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05/28/2002 12:34:56 PM

Record Type: Record

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

cc:

Subject: Comments on the Draft Report to Congress

Mr Morrall,

Attached please find a portion of the NAM's comments on the Draft Report to Congress on the Costs and Benefits of Federal Regulation. This comment deals specifically with manufacturers concerns regarding the Family and Medical Leave **Act.** In addition to this e-mail, the comments will be filed by facsimile. Comments on other subjects will be filed under separate cover. Please do not hesitate to contact me if you have any additional questions.

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National Association of Manufacturers

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May 28,2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10235
725 17th Street, N.W.
Washington D.C. 20503

Dear Mr. Morrall:

On behalf of the National Association of Manufacturers and its members, we would like to recommend that the Family and Medical Leave Act's (FMLA) implementing regulations and associated non-regulatory guidance be reviewed under OMB's request for comments on the costs and benefits of federal regulations. The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

Specifically, the Department of Labor's (DOL's) regulation, and subsequent interpretations, regarding the definition of "serious health condition" under the FMLA should be reviewed. In addition, the regulations and interpretations of "intermittent leave" issues as well as the notification and recordkeeping requirements should also be reviewed, particularly in light of the Supreme Court's decision in Ragsdale v. Wolverine Worldwide. We would also draw your attention to wage and hour opinion letters that, while technically non-binding guidance have, in effect, and without benefit of notice and comment, usurped the regulations.

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

When the FMLA passed, Congress covered both 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 it 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, has turned into a national sick leave law which would be barely recognizable to its drafters.

Moreover, employers and employees are left with no discemable guidance on what does or does not constitute a "serious health condition.'' Many NAM members have articulated that they don't have difficulty interpreting what constitutes a "serious health condition'' because ''just about everything is covered, especially if a doctor says it is covered." This unacceptable "status quo" is clearly inconsistent with the statute.

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 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.

2. Intermittent Leave 29 C.F.R. 825.203; 825.306; 825.307; 825.308

Specific applicable regulations:

825.203 -- Leave may be taken intermittently. Examples include cases where employees or their family members have serious health conditions which require periodic care by a Health Care Provider ("HCP") and in cases where the employee or family member is incapacited even if he/she does not receive treatment by a HCP.

825.306 -- Employers can request medical certifications. With respect to intermittent leave, employers can ask HCP's to provide the likely duration and frequency of episodes of incapacity.

825.307 -- Employers cannot generally question the adequacy of certifications. If an employee submits a complete certification, the employer cannot request any additional information from a HCP. An HCP representing the employer, however, can contact the employee's HCP for clarification.

825.308 -- Employers cannot generally request recertifications of medical conditions until the minimum duration specified by the HCP on the original certification has passed.

DOL's intermittent leave regulations have also been problematic for NAM members for a number of reasons. First, Congress drafted the FMLA so that employees could take leave in increments of less than one day (for example, for chemotherapy or radiation treatments). 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 a 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. Allowing employers to track intermittent leave in larger increments (such as by the hour or 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.

Unfortunately, because of the way the regulations have been written and interpreted, intermittent leave can be misused by employees, and employers have little recourse. For example, an employee may have his HCP certify that he needs intermittent leave for migraines. The HCP lists the duration as "indefinite," or "lifetime." With respect to the frequency of the episodes of incapacity, the HCP writes "unknown." The employee is then free to take every Friday afternoon off for the rest of his career due to migraines, even though he/she is not receiving any treatment on those afternoons. Another example may involve an employee who has his HCP certify that he needs intermittent leave for high blood pressure. Again, there is no duration or frequency specified, but the HCP does indicate that the purpose of the leave is for the team member to go to the doctor when his/her pressure is high. The team member takes off every Monday for high blood pressure and the employer has no way of knowing whether he has been to the HCP or not. These problems are further exacerbated by the certification provisions and the limitations placed on employers in verifying illnesses.

Revising the regulations so that HCP's provide the duration and frequency of the leave would be beneficial. Alternatively, where the duration of leave is not specified, permitting employers to authorize leave for an initial period of 30 -90 days, with recertification required upon expiration of the initial leave period would ease employers' burdens. Although HCP's cannot always say with certainty the frequency of absences, without additional information from the medical provider, employers are at a disadvantage in terms of attempting to adequately staff and schedule their operations. Moreover, the regulations should allow employers to ask employees to provide evidence that they received treatment if they are off work on intermittent leave for periodic treatments, e.g., the blood pressure example. Perhaps the regulatory change

that would most effectuate the purpose of the statute is to relax the regulations on employers' ability to contact HCP's. As the above discussion illustrates, there are many circumstances under which employers need additional information from HCP's, not just "clarification."

Employers want to be able to provide legitimate intermittent leave to employees but they also need to have adequate information so that they can properly staff their operations. Moreover, employers ought to be able to verify that an employee has an illness that requires intermittent leave and be able to understand the ramifications of that illness. Employers must also be able to institute proper absence control policies and to ensure that the use of leave is legitimate, a proposition that is difficult under the current intermittent leave regulations taken together.

Conclusion

It is important, in order to fulfill the purpose of the FMLA, to alleviate the current interpretive and legal confusion which discourages companies from offering or expanding beneficial programs, including paid leave. DOL's interpretations have especially penalized 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.

Vague, confusing and contradictory regulations and guidance do no allow employers to administer the FMLA's requirements with confidence and certainty. A thorough review of DOL's FMLA regulation, specifically those regulations that define serious health condition, intermittent leave and notice, is in order.

Sincerely,

Sandra J. Boyd
Assistant Vice President, Human Resource Policy