v. Autozone, Inc.*, 990 F. Supp. 1369 (M.D. Ala. 1998), *aff'd*, *McGregor* v. *Autozone, Inc.*, 180F.3d 1305 (11th Cir. 1999)	1997	'20/98	I.D. Ala.	25.208	ıvalid.	Regulation (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is invalid to the extent that it entitles employee to more than twelve weeks of leave during a twelve month period.
8	*Seaman* v. *Downtown Partnershiy of Baltimore, Inc.*, 991 F. Supp. 751 (D. Md. 1998)	1997	/20/98	). Md.	25.110(d)	ıvalid.	Followed ***Wolke* v. *Dreadnought Marine, Inc.***, 954 **F. Supp.** 1133 (E.D. Va. 1997), which held that the regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict **FMLA** leave to employees who have worked for the same employer for at **least** twelve months and who have worked at least 1250 hours for that employer within the immediately preceding twelve months.
9	***Bluitt* v. *Eval Company of America, Inc.***, 3 F. Supp. 2d 761 (S.D. Tex. 1998)	1997	14/98			Valid.	Regulation (stating that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA") is a permissible construction of the statute.
10	*Duckworth* v. *Pratt & Whitney, Inc.*, 152F.3d 1 (1st Cir. 1998)	1997	'/14/98	st Cir.	825.220(c)	Valid.	Regulation (providing that employers may not take prospective employee's past use of FMLA leave into account in hiring decisions) is a permissible reading of the statute.
11	*Santrizos* v. *Aranzark Cory.*, 1998 WL 704114 (N.D. Ill. Sept. 29, 1998)	1996	)/29/98	ᴉ.D. Ill.	825.110(d)	Validity not decided.	Court resolved the case on another issue, declining to take !he significant step of rejecting 825.110(d).

