

**DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division**

29 C.F.R. Part 825

Request for Information on the Family and Medical Leave Act of 1993

AGENCY: Employment Standards Administration, Wage and Hour Division, Department of Labor.

ACTION: Request for Information from the Public.

SUMMARY: This notice requests comments related to the Family and Medical Leave Act of 1993 (the “FMLA” or the “Act”). The Employment Standards Administration, Wage and Hour Division, of the Department of Labor (the “Department”) seeks information for its consideration and review of the Department’s administration of the Act and implementing regulations.

The Department held stakeholder meetings regarding the FMLA with more than 20 groups from December 2002 - February 2003. Many of the subject matter areas in this request are derived from comments at those stakeholder meetings and also from (1) rulings of the Supreme Court of the United States and other federal courts over the past twelve years; (2) the Department’s experience in administering the law; and (3) public input presented in numerous Congressional hearings and public comments filed with the Office of Management and Budget (“OMB”) in connection with three annual reports to Congress regarding the Costs and Benefits of Federal regulations in 2001, 2002, 2004. In addition, the Department has reviewed numerous source materials about issues associated with the FMLA. During this process, the Department has heard a variety of concerns expressed about the FMLA. Some of those concerns, however,

are beyond the Department's statutory authority to address. Some are not. In this regard, the Department invites interested parties having knowledge of, or experience with, the FMLA to submit comments and welcomes any pertinent information that will provide a basis for ascertaining the effectiveness of the current implementing regulations and the Department's administration of the Act. The questions posed are not meant to be an exclusive list of issues for which the Department seeks commentary and information.

DATES: Public comments should be received by no later than 5:00 p.m. EST, February 2, 2007.

ADDRESSES: Address all written submissions to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210. You may also submit comments by e-mail to: whdcomments@dol.gov. Comments of 20 pages or less may be submitted by FAX machine to (202) 693-1432, which is not a toll-free number. Because we continue to experience delays in receiving mail in the Washington, DC area, individuals are encouraged to submit comments by mail early, or to transmit them electronically by FAX or e-mail.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210; telephone: (202) 693-0066 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. What the Law Covers

The Family and Medical Leave Act of 1993, Public Law 103-3, 107 Stat. 6 (29 U.S.C. § 2601 *et seq.*) (the “FMLA” or the “Act”) was enacted on February 5, 1993 and became effective on August 5, 1993 for most covered employers. The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve-month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee’s own serious health condition. *See* 29 U.S.C. § 2612. Employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. § 2614. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department or file a private lawsuit in federal or state court. If the employer has violated an employee’s FMLA rights, the employee is entitled to reimbursement for any tangible loss incurred, equitable relief as appropriate, interest, attorneys’ fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See* 29 U.S.C. § 2617.

Title I of the FMLA applies to private sector employers of fifty or more employees, public agencies and certain federal employers and entities, such as the U.S. Postal Service and Postal Rate Commission. Title II applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63, plus certain employees covered by other federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains miscellaneous provisions, including rules

governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Title V originally extended leave provisions to certain employees of the U.S. Senate and House of Representatives, but such coverage was repealed and replaced by the Congressional Accountability Act of 1995, 2 U.S.C. § 1301.

B. Implementing Regulations

The FMLA required the Department to issue regulations to implement Title I and Title IV of the FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993. Given this short implementation period, the Department published a notice of proposed rulemaking in the Federal Register on March 10, 1993 (58 FR 13394), inviting comments until March 31, 1993, on a variety of questions and issues. The Department received a total of 393 comments at that time from a wide variety of stakeholders, including employers, trade and professional associations, advocacy organizations, labor unions, state and local governments, law firms, employee benefit firms, academic institutions, financial institutions, medical institutions, Members of Congress, and others.

After considering these comments, the Department issued an interim final rule on June 4, 1993 (58 FR 31794) that became effective on August 5, 1993. The Department also invited further public comment on the interim regulations through September 3, 1993, later extended to December 3, 1993 (58 FR 45433). During this comment period, the Department received more than 900 substantive and editorial comments on the interim regulations, from a wide variety of stakeholders.

Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995 (60 FR 2180). The regulations were amended on February 3, 1995 (60 FR 6658) and on March 30, 1995 (60 FR 16382) to make minor technical corrections. The regulations went into effect on April 6, 1995.

C. Legal Challenges

The *Ragsdale* Decision

Since the enactment of the FMLA, hundreds of reported federal cases have addressed the Act and/or implementing regulations. The most significant court decision on the validity of the regulations is that of the United States Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In its first case involving the FMLA, the Court ruled in March 2002 that the penalty provision in 29 C.F.R. § 825.700(a), which states “[i]f an employee takes . . . leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s leave entitlement[.]” was invalid because in some circumstances it required employers to provide leave to employees beyond the 12-week statutory entitlement. “The FMLA guaranteed [Plaintiff] 12—not 42—weeks of leave[.]” *Ragsdale*, 535 U.S. at 96. While the Supreme Court did not invalidate the notice and designation provisions in the regulations, it made clear that any categorical penalty for a violation of such requirements set forth in the regulations would exceed the Department’s statutory authority. *See id.* at 91-96.

Other Challenges to “Categorical Penalty” Provisions

Ragsdale is not the only court decision addressing penalty provisions contained in the regulations. Another provision of the regulations, 29 C.F.R. § 825.110(d), requires an employer to notify an employee prior to the employee commencing leave as to whether or not the employee is eligible for FMLA leave. If the employer fails to provide the employee with such information or the information is not accurate, the regulation bars the employer from challenging eligibility at a later date, even if the employee is not eligible for FMLA leave according to the statutory requirements. The majority of courts addressing this notice provision have found it to be invalid, even prior to the *Ragsdale* decision. *See, e.g., Woodford v. Cmty. Action of Greene County, Inc.*, 268 F.3d 51, 57 (2d Cir. 2001) (“The regulation exceeds agency rulemaking powers

by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements."); *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 796-97 (11th Cir. 2000) ("There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled."); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000) (the regulation tries "to change the Act" because it makes eligible employees who, under the language of the statute, are ineligible for family leave; "The statutory test is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months").

Legal Challenges to the Definition of Serious Health Condition

Other regulatory provisions have been challenged as well. In particular, challenges to the regulatory section defining the term "serious health condition," 29 C.F.R. § 825.114, have received significant attention. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001); *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000). Employers have reported to the Department that they have litigated this issue because there is much confusion as to what constitutes a "serious health condition," and some employers have stated that the broad definition has left them in the untenable position of having to either guess what the Department and courts will deem to be serious or designate all absences for a medical condition as FMLA-protected.

