

February 8, 2007

BY ELECTRONIC MAIL

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U.S. Department of Labor, Room S-3502
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**RE: Request for Information on the Family and Medical Leave Act of 1993
(71 Fed. Reg. 69,504)**

Dear Mr. Brennan:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Department of Labor's *Request for Information on the Family and Medical Leave Act of 1993* (FMLA).¹ Advocacy is pleased that the Department of Labor (DOL) is requesting compliance information from interested parties on the effectiveness of the FMLA, twelve years after DOL regulations were implemented.

As DOL gathers compliance information about the FMLA, Advocacy strongly recommends that DOL treat this exercise as a periodic review of the small business impacts of the FMLA, as required by Section 610 of the Regulatory Flexibility Act (RFA).² Small businesses tell Advocacy that the FMLA is burdensome, complex and costly.³ Section 610 of the RFA requires agencies to review all regulations which have or will have a significant economic impact on a substantial number of small entities within 10 years of their adoption as a final rule.⁴ A Section 610 review of the FMLA will

¹ *Request for Information on the Family and Medical Leave Act of 1993; Request for information from the public*; 71 Fed. Reg. 69,504 (Dec. 1, 2006).

² *Regulatory Flexibility Act of 1980*, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. § 601 et seq.). Advocacy is charged under the statute with overseeing agency compliance with the RFA.

³ Advocacy heard directly from small business representatives, including those from the National Federation of Independent Business, the National Small Business Association, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

⁴ 5 U.S.C. § 610.

provide vital information to the agency and regulated small businesses about potential ways to minimize the burden on small businesses.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁵ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁶ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.⁷ Advocacy is required to monitor and report to Congress on Federal agency compliance with the RFA, including compliance with Section 610 periodic reviews of existing regulations.⁸

Background

The FMLA was enacted on February 5, 1993, and became effective on August 5, 1993, for most covered employees.⁹ DOL published the final regulations to implement the FMLA on January 6, 1995. Under the FMLA, eligible employees of employers with more than 50 employees may take unpaid job-protected leave for up to twelve work weeks if they need time off for the birth or adoption of a child, for serious personal health condition, or to care for the serious health condition of family members.¹⁰

On December 1, 2006, DOL requested comments from interested parties on their experience with the FMLA, “to provide a basis of ascertaining the effectiveness of the current implementing regulations and DOL’s administration of the act.”¹¹

DOL Should Complete a Section 610 Periodic Review on the FMLA

It is appropriate for DOL to conduct a periodic review of the FMLA under Section 610 of the RFA at this time, because DOL is already requesting information from entities on their compliance experience with the FMLA. Section 610 of the RFA requires agencies to retrospectively review all regulations which have or will have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules.¹² The purpose of this review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated

⁵ 5 U.S.C. § 601 et seq.

⁶ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁷ 5 U.S.C. § 603.

⁸ 5 U.S.C. § 610.

⁹ 71 *Fed. Reg.* at 69,505 (Dec. 1, 2006).

¹⁰ The Family and Medical Leave Act of 1993, 29 C.F.R. § 825 (1993).

¹¹ 71 *Fed. Reg.* 69,504 (Dec. 1, 2006).

¹² 5 U.S.C. § 610(a).

objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of small entities.¹³

Advocacy believes that the FMLA poses a significant economic impact on a substantial number of small entities, and therefore, is subject to Section 610 review. Small business representatives have written comment letters to the Office of Information and Regulatory Affairs, recommending reforms of the FMLA to minimize the burden on small businesses.¹⁴ Under a Section 610 review, the agency shall consider the following factors to minimize any significant impact of the rule, the agency shall consider the following factors: (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local government rules; and (5) the length of time since the rule has been evaluated or the degree to which the technology, economic conditions, or other factors have changed in the area affected by the rule.¹⁵

The FMLA Since Poses a Significant Economic Impact on a Substantial Number of Small Entities.

Twelve years after DOL released the final FMLA rules, it is clear that the rules create a significant economic impact on a substantial number of small entities. There are a substantial number of small businesses that are regulated under this rule. According to 2004 data from the Small Business Administration, over 200,000 small businesses with more than 50 or more employees are required to comply with the FMLA. Although the small businesses that are required to comply with the FMLA make up a fraction of all small businesses, these entities employ over 25 million employees, or 30 percent of all covered employees.¹⁶

Advocacy believes that this regulation poses a significant economic impact on small businesses. In 1995, DOL estimated that the cost to all business from the FMLA at \$675

¹³ *Id.*

¹⁴ Comment letter from Andrew M. Langer, Manager, Regulatory Policy, National Federation of Independent Business, to Lorraine Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget (May 20, 2004) (*NFIB Comment Letter*), available at: http://www.whitehouse.gov/omb/info/2004_cb/8.pdf.