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
12	*Dormeyer v. Conzerica Bank-Illinois*, 1998 WL 729591 (N.D. Ill. Oct. 14, 1998), *aff'd.*, 223 F.3d 579 (7th Cir. 2000)	1996	0/14/98	N.D. Ill.	25.110(d)	ıvalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours for that employer within the immediately preceding twelve months.
1999							
13	*Toro v. Mastex Industries*, 32 F. Supp. 2d 25 (D. Mass. 1999)	1997	1/7/99	D. Mass.	825.303	Valid.	Regulation (providing that "when the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case") is not contrary to congressional intent.
14	*Covucci v. Service Merchandise* Co., *Inc.*, 178 F.3d 1294 (6th Cir. 1999)	1997	2/8/99	6th Cir.	825.208(a), (b) interim regulations	Invalid.	Technical violation of the interim regulation (requiring employer to designate leave as FMLA leave) did not deny plaintiff substantive rights under the statute and thus plaintiff is not entitled to an additional twelve weeks leave.
15	*Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F. Supp. 2d 878 (S.D. Miss. 1999)	1998	2/17/99	S.D. Miss.	825.208(c)	Valid.	Regulation (stating that employer who fails to designate leave as FMLA qualifying "may not designate FMLA leave retroactively" and "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is based on a permissible construction of the statute.
16	*Henthorn v. Olsten Corp.*, 1999 WL 102764 (N.D. Ill. Feb. 24, 1999)	1997	2/24/99	N.D. Ill.	825.305(d)	Invalid.	Regulation (requiring that employer advise employee of the consequences of failing to comply with the statute's medical certification requirement) is invalid to the extent it relieves employee of the statutory obligation to provide such certification.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
17	*McQuain v. Ehtier Furnaces, Inc.*, 55 F. Supp. 2d 763 (N.D. Ohio 1999)	1998	'17/99	.D. Ohio	825.110(d)	ivalid.	Regulation (providing that employee who is otherwise not yet eligible for coverage will be deemed eligible if employer fails to advise employee of FMLA ineligibility within two days of receiving request for leave) is contrary to the plain language of the statute which clearly sets forth minimum requirements for eligibility.
18	*Covey v. Methodist Hospital of Dyersburg, Itic.*, 56 F. Supp. 2d 965 (W.D. Tenn. 1999)	1997	125199	'.D. Tenn.	825.208(c); 825.700(a)	ıvalid.	Regulations (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as FMLA leave will result in none of the absence being counted as FMLA leave) are invalid to the extent they require employer to provide more than twelve weeks of leave during a twelve month period.
19	*McGregor v. Autozone, Inc.*, 180 F.3d 1305 (1 Ith Cir. 1999)	1998	/ 14/99	1th Cir.	825.208(c); 825.700(a)	nvalid.	Regulations (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as FMLA leave will result in none of the absence being counted as FMLA leave) are invalid to the extent they require employer to provide more than twelve weeks of leave during a twelve month period.
20	*Donnellan v. New York City Transit Authority*, 1999 WL 527901 (S.D.N.Y. July 22, 1999)	1998	122199	;.D.N.Y.	825.208 interim regulations	Validity not decided.	Court assumes regulation is valid and reads regulation as not redefining or expanding the substantive rights of the statute.
21	*Neal v. Children's Huhilitution Center*, 1999 WL 7061 17 (N.D. 111. Sept. 10, 1999)	1997	/10/99	J.D. Ill.	825.208(a)	Invalid.	Regulation (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as FMLA leave will result in none of the absence being counted as FMLA leave) is manifestly contrary to the statute because it can result in employer being required to provide more than twelve weeks of leave during a twelve month period.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
22	*Longstreth v. Copple*, 189 F.R.D. 401 (N.D. Iowa 999)	1997	0/22J99	[.D. Iowa	825.208	'alidity not ecided.	Court refuses to modify its prior summary judgment decision in light of ***McGregor v. Autozone, Inc.***, 180 F.3d 1305 (11th Cir. 1999) (holding regulation invalid). Due to the split in authority regarding the validity of 825.208 and given the Eighth Circuit's recurrent application of the regulations as an interpretive guide, the court affirms its denial of summary judgment and allows plaintiff to proceed on her claim that defendant violated the notice provisions of the FMLA.
23	*Chan v. Loyola University Medical Center*, 1999 WL I080372 (N.D. 111. Nov. 23, 999)	1997	1/23/99	I.D. Ill.	825.207(f); 825.208(a), (b)(1), (b)(2), (c); 825.301(b); 825.700(a)	'alid.	Regulations reflect a reasonable accommodation of conflicting policies and fill in the gaps of the FMLA by prescribing what information employers must provide to employees and when and how they must provide it.
	2000						
24	*Schloer v. Lucent Technologies, Inc.*, 2000 WL 128698 (D. Md. Jan. 21, 2000)	1999	/21/00	D. Md.	825.208(c); 825.700(a)	ıvalid.	Follows *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999), as the dispositive rule that regulations (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as FMLA leave will result in none of the absence being counted as FMLA leave) are invalid to the extent they require employer to provide more than twelve weeks of leave during a twelve month period.
25	*Thorson v. **Gemini, Inc.***, 205 F.3d 370 (8th Cir. 2000), *cert. **denied,*** 531 **U.S.** 871 (2000).	1999	3/3/00	8th Cir.	825.114(a)(2)	Valid.	Congress has not directly spoken on the issue of what constitutes a "serious health condition" and regulation's objective test for what constitutes a "serious health condition" is a permissible construction of the statute.
26	*Dirham v. Van Wert County Hospital*, 2000 WL 621 139 (N.D. Ohio March 3, 2000)	1999	3/3/00	N.D. Ohio	825.208	Validity not decided.	Court distinguishes ***McGregor v. Autozone, Inc.***, 180 F.3d 1305 (11th Cir. 1999) (holding regulation invalid), and applies the regulation.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
27	*Curry v. Neumann*, 2000 WL 1763842 (S.D. Fla. Apr. 3,2000)	1998	3/00	.D. Fla.	!5.301(b)(1),); 825.305(a)	ıvalid.	Regulations (requiring employers to provide employees with written notice of the consequences of failing to provide medical certification) are invalid to the extent they purport to prevent employers from taking adverse action against employees for failing to provide such certification.
