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05'28'2002 09:29:33 AM

Record Type: Record

To: John F. Morrall III/OMB/EOP@EOP

cc:

Subject: Comments on Draft Report on Costs and Benefits of Federal Regulat ions

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Please accept these attached comments from the Washington Business Group on Health. We appreciate the opportunity to recommend reform of the regulations and guidance implementing the Family and Medical Leave Action.

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Creative Solutions for Today. Strong Policy for Tomorrow

May 28,2002

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

Dear Mr. Morrall:

The Washington Business Group on Health (WBGH) recommends that the Office of Management and Budget (OMB) review the Family and Medical Leave Act (FMLA) implementing regulations and associated guidance under its request for comments on the costs and benefits of federal regulations. Surveys and comments from our members, many of whom are the human resources professionals who handle employee leave for their companies, have consistently suggested that compliance with FMLA is complex, costly, and problematic. In particular, modifying the Department of Labor's (DoL's) regulation and subsequent interpretation of "serious health conditions" and "intermittent leave" would simplify administration of FMLA. Details of WBGH's comments on each of these aspects of FMLA are attached.

While WBGH supports appropriate use of FMLA, many employers are experiencing dramatic increases in employee requests for FMLA leave, often for brief time periods and non-serious medical conditions, substantially increasing the burden of administering FMLA leave. WBGH and its employer members recognize the importance of family-friendly benefits and the need for leave related to serious personal or family medical conditions. Many of our members provide generous benefits and leave programs. It is important, in order to fulfill the purpose of the FMLA, to alleviate the current interpretive and legal confusion which has not only added to the administrative burden, but also discourages companies from expanding leave policies and penalizes companies which have gone beyond the FMLA's requirements. This problem, which manifests itself throughout DOL's FMLA regulations, was recognized by the Supreme Court when it recently struck down DOL's notice requirements in'"Ragsdale vs. Wolverine Worldwide."

The Washington Business Group on Health (WBGH) has historically been and remains a national voice for the employer community on health care and health benefits issues, with a membership of 175 of the nation's largest and most innovative public and private sector

employers. WBGH's members provide health care coverage for more than 40 million U.S. workers, retirees, and their families. WBGH represents employers in promoting market-based, performance-driven health care delivery systems that improve the health and productivity of employees and communities and the quality of health care.

WBGH appreciates this opportunity to submit comments. WBGH would welcome the opportunity to meet with DHHS to discuss the issues raised in these comments in more detail.

Sincerely,

Steven Wojcik
Director, Public Policy

Attachment

Washington Business Group on Health
Comments on the Draft Report to Congress on the Costs and Benefits of Federal Regulations
May 28,2002

1. Definition of "Serious Health Condition" 29 C.F.R. 825.114

When the FMLA passed, Congress covered leave for the birth or adoption of a child as well as medical leave (for the individual or an immediate family member) for serious health conditions. Congress made clear that the term "serious health condition" was not meant to cover short term illnesses where treatment and recovery are brief and such conditions fall within even modest sick leave policies. Nevertheless, DOL broadly defined what constitutes a serious health condition when it promulgated its definition of serious health condition at 29 C.F.R. 825.114. The expansive way in which the regulation was written has been further stretched beyond recognition by nonregulatory guidance, specifically, wage and hour opinion letters that DOL has subsequently issued without benefit of public notice and comment. As a result, the FMLA, which began as a statute meant to protect jobs for new parents and those who are seriously ill themselves or caring for a seriously ill family member, has turned into a national sick leave law which would be barely recognizable to its drafters. Moreover, employers and employees are left with no discernable guidance on what constitutes a "serious health condition."

On April 7, 1995, DOL issued wage and hour opinion letter number 57 which stated 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)." Just a year and a half later, on December 12, 1996, DOL issued opinion letter number 86. That opinion letter stated that wage hour opinion letter 57 expresses an "incorrect view" with respect to the common cold, the flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease etc. and that 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 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."

In effect, the issuance of this later opinion letter has superceded the regulation itself and has become the standard in enforcement actions and before the courts. If an employee has a three day absence, has been to a doctor and has received a prescription, no matter what the underlying cause-- from a cold to cancer—the employee is entitled to FMLA leave and all of the rights it confers.

The following are some of the more egregious examples of the use of FM:LA for minor conditions that our members have reported to us:

- One employer states that FMLA leave is often used for headaches, sinusitis, colds, flu, tooth extractions and other minor illnesses for which recovery is brief.

- Another employer cites cases in which employees whose vacation requests for specific time periods have been turned down subsequently file for FMLA leave for stress because their vacation requests were denied or when overtime is scheduled.
- In other cases, FMLA leave is requested in the absence of any medical condition, serious or minor. For example, an employee requests FMLA leave because their acupuncturist wants to observe their response to treatment for a long period of time.

The resulting confusion to employers and employees should be fixed immediately, first by DOL rescinding wage and hour opinion letter 86 and restoring the meaning of the word "serious" to serious health conditions protected by the FMLA. DOL should also institute rulemaking to determine whether its current regulation defining serious health condition is consistent with the statute. WBGH recommends that the rulemaking be as specific as possible, including clear criteria or examples of what conditions would qualify and those that would not qualify for FMLA leave. This change would help to insure the intended benefits and protections of FMLA while lowering the administrative costs.

2. Intermittent Leave 29 C.F.R. 825.203

DOL's intermittent leave regulation has also been problematic. Congress drafted the FMLA so employees could take leave in increments of less than one day (for example for chemotherapy or radiation treatments). Unfortunately, the regulation provides that leave may be counted "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." Since many employers track in increments of as small as six minutes, the task of accounting for and tracking intermittent leave is a significant administrative burden. This is especially the case when coupled with the broad definition of "serious health condition" which means that employers are keeping track of a large number of partial days for serious and non-serious conditions alike.

- *An* example illustrates the problem. A member company reported that one employee requests a ten minute FMLA leave every week to attend to a contact lens problem. The employer generates a significant amount of paperwork to comply with this request.
- In other cases, intermittent leave is taken in the same increments of time as overtime is scheduled (1-**2** hours).

Allowing employers to track intermittent leave in larger increments (such as by the half day) would ease the cost and paperwork burden while ensuring that those employees who need intermittent leave are granted such leave. Redefining what constitutes a serious health condition will also reduce the number of absences and conditions under which an employer must track intermittent leave.