Comment letter from Sandra J. Boyd, Assistant Vice President, Human Resource Policy, National Association of Manufacturers to John Morrall, Office of Information and Regulatory Affairs, Office of Management and Budget (May 28, 2002) (*NAM Comment Letter*), available in the Appendix at: http://www.whitehouse.gov/omb/info/2004_cb/9.pdf.

Comment letter from William L. Kovacs, Vice President, Chamber of Commerce of the United States of America, to Lorraine Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget (May 20, 2004) (*U.S. Chamber Comment Letter*), available at: http://www.whitehouse.gov/omb/info/2004_cb/19.pdf.

¹⁵ 5 U.S.C. § 610(b).

¹⁶ Small Business Administration, Office of Advocacy, *Employer Firms, Establishments, Employment and Annual Payroll Small Firm Size Classes, 2004*, (*Advocacy Data*) based on data provided by the U.S. Census Bureau, available at: http://www.sba.gov/advo/research/us_04ss.pdf. According to this 2004 data, 212,480 small businesses were required to comply with the FMLA.

million annually, but only computed the costs of maintaining group health insurance during periods of permitted absences.¹⁷ In contrast, a study by the Employment Policy Foundation (EPF) estimates that the direct costs to FMLA leave to employers was \$21 billion in 2004 in terms of lost productivity from absenteeism, continued health benefits, and net labor replacement costs.¹⁸ Because the costs of FMLA to business are closely tied to the number of employees, a reasonable approximation of small business share of costs based on the EPF estimates is \$6.3 billion a year.¹⁹

Advocacy also believes that a Section 610 review is an excellent opportunity for DOL to obtain data on the cost of the FMLA to the small business community. In 1995, DOL certified that this rule would not have a significant economic impact on a substantial number of small entities. It based this statement on the fact that only percent of small employers are covered by the FMLA.²⁰ However, Advocacy commented at that time that this factual basis improperly compared the number of covered small entities to the total number of small businesses, rather than calculating the number of small businesses that are covered by a rule that will suffer a significant economic impact.²¹ At that time, Advocacy also requested that DOL conduct an RFA analysis prior to the publication of the final rule.²²

Small Business Concerns Regarding the FMLA

Small businesses have recommended the following specific reforms to minimize the burden of FMLA on small businesses, and Advocacy suggests that DOL analyze these recommendations under a Section 610 review.²³

1) Complexity of FMLA-Definition of “Serious Health Condition”

Under the FMLA, eligible employees can take up to twelve weeks of job-protected, unpaid leave to care for a family member with a serious health condition, or because of the employee’s own health serious health condition.²⁴ Small businesses lack guidance on what constitutes a “serious health condition,” and seek clarification of DOL’s conflicting regulations and opinion letters on this definition.

When Congress passed the FMLA, proponents explicitly stated that the term “serious health condition” was intended to cover severe medical illnesses or emergencies, and not

¹⁷ 60 *Fed. Reg.* at 2236 (Jan. 6, 1995).

¹⁸ Janemarie Mulvey, Ph.D., Employment Policy Foundation, *The Costs and Characteristics of Family and Medical Leave* (Apr. 19, 2005).

¹⁹ *Advocacy Data*, supra note 16. Advocacy calculated this number by taking 30 percent of \$21 billion dollars, because these entities employ 25 million employees, or 30 percent of all covered employees.

²⁰ 60 *Fed. Reg.* at 2234 (Jan. 6, 1995).

²¹ Comment letter from Doris S. Freedman, Acting Chief Counsel for Advocacy, to J. Dean Speer, Division of Policy Analysis, Wage and Hour Division, U.S. Department of Labor (Aug. 31, 1993).

²² *Id.*

²³ Comment Letters, supra note 14.