28	*Plant v. Morton International, Inc.*, 212 F.3d 929 (6th Cir. 2000)	1999	'12/00	th Cir.	!5.208(c)	alid.	Statute is silent **as** to the notice employer must give before designating paid leave **as** FMLA leave and regulation (prohibiting employer from retroactively designating paid leave **as** FMLA leave) constitutes **a** reasonable understanding of the statute.
29	***Ragsdale v. Wolverine Worldwide. Inc.***, 218 F.3d 933 (8th Cir. 2000), *aff'd*, 122 **S.** Ct. 1155 (2002)	1999	'1 1/00	th Cir.	25.208(c); 25.700(a)	ivalid.	Regulations (stating that if employer fails to designate leave **as** FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are invalid to the extent they contradict the statute and require employer to provide more than twelve weeks of leave during **a** twelve month period.
30	*Dormeyer v. Comerica Bank-Illinois,* 223 F.3d 519 (7th Cir. 2000)	1999	/24/00	th Cir.	25.110(d)	ıvalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it attempts to change the statute which clearly defines an eligible employee **as** one who has worked for the same employer for at least twelve months and who has worked at least 1250 hours for that employer within the immediately preceding twelve months.
31	*Bowden v. Bill Dodge Buick-GMC Truck, Inc.*, 2000 WL 1061226 (D. Me. July 28,2000)	1999	/28/00	). Me.	325.208	/alidity not lecided.	Court does not reach the issue **of** whether regulation (stating that if employer fails to designate leave **as** FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is valid because **a** genuine issue of material fact exists as to whether plaintiff voluntarily resigned.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
32	*Schober v. SMC Pneumatics, Inc.*, 2000 WL 1231557 (S.D. Ind. Aug. 21, 2000) Please note that this decision arises from the same district court case as the decision reported on Row 39 of this chart.	1999	/21/00	.D. Ind.	!5.220(c)	'alid.	Regulation (prohibiting employer from discriminating against employee for having used FMLA leave) is based on a reasonable interpretation of the statute.
33	***Twyman v. Dilks***, 2000 WL 1277917 (E.D. Pa. Sept. 8, 2000)	1999	1/8/00	:.D. Pa.	25.208(c); 25.700(a)	nvalid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are inconsistent with the express language of the statute which provides that an employer must provide a total of twelve weeks leave during a twelve month period.
34	*Gadinski v. Shamokin Area Community **Hospital***, 116 F. Supp. 2d 586 (M.D. Pa. 2000)	1999	0/19/00	∕I.D. Pa.	25.208(a); 25.700(a)	√alid.	Regulations are valid where employer refuses to allow employee to return to work at the end of an agreed upon six-month leave; FMLA requires employer to return employee to previously held position after leave expires regardless of whether employer provides more leave than required by the statute and, where employer fails to do so, notice requirements and the consequences to employer for not providing notice will be enforced.
35	*Smith v. BellSouth Telecommunications **International**, Inc.*, 117 F. Supp. 2d 1213 (N.D. Ala. 2000), *rev'd*, 273 F.3d 1303 (11th Cir. 2001)	1999	10/24/00	N.D. Ala.	25.220(c)	nvalid.	Regulation (prohibiting discrimination against prospective employees on the basis of their use of FMLA leave) is inconsistent with the definition of employees provided by the statute.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
36	*Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, *cert. denied*, (1 1th Cir. 2000)	1999	0/24/00	th Cir.	825.110(d)	valid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid to the extent it extends the statute's eligibility provisions to cover employees who have not worked for the same employer for at least twelve months and who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
37	***Dolese v. Office Depot, Inc.*** **331 F.3d 202 (5th Cir. 2000**	2000	1/7/00	h Cir.	125.700	.valid.	Regulation is invalid to the extent it authorizes a private cause of action under the statute to enforce the terms of an employment program or plan that provides more leave than the statutorily required twelve weeks.
38	***Scheiriecker*** v. ***Arvig*** Enterprises, 122 F. Supp. 2d 1031 (D. Minn. 2000)	1999	1/9/00	'. Minn.	$25.110(d)	ıvalid.	Regulation (prohibiting employer from later challenging employee's eligibility under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid to the extent it attempts to grant employees greater rights than those conferred by the statute.
39	***Schober*** v. *SMC Pneumatics, Inc.*, 2000 **WL** 1911684 (S.D. **Ind.** Dec. 4, 2000) Please note that this decisior arises from the same district court case as the decision reported on Row 32 of this chart.	1999	2/4/00	.D. Ind.	325.208(c); 325.700(a)	'alid.	In deciding motion in ***limine*** to exclude evidence regarding employer's failure to designate time as FMLA leave, court determines that, in the circumstances of this case, application of the regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") will not amount to an elevation of form over substance.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
2001							
40	*'ewall v. Chicago Transit luthority*, 2001 WL 40802 N.D. Ill. Jan. 16, 2001)	1999	1/16/01	I.D. Ill.	25.110(d)	Invalid.	Regulation (deeming ineligible employee eligible for FMLA leave where employer fails to notify employee that he has not met the twelve months of employment requirement) is unreasonable to the extent that it changes the statutory eligibility requirements to include persons who have not worked for the same employer for **at** least twelve months and who have not worked **at** least 1250 hours for that employer within the immediatelv preceding twelve months.
41	*Vordquist v. City Finance `o.*, 173 F. **Supp.** 2d 537 N.D. Miss. 2001)	2000	1/19/01	I.D. Miss.	25.110(d)	Validity not decided.	Court determines regulation (prohibiting employer from later challenging employee's eligibility where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is not applicable to the facts of the case; court notes, however, that if it were, it would likely reject regulation as an invalid attempt to extend FMLA coverage to employees who are not otherwise eligible.