The Department itself has struggled with this definition. After the Act's passage, the Department promulgated section 825.114(c), which states that "[o]rdinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." This regulatory language implements the legislative history of the FMLA and expresses the Congressional intent that minor, short-term illnesses for which

treatment and recovery are very brief would be covered by employers' sick leave programs. *See* H. Rep. No. 103-8, at 40 (1993); S. Rep. No. 103-3, at 28-29 (1993). Therefore, when first asked about the proper handling of an employee's request for leave due to the common cold, the Department issued an Opinion Letter stating that "[t]he 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)." DOL Opinion Letter FMLA-57 (April 7, 1995). More than a year and a half later, however, the Department issued an Opinion Letter changing its interpretation, stating that DOL Opinion Letter FMLA-57 "expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying 'serious health conditions' under the FMLA regulations." DOL Opinion Letter FMLA-86 (December 12, 1996). The Department further stated that such minor illnesses ordinarily would not be expected to last more than three days, but if they did meet the regulatory criteria for a serious health condition under section 825.114(a), they qualify for FMLA leave.

Other Legal Challenges

Other legal issues have arisen under the regulations. For example, litigation has ensued under section 29 C.F.R. §§ 825.302-.303 as to what constitutes sufficient employee notice to trigger an employer's obligations under the FMLA. *See, e.g., Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002) (employee who had made employer aware that she had problems with depression gave sufficient notice when she called in and indicated she was out because of "depression again"). Another regulation that has been the subject of litigation is 29 C.F.R. § 825.220(d), which discusses the impact of a light duty work assignment on an employee's FMLA rights. *See, e.g., Roberts v. Owens-Illinois, Inc.*, 2004 WL 1087355 (S.D.

Ind. May 14, 2004) (an employee uses up his or her twelve week FMLA leave entitlement while performing work in a light duty assignment); *Artis v. Palos Cmty. Hosp.*, 2004 WL 2125414 (N.D. Ill. Sept. 22, 2004) (same).

D. Statutory and Regulatory Developments

In addition to developments in the courts, over the past decade several important legislative and regulatory developments have occurred that interact with the FMLA regulations. Most significantly, in 1996 Congress enacted the Health Insurance Portability and Accountability Act (“HIPAA”), Pub. L. 104-191, which addresses in part the privacy of individually identifiable health information. On December 28, 2000, and as amended on May 31, 2002, August 14, 2002, and February 16, 2006, the Department of Health and Human Services (“HHS”) issued regulations found at 45 C.F.R. Parts 160 and 164 that provide standards for the privacy of individually identifiable health information. These standards apply only to “covered entities,” defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction as defined in the HIPAA privacy regulations. *See* 45 C.F.R. §§ 160.102(a), 164.103. Further, HHS acknowledges that the HIPAA statute does not include “employers per se as covered entities.”

The HIPAA regulations do not impede the disclosure of the protected health information for FMLA reasons if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and requests a copy of that form to personally take or send to the employer in order to exercise FMLA rights. HIPAA regulations, however, clearly do come into play if, for example, the employee asks the health care provider to send the completed certification form or medical information directly to the employer or the employer’s representative. HIPAA will generally require the health care provider to first receive a valid authorization from the employee before sending the information to the employer or the

employer's representative.

In all cases, employers have the statutory right under the FMLA to obtain sufficient medical information to determine whether an employee's leave qualifies for FMLA protections and it is the employee's responsibility to ensure that such information is provided to the employer. If an employee does not fulfill his or her obligation to provide such information upon the employer's request, the employee will not qualify for FMLA leave. *See* 29 C.F.R. §§ 825.307-.308; DOL Opinion Letter FMLA-2004-2-A (May 25, 2004). Although these rules may appear straightforward, recent enforcement experience reveals confusion with regard to the interaction of FMLA and HIPAA and clarification may be needed.

Similarly, FMLA's interaction with other laws is also a potential source of confusion. For example, since the final FMLA regulations were implemented in 1995, the Equal Employment Opportunity Commission ("EEOC"), the agency responsible for enforcing the employment provisions of the Americans with Disabilities Act ("ADA"), has issued guidance with regard to the privacy of employee medical information. *See, e.g., Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (EEOC 2000).*

E. Employer Commentary

Employers report to the Department that they recognize the value of the FMLA and attempt to comply with its requirements. For example, the Department has not received complaints about the use of family leave – i.e., leave for the birth or adoption of a child. Nor do employers for the most part report problems with the use of scheduled intermittent leave as contemplated by the statute, such as when an employee requests leave for medical appointments or medical treatment like chemotherapy. Rather, employers report job disruptions and adverse effects on the workforce when employees take frequent, *unscheduled*, intermittent leave from work with

little or no advance notice to the employer.

Unforeseen, Intermittent Leave

The Department has received significant commentary on the requirements associated with the administration and use of unforeseen, intermittent leave set forth in 29 C.F.R. § 825.203. Employer stakeholders who have met with the Department as well as those who have submitted comments to Congress and OMB have indicated that the administration of intermittent leave, which must be done in increments that correspond to the employer's payroll system (section 825.203(d)), is overly burdensome, especially in the case of unforeseeable, intermittent leave. Similarly, many employer groups who participated in the Department's stakeholder meetings stated that the requirement that employees be permitted to take FMLA leave in the smallest increments used by the employer's payroll system has provided an opportunity to avoid compliance with accepted practices of timeliness in the workplace. Employers contend that one of the unintended consequences of the FMLA regulations has been that employers have little recourse to prevent those employees who take FMLA leave improperly from doing so under the current regulatory scheme.

While the Department acknowledges that the regulations and the administrative details required by them may work in combination to allow certain employees to attempt to evade legitimate absence control policies, crafting the perfectly equipped rule to single out only alleged misuse has proven to be a difficult task. Moreover, employee groups point to the 2000 Westat Report, at 6-7, and cite that "a majority of [establishments] reported most aspects of administering FMLA are very or somewhat easy."¹

Medical Certification Procedures

¹ Westat, "Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update," January 2001.