²⁴ 29 C.F.R. § 825.100.

minor illnesses that are covered by regular sick leave.²⁵ DOL's regulation 825.114(c) follows this Congressional intent, which states that "ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers... etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave."²⁶ In 1996, DOL issued conflicting opinion letter 86,²⁷ codified in section 825.114(a),²⁸ which stated that these minor health conditions could meet the criteria for a serious health condition if there was a period of incapacity for more than three days and treatment by a health care provider. This broad definition has led to fraud and abuse of FMLA policies by employees, who have obtained medical certifications for minor or chronic conditions such as allergies, migraines, back problems, depression, asthma and diabetes.²⁹

Small business representatives have proposed changes to clarify the definition of a "serious health condition."³⁰ The National Federation of Independent Business (NFIB) recommends that DOL strengthen the minor illness exceptions in section 825.114(c), "to make certain that unless complications arise, those exceptions will not be granted, even when meeting the criteria laid out in section 114(a)."³¹ The U.S. Chamber of Commerce and the FMLA Technical Corrections Coalition have commented that DOL should revise section 825.114 and rescind DOL opinion letter FMLA-86, explicitly excluding minor illnesses from the definition of a serious health condition. They also commented that these regulations should reaffirm that these minor illnesses should not be converted into a serious health condition, even though there is incapacity for three days and continuing treatment by a health care provider.³²

2) Costs and Abuse from FMLA- Intermittent Leave

The FMLA allows employees to take leave intermittently or in "separate blocks of time due to a single qualifying reason."³³ Small business representatives have told Advocacy that intermittent leave is the most costly and challenging aspect of the FMLA, due to the

²⁵ Ira Carnahan, *Protecting The Common Cold*, Forbes Magazine, Feb. 19, 2003, available at: http://www.forbes.com/home/2003/02/19/cz_ic_0219beltway.html. Former Rep. Marge Roukema (R-N.J.) declared at the time: "'Serious illness' means the employee who is in a car accident and requires hospitalization beyond the standard two weeks of paid sick leave typically given to employees....What we are talking about here are severe medical emergencies...and by family medical crisis I don't mean a child with the sniffles or the flu..."

²⁶ 29 C.F.R. § 825.114(c).

²⁷ FMLA-86, Department of Labor Opinion Letter (Dec. 12, 1996).

²⁸ 29 C.F.R. § 825.114(a).

²⁹ *Roundtable Discussion: The Family and Medical Leave Act: A Dozen Years of Experience*, Committee on Health, Education, Labor, and Pensions, 109th Cong. 53 (2005) (statement of Sandra Boyd, Vice President, National Association of Manufacturers).

³⁰ Comment Letters, *supra* note 14.

³¹ Telephone Interview with Dan Bosch, Program Manager, NFIB Legal Foundation, in Washington, D.C. (Jan. 18, 2007).

³² *U.S. Chamber Comment Letter*, and Comment letter from Deanna R. Gelak, FMLA Technical Corrections Coalition, to Lorraine Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget (May 20, 2004) (*FMLA Coalition Comment Letter*), available at: http://www.whitehouse.gov/omb/infoereg/2004_cb/4.pdf.

³³ 29 C.F.R. § 825.203.

difficulty in tracking these small increments of time and scheduling staff due to the number of unplanned and fraudulent absences for minor or chronic conditions.³⁴

a. Reform of Tracking Provisions

The NFIB has commented that “the regulations under FMLA have created a burdensome paperwork nightmare for employers, especially through the mandated allowance of small time periods of leave.”³⁵ The regulations “limit leave increments to the shortest period of time that the employer’s payroll system uses to account for absences or use for leave, provided it is one hour or less.”³⁶ Small businesses such as manufacturers track time in increments of as small as six minutes, making the task of accounting and tracking short time periods of intermittent leave a significant administrative burden.³⁷

Small business and employer representatives have previously recommended that DOL reform the intermittent leave section, to require an employee to take intermittent leave in increments of up to one-half of a work day or four hours.³⁸ This reform of intermittent leave would ease the burden for employers, by decreasing the administrative paperwork and making it easier for these employers to cover effectively for absent employees.

b. Reform of the Notice Provision

Small businesses representatives have testified in Congressional hearings that their members are having problems with employees abusing the intermittent leave policies for unplanned minor or chronic conditions and seek reform of the lenient notice policies in DOL regulations.³⁹ Under the FMLA, “the employer has a right to 30 days advance notice from the employee where practicable.”⁴⁰ However, DOL opinion letter FMLA-101 has weakened this notice provision, by allowing an employee to give notice “within one or two days of when the employee learns of the need for the leave.”⁴¹ The Employment Policy Foundation reports that more than 50 percent of leave-takers provide notice either the day leave begins or after the leave has commenced.⁴² The U.S. Chamber of Commerce has recommended that DOL rescind DOL opinion letter FMLA-101 to amend sections 825.302 and 825.303, “by requiring at least one week advanced notice of

³⁴ See note 3.