42	*Volan v. Hypercom Manufacturing Resources*, !001 WL 378235 (D. Ariz. Mar. 26, 2001)	2000	3/26/01	D. Ariz.	25.208	Invalid.	Regulation (stating that if employer fails to designate leave **as** FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is contrary to the statute to the extent it requires employer to provide more than twelve weeks of leave during **a** twelve month oeriod.
43	*Evanoff v. **Minneapolis Public Schools,*** 11 Fed. Appx. 670 (8th Cir. 2001)	2000	4/17/01	8th Cir.	25.110(d)	Invalid.	Regulation (prohibiting employer from later challenging employee's eligibility where, upon request for FMLA leave, employer fails to timely notify employee **that** he is ineligible) contravenes the plain language of the statute because it broadens the definition of eligible employee to include persons who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately Drecedine twelve months.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
44	***Miller v. AT&T Corp.***, 250 F.3d 820 (4th Cir. 2001)	2000	'7/01	ih Cir.	55.114(b), (c)	alid.	Regulation's definition of "treatment" by a health care professional (which includes examinations to determine if a serious health condition exists and evaluations of that serious health condition) is not overly broad; regulation does not contravene the underlying purpose of the statute to the limited extent that it permits coverage for the common flu.
45	***Daley v. Wellpoint Health Networks, Inc.***, 146 F. Supp 2d 92 (D. Mass. 2001)	1999	'14/01	'. Mass.	25.208(c)	ivalid.	Regulation (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is invalid to the extent it contradicts the statute and requires an employer to provide more than a total of twelve weeks leave during a twelve month period.
46	(***Haggard v. Levi Strauss & Co.***, 8 Fed. Appx. 599 (8th Cir. 2001)	2000	/18/01	th Cir.	25.208(c); 25.700(a)	ivalid.	Court follows ***Ragsdale*** v. ***Wolverine Worldwide. Inc.***, 218 F.3d 933 (8th Cir. 2000), which held that regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are invalid to the extent they require an employer to provide more than a total of twelve weeks leave during a twelve month period.
47	*Bachelder v America West* ***Airlines, Inc.***, 259 F.3d 111 (9th Cir. 2001)	1999	/8/01	th Cir.	325.220(c)	'alid.	Regulation (stating that employer cannot use the taking of FMLA leave as a negative factor in employment actions) constitutes a reasonable interpretation of the statute's prohibition on "interference with" and "restraint of" employee rights under the statute even though it uses the term "discrimination" as opposed to the term "interfere" or "restrain."
48	***Whitaker v.*** Bosch ***Braking*** *Systems*, 2001 WL 169423: (W.D. Mich. Aug. 27,2001	2000	:/27/01	Y.D. Mich.	125.114	'alid.	Regulation (stating that pregnancy can be a serious health condition based upon continuing treatment by a health care provider only if the pregnancy produces a period of incapacity or if preventive care is sought) is a reasonable and valid exercise of the Secretary of Labor's authority to promulgate regulations to assist in carrying out the provisions of the statute.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
49	***Fulhani* v. *HSBC Bank USA*** 2001 WL 1029051 (S.D.N.Y. Sept. 6,2001)	1999	*6101*	.D.N.Y.	!5.208(c); !5.700	Invalid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are invalid to the extent they require employer to provide more than twelve weeks **of** leave during a twelve month neriod.
S0	***Harhert* v. *Healthcare Services Group, Inc.*,** 173 F. Supp. 2d 1101 (D. Colo. 2001)	2000	'28/01	'. Colo.	**!5.111(a)(3)**	**Valid.**	The'statute does not provide a definition of "worksite" and regulation's definition (in the context of a joint employment relationship) **is** not in contravention of the plain language or the stated goal of the statute.
51	***Woodford* v. *Community Action of Greene County, Inc.*,** 268 F.3d 51 (2d Cir. 2001)	2000	)/10/01	nd Cir.	25.110(d)	Invalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer confirms employee's eligibility) **is** invalid to the extent it widens the statutory definition of eligible employee to include employees who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
52	***Nusbaum* v. *CB Richard Ellis, Inc.*,** 171 F. Supp. 2d 377 (D.N.J. 2001)	2000	0/26/01	). N.J.	(25.208; 25.700	Valid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are consistent with the overall statutory scheme of allowing employees to make informed decisions about leave.
53	***Alexander* v. *Ford Motor Co.*,** 204 F.R.D. 314 (E.D. Mich. 2001)	2001	1/5/01	I.D. Mich.	25.110(d)	Invalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours **for** that employer within the immediatelv preceding twelve months.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
54	*Smith v. BellSouth Telecomniiinications. Inc.*, 273 F.3d 1303(11th Cir. 2001)	2000	1/27/01	1th Cir.	325.220(c)	'alid.	Regulation (prohibiting employers from discriminating against employees or prospective employees on the basis of their use of FMLA leave) is entitled to deference because the statute is ambiguous as to whether it provides a private cause of action solely to current employees, as opposed to former or prospective employees, and regulation constitutes a reasonable interpretation of the statute.
55	*Caraballo v. Puerto Rico Telephone, Inc.*, 178 F. Supp. 2d 60 (D. P.R. 2001)	2001	2/12/01	). Puerto Rico	125.110(d)	nvalid.	Regulation (prohibiting employer from later challenging employee's eligibility under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it attempts to change the statute's definition of eligible employee to include persons who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
56	*Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2d Cir. 2001)	2000	2/20/01	nd Cir.	825.110(d)	nvalid.	Regulation (prohibiting employer from later challenging employee's eligibility under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid to the extent it attempts to change the statutory definition of eligible employee to include persons who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
57	*Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757 (5th Cir. 2001)	2000	2/26/01	ith Cir.	325.208(c)	Validity not decided.	Court determines that the posture of the case does not require it to reach the issue of whether regulation (prohibiting employer from retroactively designating leave as FMLA leave) is valid.