The proper flow of accurate medical information is critical to the smooth functioning of the FMLA. The Department has heard repeated concerns from both employers and employees with regard to the medical certification procedures required by the regulations (*see also* Employee Commentary, *infra*). Employers have complained that due to the confusing nature of the medical certification form, health care providers often do not complete it properly. Thus, in order for the employer to determine whether a serious health condition exists, the employer frequently must secure the employee's permission to contact the health care provider or ask another doctor for a second opinion. Employers assert, however, that the regulatory requirement that the employee's health care provider be contacted only through the employer's health care representative and only with the employee's permission has been very costly for employers. *See* 29 C.F.R. § 825.307. Several stakeholders have challenged the clarification and authentication process through letters written to OMB, describing it as difficult and time-consuming.

Other commenters have noted that these limitations lead to either the employer denying FMLA leave or, conversely, improvidently granting FMLA leave because of the difficulty and expense of obtaining sufficient factual support for the employee's condition. One often-cited example is certification for chronic conditions. An employee's health care provider may certify an employee's chronic condition and list the duration as "indefinite" or "lifetime." With respect to the frequency of the episodes of incapacity, the health care provider might write "unknown." Employers argue that this leaves them in the difficult position of guessing about the employee's regular attendance.

These regulatory limitations also apply to fitness-for-duty certifications, which employers may request as a condition of restoring an employee who has taken FMLA leave for the employee's own serious health condition. *See* 29 C.F.R. § 825.310. Commenters state that these

regulatory limitations create risks to the employee and to co-workers when an employee is in a safety-sensitive position.

Impact on Other Workers

Surveys conducted by both the Society for Human Resources Management (SHRM) and the Department reveal that employers tend to cover the work of employees out on FMLA leave with co-workers. A survey conducted by SHRM of its members in 1997 indicated that co-workers cover job duties 92% of the time when absences occur. According to the 1995 report by the Commission on Leave entitled “A Workable Balance: Report to Congress on Family and Medical Leave Policies” (the “1995 Commission on Leave Report”), the most prevalent method that employers use to cover work is to assign the work temporarily to other co-workers (72.3%). Similarly, in the Department’s 2000 report, assigning work to other employees was the most prevalent method (76.5%).

Impact on Benefit Programs

Many employer representatives also have stated that benefit programs (excluding health benefits, which are statutorily addressed in the FMLA itself) have suffered or have even been eliminated as a result of the FMLA regulatory requirements. The most often cited example is the regulatory requirement that FMLA leave cannot disqualify an employee from a perfect attendance award, which may have the unintended consequence of discouraging such awards and programs.

F. Employee Commentary

Groups and organizations representing employees have also provided information to the Department about their concerns with the FMLA.

Notice and Awareness of FMLA Rights

One consistent concern expressed by the employee representatives during the stakeholder meetings was that employees need to be better aware of their rights under the FMLA. Awareness of FMLA rights and responsibilities is critical to fulfilling the goals of the statute, yet it has been a challenge from the inception of the FMLA.

The 1995 Commission on Leave Report found that 41.9 percent of employees at covered establishments had not heard of the FMLA. In 2000, a survey of employers and a survey of employees conducted for the Department by Westat titled “Balancing the Needs of Families and Employers” (“2000 Westat Report”) found that 40.7 percent of covered employees had not heard of the FMLA and nearly half the employees did not know whether the law applied to them. Additionally, the 2000 Westat Report revealed a significant difference in the estimated number of workers taking FMLA leave based upon the employee survey (2.4 million) and the employer survey (6.1 million).² The reason for this discrepancy is not accounted for in the 2000 Westat Report. One reason may have been that employers were designating the employee’s leave as covered FMLA leave and employees were unaware of it. This suggests the need for better communication between employers and employees.

The regulations require an employer, under certain circumstances, to provide a posting of FMLA rights to employees in a language in which they are literate. Nonetheless, the Department received comments at the stakeholder meetings that “language barriers” continue to be an impediment to employees’ understanding and exercising of their rights.

Medical Certification Procedures

Employees have also complained to the Department that the medical certification process is too burdensome. Section 825.305(a) states that an employer may require medical certifications to support an employee’s or family member’s serious health condition. Section 825.308

² See the section on the coverage and usages estimates for the details of these estimates.

generally provides that employers may ask for a recertification no more often than every 30 days and only in connection with an employee’s absence from work. Employees have complained that the certification process is too burdensome, and that employers repeatedly deny leave based on “inadequate” information provided by health care providers – information that the employees think is sufficient. Employees have also complained that every 30 days is too frequent to require recertification for chronic, life-long serious health conditions.

At the same time, the Department’s enforcement experience indicates that health care providers of employees complain that the certification requirements are too cumbersome, and they do not have the time to complete the Wage and Hour Form 380 (“WH-380”) numerous times per employee or to provide detailed information.

II. Public Comments Solicited – Key Issues On Which Information Is Requested

The Department seeks comments and information from the public on all issues related to the FMLA regulations. We specifically seek comment on the following issues.

A. Eligible Employee

- Section 825.110 of the regulations sets forth the eligibility standards employees must meet in order to take FMLA leave. Specifically, subsection 825.110(a) restates the statutory requirement that an employee needs to work for an employer for 12 months, work for 1,250 hours in the 12 months prior to taking leave, and work for an employer with 50 or more employees within 75 miles of the worksite in order to be eligible for leave. Although this provision has been in effect for over 10 years, several issues continue to arise which appear to warrant clarification.
- One court has interpreted the requirement of 12 months of service under section 825.110(a)(1) to preclude an employee from aggregating for coverage purposes

two separate and distinct work periods (separated by a 5 year absence from the company). See *Rucker v. Lee Holding, Co.*, 419 F. Supp. 2d 1 (D. Me. 2006), *appeal pending*, No. 06-1633 (1st Cir.).³ The court acknowledged that the regulations at section 825.110(b) state that the “12 months an employee must have been employed . . . need not be consecutive months” and that an employee who maintains an ongoing relationship with an employer punctuated by brief interruptions in service may combine those time periods in order to meet the 12-month requirement. The court also stated, however, that while the regulation “accommodates individuals whose employment might be intermittent or casual, it makes no allowance for an employee who severs all ties with the employer for a period of years before returning.” *Id.* at 3. The Department seeks input on whether and how to address the treatment of combining non-consecutive periods of service for purposes of meeting the 12 months requirement in section 825.110.