³⁵ *Id.*

³⁶ 29 C.F.R. § 825.203(d).

³⁷ *Family and Medical Leave Act Before the House Subcomm. on Oversight and Investigations, Committee on Education and the Workforce*, 105th Cong. (1997) (statement of George G. Daniels, owner of Daniels Manufacturing Corporation, a small business in Orlando, Florida). Mr. Daniels recommended that employers should have the right to require that intermittent leave in blocks of no longer than 4 hours.

³⁸ See *NAM Comment Letter, FMLA Coalition Comment Letter and U.S. Chamber Comment Letter*, *supra* note 14 and 32.

³⁹ *Roundtable*, *supra* note 29, at 55 (statement of Sandra Boyd, Vice President, National Association of Manufacturers).

⁴⁰ 29 C.F.R. § 825.100.

⁴¹ FMLA-101, Department of Labor Opinion Letter (Jan. 15, 1999), available at: <http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-101.pdf>.

⁴² *Roundtable*, *supra* note 29 (statement of Janemarie Mulvey, President and Chief Economist, Employment Policy Foundation).

the need for intermittent leave except in cases of an emergency, in which case they must provide notice on the day of the absence, unless they can show it was impossible to do so.⁴³

c. Preventing Employee Abuse

Employers state that the abuse occurs when an employee has continued unscheduled absences due to medical certifications for permanent or chronic health conditions such as asthma, migraines, or stress. Many of these medical certifications fail to specify a duration and frequency of leave, which allows employees to utilize these medical certifications permanently or indefinitely.

The National Association of Manufacturers (NAM) has recommended that if a health care provider fails to specify duration and frequency, the regulations should allow employers to authorize leave for an initial period of 30-90 days, with recertification required upon expiration of the initial leave period.⁴⁴

d. How Employers Cover the Work of Employees on Intermittent Leave

According to the NFIB, employees are frequently and unpredictably absent due to intermittent leave disrupt the work environment, affecting staff scheduling and productivity.⁴⁵ According to a study by the NFIB, the most frequent ways to compensate for employee absences are other employees covering (71 percent), the owner's family covering (62 percent), and postponing employee's work (21 percent).⁴⁶ An employment attorney testified that although there are only a small percentage of employees who abuse the FMLA, these abuses have a tremendous impact on the rest of the workforce who cover for absent employees with little or no notice.⁴⁷ Robert Prybutok, a president at a small manufacturing company, testified that the manufacturing industry is hit hard by these unplanned absences because their work processes require a minimum number of experienced operators and temporary replacements are expensive. Prybutok testified that FMLA increases the labor costs per unit of production time, making it harder for his small business to compete with low labor markets abroad.⁴⁸

Conclusion

Flexibility is an important competitive advantage to smaller firms in recruiting and retaining qualified employees.⁴⁹ Small businesses covered by the FMLA are trying to

⁴³ See *U.S. Chamber Comment Letter*, *supra* note 14.

⁴⁴ *NAM Comment Letter*, at 3.

⁴⁵ Telephone Interview with Dan Bosch, Program Manager, NFIB Legal Foundation, in Washington, D.C. (Jan. 18, 2007).

⁴⁶ National Federation of Independent Business, *NFIB National Small Business Poll: Family and Medical Leave* (2004) (*NFIB Poll*).

⁴⁷ *Roundtable*, *supra* note 29, at 26 (testimony of Sue Willman, attorney, Spencer Fane, Kansas City, MO).

⁴⁸ *Roundtable*, *supra* note 29, at 19 (testimony of Robert Prybutok, President, Polymer Technologies, Newark, DE).

⁴⁹ *NFIB Poll*, at 7.

provide flexibility to their employees who need to take family and medical leave, but the rigid DOL regulations have proven to be complex, burdensome and easily abused by employees. Twelve years after DOL released its final FMLA rules, it is clear that these rules pose a significant economic impact on a substantial number of small entities. A Section 610 review of FMLA will provide critical information to the agency and small businesses about potential ways to reduce the regulatory burden of the FMLA on small businesses.

Advocacy is pleased to forward the comments and concerns of small businesses. Please feel free to contact me or Janis Reyes at (202) 619-0312 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//
Thomas M. Sullivan
Chief Counsel of Advocacy

//signed//
Janis C. Reyes
Assistant Chief Counsel

cc: Steven D. Aitken, Acting Administrator, Office of Information and Regulatory Affairs