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	Case Name	Case Filed	Relevant Decision	Court	Regulation	Decision	Comments
				2002			
58	*Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002)	2000	3/19/02	J.S. Supreme Court	825.700(a)	nvalid.	Regulation (providing that if employer fails to designate leave as FMLA qualifying then none of the absence preceding the notice to the employee of the designation will be counted against the employee's 12-week FMLA leave entitlement) is invalid because it creates a categorical penalty unconnected to any prejudice suffered by employee, which is "incompatible with the FMLA's comprehensive remedial mechanism"; regulation is "invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice."

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C

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TEXT OF CHALLENGED FMLA REGULATIONS

March 20,2002

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WA 638289.1

TEXT OF CHALLENGED FMLA REGULATIONS

The entire regulation is included in this Appendix, even though only a portion of it may have been challenged. The challenged portion of the regulation is in bold print.

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§ 825.110	**Which employees are "eligible" to take leave under FMLA?**

(a) An "eligible employee" is an employee of a ***covered*** employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. ***(See*** § 825.105(a) regarding employees who work outside the **U.S.)**

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer ***(e.g.*,** workers' compensation, group health plan benefits, ***etc.*),** the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualities as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work ***(see*** 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of record-keeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked ***(e.g.*,** bona tide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer *is* unable to meet this burden the employee is deemed to have met this test. See also § 825.500(f). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

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(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of the need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the eniployee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

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§ 825.111	In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

§ 825.111 In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite." The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility

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in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and retum from work to their personal residence, or employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which they report and from which assignments are made.

(3) **For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.**

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The detemiination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are "maintained on the payroll" during any portion of the year when school is not in session. See § 825.105(c).

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§ 825.114	What is a "serious health condition" entitling an employee to FMLA leave?

§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) ***Inpatient** care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perforni other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) ***Continuing** treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity* (*i.e.*, inability work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care

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provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

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§ 825.207	Is FMLA leave paid or unpaid?

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d):

(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

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(2) The Act provides that a serious health condition may result from injury to the employee "on or off' the job. If the employer designates the leave as FMLA leave in accordance with § 825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' conipensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job". As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. See also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation **or** personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's **or** the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation **or** personal leave for these purposes.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the I2 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (*e.g.*, notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. See § § 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in tire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to usc his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with Regulations, 29 **CFK** § *553.25,* the absence which paid from the employee's accrued compensatory time "account" may not be counted against the employee's FMLA leave entitlement.

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§ 825.208	Under what circumstances may an employer designate leave, paid or unpaid, as **FMLA** leave and, as a result, count it against the employee's total **FMLA** leave entitlement?