- Subsection 825.110(d) states that employee eligibility determinations “must be made as of the date leave commences.” This language has led to differing opinions about whether employees who have worked for 1,250 hours may begin a block of leave before they have met the 12-month eligibility date. Compare *Babcock v. BellSouth Advertising and Publ’g Corp.*, 348 F.3d 73 (4th Cir. 2003), and *Beffert v. Penn. Dep’t of Pub. Welfare*, 2005 WL 906362 (E.D. Pa. Apr. 18, 2005), with *Willemsen v. Conveyor Co.*, 359 F. Supp. 2d 813 (N.D. Iowa 2005). The Department solicits comment on how to appropriately clarify this situation. For example, if an employee is on leave at the time he/she meets the 12-month

³ The Department filed an amicus brief in the First Circuit arguing that, under the current regulations, a five-year break in service is at the outer bounds of what is permissible.

eligibility requirement, should the period of leave after meeting the statutory 12-month requirement be considered protected FMLA leave?

- In addition, the Department seeks comment on the differing regulatory tests used for determining employee eligibility. Subsection (d) states that an employer must determine whether an employee has met the 12-month/1,250-hour eligibility requirements *as of the date leave is to commence*. See 29 C.F.R. § 825.110(d) (emphasis added). In contrast, subsection (f) states that for purposes of determining whether an employee works for an employer who employs 50 or more employees within 75 miles of the worksite, the determination is to be made *as of the date that the leave request is made*. See 29 C.F.R. § 825.110(f) (emphasis added).
- Section 825.111 sets forth the standards for determining employer coverage under the statutory requirement that employers must employ 50 employees within 75 miles to be covered by the FMLA (29 U.S.C. § 2611(2)(B)(ii)). In December 2004, the United States Court of Appeals for the Tenth Circuit partially invalidated section 825.111(a)(3) of the existing regulations, which states that when an employee is jointly employed by two or more employers under section 825.106, the employee's worksite is the primary employer's office from which the employee has been assigned or to which the employee reports. See *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004). The court ruled that the existing regulation, as applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious because it: (1) contravened the plain meaning of term "worksite" as the place where an employee actually works (as opposed to the long-term care

placement agency from which she was assigned); (2) contradicted Congressional intent (manifested in 29 U.S.C. § 2611(2)(B)(ii) and the legislative history) that if any employer, large or small, has no significant pool of employees *nearby* (within 75 miles) to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee; and (3) created an arbitrary distinction between sole and joint employers. The Department seeks comment on these situations and any issues that may arise when an employee is jointly employed by two or more employers or when the employee works from home.

B. Definition of “Serious Health Condition”

- Section 825.114(c) states “[o]rdinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.” Have these limitations in section 825.114(c) been rendered inoperative by the regulatory tests set forth in section 825.114(a)?
- Is there a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA?

C. Definition of a “Day”

- Should scheduled holidays count against an employee’s 12 weeks of FMLA leave when the employee is out for a full week as they do now?
- Should “more than three consecutive calendar days” for a serious health condition in section 825.114(a)(2)(i) mean four days or three days and any part of

the fourth day? *Compare Russell v. North Broward Hosp.*, 346 F.3d 1335 (11th Cir. 2003) (three full days and a partial day will meet the test for continuing treatment), *with Murray v. Red Kap Indus., Inc.*, 124 F.3d 696, 698 (5th Cir. 1997) (“where an employee alleges that he has a serious health condition involving continuing treatment by a health care provider, he must first demonstrate a period of incapacity . . . for at least four consecutive days”); *Henderson v. Cent. Progressive Bank*, 2002 WL 31086086, at *3 (E.D. La. Sept. 17, 2002) (“statute requires an absence of at least four consecutive days”); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 243-44 (E.D. Pa. 1994) (plaintiff could not show that her son had “serious health condition” because he had been incapacitated for only three days, not the statutory four or more); *Bond v. Abbott Labs.*, 7 F. Supp. 2d 967, 973 (N.D. Ohio 1998) (“[plaintiff] must show that the period of incapacity was required to be at least four consecutive days”).

D. Substitution of Paid Leave

- What is the impact of section 825.207 which prohibits employers from applying their normal leave policies to employees substituting paid vacation and personal leave for unpaid FMLA leave?
- Does the existence of paid leave policies affect the nature and type of FMLA leave used?
- Do employers allow employees to use paid leave such as sick leave to cover short absences from work (such as late arrivals and early departures) for FMLA covered conditions?

E. Attendance Policies

- How does the FMLA impact the ability of employers to adhere to attendance

policies? Has section 825.215(c)(2) impacted the employers' ability to use "perfect attendance awards" and other incentives to encourage attendance? Is there a way to structure such awards and still maintain their effectiveness as an attendance incentive?

F. Different Types of FMLA Leave

- Does scheduled FMLA leave present different problems or benefits from unscheduled FMLA leave? Does intermittent leave present different problems or benefits from leave taken for one continuous block of time? Does the length of leave taken present different problems or benefits?
- Are there differences in leave usage based on occupation, employee classification, or other factors?
- How do employers cover the work of employees taking FMLA leave? Does the length of leave impact this coverage? Does the fact that the leave is scheduled or unscheduled impact this coverage? Does the amount of notice given by the leave-taking employee impact this coverage? Does the fact that the leave is intermittent impact this coverage?
- Do employers track late arrivals and early departures for FMLA-covered conditions? If so, how is such leave counted against the employee's allotment of twelve weeks of FMLA leave?
- Is there any evidence that employers are improperly denying requests for FMLA leave? If so, is the denial of FMLA leave more prevalent for certain types of leave?
- Is there any evidence that employees are misusing FMLA leave? If so, how does this compare to other types of leave?

- Is there any evidence of employers closing or relocating facilities as a result of employee leave patterns (either scheduled or unscheduled)?
- Is there a way to appropriately balance employer absence control policies and legitimate employee use of unscheduled, intermittent leave?

G. Light Duty

- At least two courts have interpreted section 825.220(d) to mean that an employee uses his or her 12-week FMLA leave entitlement while on a light duty assignment. Should “light duty” work count against the employee’s FMLA leave entitlement and/or reinstatement rights?

H. Essential Functions

- In order to qualify for FMLA leave, an employee must be unable to work at all or unable to perform any one of the essential functions of the employee’s position. *See* 29 C.F.R. § 825.115. What are the implications of permitting an employer to modify an employee’s existing job duties to meet any limitations caused by the employee’s serious health condition as specified by a health care provider, while maintaining the employee’s same job, pay, and benefits?