§ 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (*i.e.*, that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

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(b):

(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision **must** be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two

business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an **FMLA** reason but the employer was not aware of the reason, and the employee desires that the leave be counted as **FMLA** leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert **FMLA** protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under **FMLA,** or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an **FMLA** reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an **FMLA** reason, the employer must withdraw the designation (with written notice to the employee).

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§ 825.220	How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any way discriminating against any person (whether or not an employee) for opposing or coniplaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has –

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

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(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, tile a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

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§ 825.301	What other notices to employees are required of employers under the FMLA?

§ 825.301 What other notices to employees are required of employers under the FMLA?

(a):

(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) If such an employer does not have written policies, manuals, or handbook describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b):

(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

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(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210)' and the possible consequences of failure to make such payments on a timely basis (**i.e.**, the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The specific notice may include other information – *e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2):

(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall ***not*** be required if the initial notice in the six-month period ***and*** the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification

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or a "fitness-for-duty" report would be required (*e.g.*, by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. **(See** § 825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

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§ 825.302	What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

§ 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable‘?

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see § 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with

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their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs **of** both the employer and the employee. **If** an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule **of** treatments ***so*** as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(9 In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, **of** the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of **a** collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (see § 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

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§ 825.303	What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for **FMLA** leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for **FMLA** leave as soon as practicable under the facts and circumstances of the particular case. **It is** expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the **FMLA** or even mention the **FMLA,** but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking in to consideration the exigencies of the situation.

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§ 825.305	When must an employee provide medical certification to support FMLA leave?

§ *825.305* When must an employee provide medical certification to support FMLA leave'!

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § **825.301.** An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least *30* days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

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§ 825.700	What if an employer provides more generous benefits than required by FMLA?

§ 825.700 What if an employer provides more generous benefits than required by FMLA‘?

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by an employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benetits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leaves as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

(c):

(1) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (*i.e.*, its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specified times, *e.g.*, to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA.

(2) As discussed in § 825.102(b), the period prior to the Act's delayed effective date must be considered in determining employer coverage and employee eligibility for FMLA leave.

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Attachment #3

SUMMARY OF CONGRESSIONAL HEARINGS DOCUMENTING PROBLEMS WITH DEPARTMENT OF LABOR'S FMLA INTERPRETATIONS

DATE	SUBCOMMITTEE/ COMMITTEE	TYPE OF ACTION	TOPIC
May 9, 1996	Senate Subcommittee on Children and Families, Committee on Labor and Human Resources	Senate Hearing Report No. 104-503	"Oversight of the Family and Medical Leave Act"
June 10,1997	House Subcommittee on Oversight and Investigations Hearing	House Hearing Report No. 105-44	"Hearing on the Family and Medical Leave Act [FMLA] of 1993"
July 14, 1999	Subcommittee on Children and Families, Committee on Health, Education, Labor, and Pensions	Senate Hearing Report No. 106-156	"Oversight Hearing on the FMLA. The Family and Medical Leave Act: Present Impact and Possible Next Steps"
March 9,2000	House Subcommittee on Human Resources, Committee on Ways and Means Hearing	House Hearing Report No. 106-114	"FMLA and Unemployment Compensation"
February 15,2000	Subcommittee on National Economic Growth Natural Resources and Regulatory Affairs	House Hearing Report No. 106-171*	"Is the Department of Labor Regulating the Public Through the Backdoor?"
April 11, 2002	Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs	Report Pending	"Paperwork Inflation – The Growing Burden on America"

*The Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs issued a report on Non-Binding Legal Effect of Agency Documents as a result of the Subcommittee's 1999-2000 investigation, which amplified the revelations in the subcommittee's earlier hearing with respect the FMLA:

> "The hearing including testimony by Ms. Dugan, examined one aspect of DOL's Family and Medical Leave Act [FMLA] guidance. The hearing revealed that DOL issued a nonregulatory but policysetting guidance opinion letter which redefined a 'serious health condition' under the 1993 FMLA. DOL's 1995 opinion letter said that minor illnesses, such as the common cold, were not a serious health condition. However, in December 1996, DOL retracted its previous definition and stated that the common cold, the flu, ear-aches, upset stomachs, et cetera, all are covered by the FMLA if an employee is incapacitated more than 3 consecutive days and receives continuing treatment from a health care provider. Ms. Dugan's testimony explained that the consequences of this nonregulatory and costly redefinition

reverberated throughout the employer world and actually created a problem for needy people." House **Report No. 106-109, "Non-binding Legal Effect of Agency Guidance Documents", October 26,2000, p. 7.**