I. Waiver of Rights

- Section 825.220(d) states that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.” Some courts have interpreted this language to prohibit not only an employee’s prospective or future waiver of rights but also the ability of an employee to settle his or her past FMLA claim. *See, e.g., Taylor v. Progress Energy*, 415 F.3d 364 (4th Cir. 2005),

vacated and rehearing granted (June 14, 2006).⁴ The Department seeks input on whether a limitation should be placed on the ability of employees to settle their past FMLA claims.

J. Communication Between Employers and Their Employees

- Some commenters have expressed concern about the lack of awareness of FMLA rights and responsibilities among some employees. The Department requests information on whether employees continue to be unaware of their rights under the Act and, if so, what steps could be taken to improve this situation.
- In addition, as is discussed in the FMLA Coverage and Usage Estimates section presented below, the estimated number of workers taking FMLA leave based upon the 2000 Westat *employee* survey (2.4 million) is significantly lower than the estimate based upon the *employer* survey (6.1 million). What may account for this difference?
- Although there is evidence that some employers are failing to advise workers that their leave is being charged to FMLA, the Supreme Court in *Ragsdale* held that an employee is not automatically entitled to additional FMLA leave if the employer fails to properly advise the worker that the leave is being charged to FMLA because such a categorical penalty is inconsistent with the statute. What methods are used to notify employees that their leave has been designated as FMLA leave? What improvements can be made so that employees have more accurate information on their FMLA leave balances?

⁴ The Department filed an amicus brief in the Fourth Circuit on rehearing arguing that the regulation should be interpreted solely to bar the waiver of prospective rights.

- What changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?
- Employers have reported that some employees do not promptly notify their employers when they take unforeseeable FMLA leave. The Department requests information on the prevalence and causes of employees failing to notify their employers promptly that they are taking FMLA leave and suggestions as to how to improve this situation.

K. FMLA Leave Determinations / Medical Certifications

- Does the regulatory provision (section 825.307) that permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider result in unnecessary expenses for employers (e.g., by requiring them to hire a health care professional for purposes of this contact) and/or delay the certification process? How should the FMLA be reconciled with the Americans with Disabilities Act ("ADA"), which governs employee medical inquiries and contains no such limitation on employer contact? What are the costs and benefits to having this limitation?
- Does the model certification form (WH-380) seek the appropriate medical information? If not, what improvements could be made to the form to make it clearer and easier for health care providers to complete, so that it is more likely that the necessary and appropriate information will be reported?

- Does the two-day timeframe for providing notification to employees that their FMLA leave request has been approved or denied provide adequate time for employers to review sufficiently the information and make a determination?
- Section 825.308 generally permits an employer to request a medical recertification no more often than every 30 days and only in connection with the absence of the employee. Is that an appropriate timeframe?
- Section 825.308(e) permits employers to request a second opinion only for the initial certification. What are the costs and benefits to greater flexibility in requesting second opinions for recertifications? Would it create any hardships?
- Section 825.310(g) does not allow an employer to request a fitness for duty statement in the case of a worker who is absent intermittently. What are the benefits and burdens of permitting such fitness for duty certifications?

L. Employee Turnover and Retention

- How does the availability of FMLA leave affect employee morale and productivity?
- Is there any evidence that FMLA leave increases employee retention, thereby, reducing employee turnover and the associated costs?

III. FMLA Coverage And Usage Estimates

A. Introduction

In order to assist the Department's analysis of the impacts of the FMLA discussed above, the Department in the following sections presents estimates of the coverage and usage of FMLA leave in 2005. The Department generally requests comment on these estimates and any data that would allow the Department to better estimate the costs and benefits of the FMLA. Throughout

this section, the Department has also identified particular issues for which we request additional information and comment.

The Family and Medical Leave Act established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies and their impact on workers and their employers. The Commission surveyed workers and employers and issued a report in 1995.

In 1999 the Department contracted with Westat to update the employee and establishment surveys conducted in 1995. The surveys were completed in 2000. A report entitled “Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update” was published in January 2001 (the “2000 Westat Report”) and is available on the Department’s website at www.dol.gov/esa/whd/fmlacomment.htm. The 2000 Westat Report is actually composed of two separate surveys: (1) an employer or establishment survey; and (2) an employee survey. The following analysis updates the Department’s estimates of the number of workers employed at establishments covered by the FMLA, and the number of workers who took FMLA leave in 2005 (the latest year for which BLS employment data is available). It also highlights a number of important results and caveats in the 2000 Westat Report.

B. Westat’s Estimates

The Department is interested in refining the coverage and eligibility estimates in the 2000 Westat Report for two reasons. The Department believes there are several methodological issues in the 2000 Westat Report that resulted in the overestimation of covered and eligible workers, and an underestimation of workers not covered by the Act.⁵ In addition, the employment estimates in the Westat Report are based upon their 2000 survey and may not present an accurate picture of the current workforce.

⁵ Westat, “Balancing the Needs of Families and Employers.” These methodological issues are footnoted in the report in a variety of places, particularly Appendix C.

Although the Bureau of Labor Statistics (“BLS”) reports that total employment in 1999 was 133.5 million, the 2000 Westat Report estimated the number of covered workers by applying the percentages developed in its surveys to a workforce of 144 million. As noted in Appendix C of the 2000 report, this methodology (e.g., using an 18-20 month survey period) likely results in an overestimate of total employment. Moreover, “[h]ouseholds that refused to complete the 2000 screener tended to consist of persons that were not employed during the reference period. All other things being equal, this would lead to a higher estimate of the total number of employed persons in the 2000 survey.”⁶

Further, the 133.5 million employment estimate includes workers who are not covered by the Department’s regulations implementing the Act, such as the self-employed, unpaid volunteers, and many federal employees. Including these groups in the total also distorts the estimates of covered and eligible employees.⁷

C. Number of Workers Employed at FMLA Covered Establishments and the Number of Workers Eligible to Take FMLA Leave

The FMLA coverage estimates presented in this analysis are based upon applying the percentages in the 2000 Westat Report to the number of wage and salary workers in private industry and state and local governments in the 2005 Current Population Survey (see Table 1).⁸

Table 1: Civilian U.S. Employment Age 16 Years and Over in 2005

	Millions of Employees
Total Employment	141.7
Self-Employed and Unpaid Volunteers/Family Members	15.8
Federal Employees (covered by OPM’s FMLA regs)	2.6

⁶ Westat, “Balancing the Needs of Families and Employers,” at C-12.

⁷ For example, the self-employed do not need to be included in the FMLA coverage estimates since they do not have to be told to rehire themselves after they return from “family leave.”

⁸ Of the two major BLS employment surveys, the Current Population Survey was used because it covers agriculture, while the Current Employment Statistics survey does not.

Wage and Salary Workers in Private Industry and State and Local Government*	123.3
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Source: U.S. DOL, ESA estimates based upon 2005 Current Population Survey.

* Includes some Federal government workers employed by certain agencies such as the USPS.

The best available FMLA coverage estimates were published in Table A2-3.1 of the 2000 Westat Report, which are presented in Table 2 below.

Table 2: Coverage and Eligibility of Employees Under the Family and Medical Leave Act: 2000 Survey

	Percent of All Employees
Eligible Employees at FMLA-Covered Worksites	61.7
Non-eligible Employees at Covered Worksites	14.9
Employees at Non-covered Worksites	23.3

Source: Westat, "Balancing the Needs of Families and Employers," at A-2-21.

Does not sum to 100.0% due to rounding.

The estimates of the number of workers covered and eligible for FMLA leave under the regulations administered by the Department were developed by multiplying the 123.3 million wage and salary workers in private industry and state and local governments in 2005 by the percentage estimates in Table 2 above.

Table 3: Number of Covered and Eligible Employees Under the Family and Medical Leave Act in 2005

	Millions of Employees
Employees at FMLA-Covered Worksites	94.4
Eligible Employees at FMLA-Covered Worksites	76.1
Non-eligible Employees at FMLA Covered Worksites	18.4
Employees at Non-FMLA covered Worksites	28.7

Source: U.S. DOL, ESA based upon 2005 Current Population Survey and the 2000 Westat Report.

Does not sum to 123.3 million due to rounding.

- The Department requests comment on the approach used here to estimate the number of FMLA eligible workers employed at covered worksites. The Department also requests that commenters submit alternative methodologies and other available data that could be used to refine these estimates.

D. Number of Covered and Eligible FMLA Leave Takers

According to the 2000 Westat Report, 17.1 percent of covered and eligible employees took leave for a “covered reason.”⁹ Applying this percentage to the 76.1 million eligible employees at covered worksites in Table 3 yields an estimate of 13.0 million workers who took leave that they reported was for reasons covered by the FMLA. However, 13.0 million may be an upper-bound estimate in that it may over-estimate the number of covered and eligible workers who actually took FMLA leave because many of the “covered reason[s]” for leave may not rise to the level of a serious health condition. In fact, Westat cautioned “that the leave-takers discussed in this section [the one where the 17.1 percent estimate appears] did not necessarily take leave under the FMLA.”¹⁰ Moreover, 33.6 percent of FMLA-covered establishments report that at least some of the time employees take leave for family and medical reasons, that leave is not counted as FMLA leave.¹¹

The distinction between leave taken for family and medical *reasons* and leave that qualifies as *FMLA leave* is important. Only leave that qualifies as FMLA leave triggers the employee’s job protection rights and counts against the 12 weeks of leave provided by the Act. In order to estimate the number of covered and eligible employees who took *FMLA leave*, additional analysis is necessary.

⁹ Westat, “Balancing the Needs of Families and Employers,” at 3-5 to 3-6.

¹⁰ *Id.* at 3-5. Westat provided this caution because the questions Westat asked employees did not inquire about the seriousness of the health conditions. *See* questions A3, A4, and A5 of Westat’s 2000 Survey of Employees Questionnaire.

¹¹ U.S. Department of Labor, Employment Standards Administration estimate based on Westat’s 2000 FMLA Establishment Survey data.

According to the 2000 Westat employee survey, only 18.3 percent of covered and eligible workers who took leave that they reported was for reasons covered by the FMLA actually took FMLA leave.¹² Applying this percentage to the 13.0 million covered and eligible workers who took leave that they reported was for reasons covered by the FMLA yields an estimate of 2.4 million workers who took FMLA leave in 2005.¹³ However, 2.4 million may be a lower-bound estimate in that it may under-estimate the number of covered and eligible workers who actually took FMLA leave, because evidence exists that many workers are unaware that their leave qualified and that their employers may have designated their leave as FMLA leave.¹⁴

Because of the data limitations described above, the Department developed estimates of the number of covered and eligible employees who took FMLA leave based upon Westat's 2000 establishment survey rather than the employee survey. According to the 2000 Westat Report's establishment survey, 6.5 percent of employees in covered establishments took FMLA leave.¹⁵ Applying this percentage to the 94.4 million workers employed at FMLA-covered establishments in 2005 yields an estimate of 6.1 million covered and eligible employees who took FMLA leave in 2005.¹⁶ The Department notes that the results of the 2000 Westat establishment survey for large employers are consistent with the results of a recent WorldatWork survey.¹⁷

- The Department requests comments on the approach that was used to estimate the number of covered and eligible employees who took FMLA leave. The

¹² Westat, "Balancing the Needs of Families and Employers," at 3-14.

¹³ This estimate is consistent with Westat's estimate of "between 2.2 and 3.3 million people" based on the employee survey. Westat, "Balancing the Needs of Families and Employers," at 3-13.

¹⁴ According to U.S. Department of Labor, Employment Standards Administration tabulation of data in Westat's 2000 FMLA Employee Survey, 34.5 percent of covered and eligible workers who reported taking leave for an FMLA covered reason also reported that they had never heard of the FMLA.

¹⁵ Westat, "Balancing the Needs of Families and Employers," at 3-14 to 3-15.

¹⁶ This estimate is consistent with Westat's estimate of "between 4.6 million and 6.1 million" based on the establishment survey. Westat, "Balancing the Needs of Families and Employers," at 3-14.

¹⁷ A recent survey of large companies found that 9.5 percent of covered employees took FMLA leave compared to 8.9 percent for large employers in the 2000 Westat establishment survey. See WorldatWork, *FMLA Perspectives and Practices*, April 2005, at 7, and Westat, "Balancing the Needs of Families and Employers," Table 3.6, at 3-15.

Department also requests that commenters submit alternative methodologies and other available data that could be used to refine the estimate.

Although the Department previously estimated that “over 35 million covered and eligible workers have benefited from taking leave for family and medical *reasons* since 1993” (emphasis added),¹⁸ the Department is concerned that this estimate has been misinterpreted to be equivalent to the number of workers who actually took *FMLA leave* since 1993.¹⁹ This is *not* an accurate estimate of the number of workers who took FMLA leave. As noted above, there is an important difference between leave taken for *reasons* covered by the FMLA and *leave* actually qualified as FMLA leave. The two are not the same and it is important to differentiate the two in order to estimate the marginal impact of the FMLA itself, as opposed to estimating the impact of all sick leave policies in the workforce. In addition, as noted in the 2000 Westat Report, “establishments may double count persons that took more than one FMLA leave” during the 18-20 month survey period that began in January 1999.²⁰ Moreover, this double counting is even more likely to occur over the longer period that began in 1993 due to workers who have chronic conditions, more than one family member with a serious health condition, or multiple pregnancies or adoptions. After reviewing the 2000 Westat Report, the Department has determined that the available data do *not* enable the accurate estimation of the total number of workers who took *FMLA leave* since 1993.

- The Department requests that commenters submit alternative methodologies and other available data that could be used to develop this estimate given the data limitations and methodological issues in the 1995 and 2000 FMLA reports.

¹⁸ Westat, “Balancing the Needs of Families and Employers,” Statement from Alexis M. Herman, Secretary of Labor.

¹⁹ In the past few years, several press accounts reported that 50 million workers have taken advantage of FMLA leave since 1993 and have attributed this estimate to the Department. There is no Department estimate of 50 million workers having taken FMLA leave. While it might be possible to develop such an estimate by extrapolating from estimates in the 2000 Westat Report, such estimates would suffer from the same problems as those discussed above.

²⁰ Westat, “Balancing the Needs of Families and Employers,” at 3-14 n.25.

E. Estimated Number of Workers Taking Intermittent FMLA Leave

Although the Westat surveys tended to focus on the longest leaves taken for family and medical reasons rather than the leaves taken intermittently, the Department believes that the report can be used to develop an estimate of the number of workers that use intermittent FMLA leave. Almost one-quarter (23.9 percent) of covered and eligible workers who took FMLA leave reported taking their leave intermittently.²¹ That is, they repeatedly took leave for a few *hours* or *days* at a time because of ongoing family or medical reasons.²² Assuming that the 23.9 percent estimate applies to leave-takers as well as leave (i.e., the intermittent leave is not concentrated in a small group of leave-takers), then about 1.5 million FMLA leave-takers (i.e., 23.9 % of 6.1 million FMLA leave-takers) use intermittent leave in a year.

- The Department requests comment on the approach that was used to estimate the number of FMLA eligible workers employed at covered worksites taking intermittent FMLA leave. The Department also requests that commenters submit alternative methodologies and other available data that could be used to refine this estimate.

F. The Financial Impact of Intermittent FMLA Leave

In the foreword to the 2000 Westat Report, the Department noted:

Two-thirds of covered employers reported that, overall, complying with the Act was very or somewhat easy . . . The survey found that for most employers, intermittent leave had no impact on their business. Slightly more than 81 percent of employers said the use of intermittent leave had no impact on productivity and 94 percent said it had no impact on their profitability.²³

²¹ U.S. Department of Labor, Employment Standards Administration, estimate based on Westat's 2000 FMLA Employee Survey data.

²² Those that answered yes to Question A5B of Westat's employee questionnaire.

²³ Westat, "Balancing the Needs of Families and Employers," at xii.

However, because employers have reported that recurring *unforeseen* (i.e., unscheduled), intermittent FMLA leave is a problem, the Department has reexamined the estimates in the Westat Report. According to Table A2-6.13 of the Westat Report (presented below and renumbered as Table 4), 32.3 percent of establishments with over 250 employees reported a *negative* impact on productivity.²⁴ Moreover, 17.4 percent of establishments with over 250 employees reported a *negative* impact on profits.²⁵ Additionally, “[a]cross the board, administrative issues are perceived to be more difficult in 2000 than they were in 1995;”²⁶

Table 4: The Impact of Intermittent Leave Taken Under FMLA on Covered Establishments by Size: 2000 Survey

	Percent of Covered Establishments With:		All Covered Establishments
	1-250 Employees	251+ Employees	
Productivity			
<i>Large negative impact</i>	--	3.2%	0.5%
<i>Moderate negative impact</i>	12.0%	14.6%	12.2%
<i>Small negative impact**</i>	4.8%	14.5%	5.4%
<i>No impact*</i>	82.3%	65.7%	81.2%
<i>Small positive impact</i>	--	--	--
<i>Moderate positive impact</i>	--	--	--
<i>Large positive impact</i>	&	&	&
Profitability			
<i>Large negative impact**</i>	--	1.2%	0.1%
<i>Moderate negative impact**</i>	1.5%	5.5%	1.7%
<i>Small negative impact**</i>	3.8%	10.7%	4.2%
<i>No impact**</i>	94.5%	81.7%	93.7%
<i>Small positive impact</i>	--	--	--
<i>Moderate positive impact</i>	&	--	--
<i>Large positive impact</i>	&	&	&

* Significant at $p < .10$, using a t-test.

** Significant at $p < .05$, using a t-test.

& Indicates no significance test was conducted because of zero cell.

-- Indicates less than 10 unweighted cases.

Note. Column percents may not total to 100% due to rounding.

Source: Westat, “Balancing the Needs of Families and Employers,” pg. A-2-59.

²⁴ *Id.* at A-2-59.

²⁵ *Id.*

²⁶ *Id.* at 6-8.

A possible explanation of the differing impact of intermittent leave by establishment size may be that FMLA leave usage varies by establishment size. In fact, Westat found “Taking FMLA leave is apparently more frequent in larger establishments (8.9 leave-takers per 100 employees) than in smaller establishments (5.5 leave-takers per 100 employees).”²⁷ Thus, the higher negative impacts reported by the larger firms (i.e., those with 251 or more employees) may be due to that fact that they have a higher percentage of employees taking FMLA leave than small firms (i.e., those with 50 to 250 employees).

- The Department also requests that commenters submit alternative information related to the different impacts that intermittent leave has on large employers compared to smaller employers.

The definition of intermittent leave used in the 2000 Westat Report may also mask issues of concern. As Westat specifically noted, the employee survey defined intermittent leave as “repeatedly tak[ing] leave for a few hours or days at a time because of ongoing family or medical reasons,”²⁸ whereas the regulations at 29 C.F.R. § 825.203(a) define it as “leave taken in separate blocks of time *due to a single qualifying reason.*” (Emphasis added.)

Finally, the Westat survey did not distinguish between unscheduled, intermittent leave and scheduled, intermittent leave. By including leaves that do not occur repeatedly (i.e., 2 or 3 leaves in 18-20 months) in the surveys and by not asking questions about the impact of unscheduled, intermittent leave, the report may underestimate issues associated with frequent unscheduled, intermittent leaves of a day or less.

- The Department also requests that commenters submit alternative information regarding any impact that recurring unforeseen, intermittent FMLA leave may have on covered employers.

²⁷ *Id.* at 3-14.

²⁸ *Id.* at 2-10 n.10.

G. Estimated Number of Workers Taking Unforeseen, Intermittent FMLA Leave

Although the Westat Report does not provide information on the portions of the intermittent leave that are foreseeable and unforeseeable, the 2000 survey did provide some data that may be used as a rough “proxy.” Question A8a of the survey was “Did you take leave on a regular routine or as needed?” and had two responses: “Regular Routine” and “As Needed.” Of the employees who took intermittent FMLA leave for their longest leave, 45.4 percent reported that they took it as needed.²⁹ Assuming that all of the intermittent FMLA leave-takers who took unforeseeable leave answered “As Needed” to question A8a, then about 700,000 workers (i.e., 45.4% of 1.5 million) took *unforeseen*, intermittent FMLA leave.

- The Department requests comment on the approach that was used to estimate the number of FMLA eligible workers employed at covered worksites taking unforeseen, intermittent FMLA leave.
- The Department also requests that commenters submit alternative methodologies and other available data that could be used to refine this estimate.
- The Department also requests comment on the prevalence, durations, and causes of intermittent leave.

H. The Financial Impact of Unforeseen, Intermittent FMLA Leave

Based upon the preceding analysis, less than one-percent (700,000 of the 94.4 million) of the workers employed at FMLA covered establishments may be taking unforeseen, intermittent FMLA leave. If this estimate is accurate, it would seem to explain why most employers in the Westat survey reported that intermittent leave had little impact on productivity or profits. The temporary absence of less than 1 in about 135 workers probably would not have a significant impact on the overall efficiency of most employers’ operations.

²⁹ U.S. Department of Labor, Employment Standards Administration estimate based on 2000 FMLA Employee Survey data.

This does not preclude the possibility, however, that unforeseen, intermittent FMLA leave may be a significant problem for some employers. The unexpected absence of certain employees may create problems in the workplace. For example, an unannounced absence can cause other workers or equipment to be idled. An unannounced absence can result in lost business or performance penalties to be imposed upon the employer. It is noteworthy that the two industries with the highest FMLA costs in the 2004 Employment Policy Foundation (“EPF”) survey were transportation (an industry which has performance penalties) and telecommunications (an industry where quality of service agreements are common).³⁰ Anecdotal reports also indicate that some employers schedule extra workers for some positions to avoid the negative impacts of unforeseen, intermittent leave.

- The Department also requests comment on the impact that unscheduled, intermittent leave has on productivity and profits.

There is some indication that the use of unscheduled, intermittent FMLA leave is not evenly distributed across employers or even across the facilities of a given employer. Rather, it may be concentrated in some facilities and only becomes a problem for employers when the portion of workers taking unscheduled, intermittent FMLA leave in a given facility or operation exceeds some critical point.

Some believe that the apparent concentration of workers taking unscheduled, intermittent FMLA leave may be due to poor management or other labor-relations problems. Others believe that as more and more workers in a particular facility take unscheduled, leave, the likelihood that

³⁰ Mulvey, Janemarie, “The Cost and Characteristics of Family and Medical Leave,” Employment Policy Foundation *Issue Backgrounder* (Apr. 19, 2005). *But see* Institute for Women’s Policy Research, “Assessing the Family and Medical Leave Act: An Analysis of an Employment Policy Foundation Paper on Costs (June 29, 2005).

the remaining workers will become sick or injured and begin to take FMLA leave also increases. *See, e.g., Workers' Compensation and Family and Medical Leave Act Claim Contagion.*³¹

- The Department requests that commenters submit information on the concentration of workers taking unscheduled, intermittent FMLA leave in specific industries and employers.
- The Department requests that commenters submit information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.

Finally, the problems associated with employees taking unscheduled, intermittent FMLA leave may be related to the salaried or hourly-pay status of the employees. Anecdotal reports indicate that employers do not appear to have problems when workers who are salaried and exempt from the Fair Labor Standards Act (“FLSA”) under 29 C.F.R. Part 541 take small blocks of unscheduled, intermittent FMLA leave so long as these workers complete their work. In fact, some employers may not even record absences of a couple hours or less because of the scheduling flexibility typically afforded to salaried workers, and because the absences often have no impact on such workers’ pay or productivity. Employers report they have both administrative and production problems when non-exempt (typically hourly-paid) workers take unscheduled, intermittent FMLA leave, especially when these workers do not notify their employers that they are not coming to work at their scheduled reporting time. Unlike salaried employees, many non-exempt employees may not be paid when they take unscheduled, intermittent FMLA leave.

- The Department requests that commenters submit information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave.

³¹ Gardner, Harold H., Kleinman, Nathan L., and Butler, Richard J., *Workers' Compensation and Family and Medical Leave Act Claim Contagion*, *Journal of Risk and Uncertainty*, Volume 20, Jan. 2000, at 89-112.

- The Department also requests information on the different impact the leave taking by FLSA exempt and nonexempt employees may have on the workers who are taking leave and their employers.

I. Additional Questions Related to the Coverage Estimates and Their Impacts

- The Department requests public comment on the estimates and the methodology used to produce these estimates, including any available information that can be used to improve the estimates of the impact that FMLA leave has on employers and employees.

IV. Conclusion

The Department invites interested parties having knowledge of the FMLA to submit comments and welcomes any pertinent information that will provide a basis for ascertaining the effectiveness of the current implementing regulations and the Department's administration of the Act. The issues posed in this notice are not meant to be an exclusive list of issues for which the Department seeks commentary.

Signed at Washington, DC, this _____ day of _____, 2006.

Victoria A. Lipnic
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Paul DeCamp
Administrator
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Billing Code: 4510-27-P