



April 7, 2008

**BY ELECTRONIC MAIL**

The Honorable Victoria A. Lipnic  
Assistant Secretary for Employment Standards  
Employment Standards Administration  
U.S. Department of Labor, Room S2321  
200 Constitution Avenue, NW  
Washington, DC 20210

Richard M. Brennan  
Senior Regulatory Officer  
Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor, Room S3502  
200 Constitution Avenue, NW  
Washington, DC 20210  
Electronic Address: [www.regulations.gov](http://www.regulations.gov) (Docket ID-1215-AB35)

**RE: Notice of Proposed Rulemaking on the Family and Medical Leave Act of 1993 (73 Fed. Reg. 7876)**

Dear Assistant Secretary Lipnic and Mr. Brennan,

The U.S. Small Business Administration's Office of Advocacy (Advocacy) is pleased to submit the following comments on the Department of Labor's (DOL) *Notice of Proposed Rulemaking* (NPRM), which revises the regulations implementing the Family and Medical Leave Act of 1993 (FMLA).<sup>1</sup>

Advocacy supports DOL's efforts to evaluate the effectiveness of the FMLA regulations fifteen years after they were enacted, by seeking comment on the impact of the FMLA in its 2006 *Request for Information* (RFI)<sup>2</sup> and for releasing this proposed rule. Although Advocacy agrees with the helpful revisions in this proposed rule, we recommend that DOL finalize additional reforms to minimize the costs of this rulemaking on small entities.<sup>3</sup>

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<sup>1</sup> *Notice of Proposed Rulemaking on the Family and Medical Leave Act of 1993*; 73 Fed. Reg. 7876 (Feb. 11, 2008).

<sup>2</sup> *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).

<sup>3</sup> In its RFI Comments, Advocacy recommended that DOL reform two provisions that are particularly burdensome for employers—the definition of a “serious health condition” and the “intermittent leave” provisions. Comment letter from Thomas M. Sullivan, Chief Counsel, SBA Office of Advocacy, to DOL

## **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),<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>5</sup> 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.

On August 13, 2002, President Bush signed Executive Order 13272,<sup>6</sup> which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

## **Advocacy Recommendations and Comments on the Proposed Rule**

On March 20, 2008, Advocacy held a roundtable on this NPRM that was attended by small business representatives, trade association staff and DOL personnel. Advocacy has summarized the small business comments and recommendations to the major provisions of the NPRM from this roundtable in the paragraphs below.

### **1) Definition of a “Serious Health Condition” (Section 825.114)**

Small business representatives have identified the definition of a “serious health condition” as one of the major sources of employee abuse, because the definition is broad enough to cover almost any illness, such as a cold or the flu. Roundtable participants were concerned that DOL left this definition unchanged in this NPRM.

DOL’s FMLA regulations section 825.114(c) states that “ordinarily, unless complications arise, the common cold, the flu, earaches, 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.”<sup>7</sup> In 1996, DOL issued conflicting opinion letter 86,<sup>8</sup>

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(Feb. 21, 2007) (*Advocacy RFI Comment*), available at:

[http://www.sba.gov/advo/laws/comments/dol07\\_0208.html](http://www.sba.gov/advo/laws/comments/dol07_0208.html).

<sup>4</sup> 5 U.S.C. § 601 et seq.

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

<sup>6</sup> *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

<sup>7</sup> 29 C.F.R. § 825.114(c).

<sup>8</sup> FMLA-86, Department of Labor Opinion Letter (Dec. 12, 1996).

codified in section 825.114(a),<sup>9</sup> 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. Advocacy recommends that DOL consider reforming the definition of a “serious health condition” pursuant to small business comments.<sup>10</sup>

Although DOL did not clarify the definition of a “serious health condition,” Advocacy does support DOL’s proposal to clarify the time frames for practitioner’s visits that would qualify as a “continuing treatment” for two definitions of a serious health condition: incapacity in excess of three consecutive days and chronic conditions.<sup>11</sup> Under DOL’s proposals, for a period of incapacity of more than three consecutive calendar days, the proposal clarifies that an employee must have two visits to a health care provider within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist.<sup>12</sup> For chronic conditions, the proposal clarifies that “periodic visits” to a health care provider is defined as twice or more a year.<sup>13</sup> Advocacy is pleased that DOL is clarifying these terms that have open-ended time frames in the current regulations, because it provides guidance to the business community and may lead to less abuse of these provisions by employees. Advocacy recommends that DOL consider additional reforms of these provisions recommended by small business representatives.<sup>14</sup>

## **2) Definition of Intermittent Leave (Section 825.203)**

Roundtable participants expressed concern that DOL left the definition of intermittent leave unchanged in this proposed rule despite receiving the most substantive commentary on this issue in its RFI.<sup>15</sup>

Intermittent leave is more difficult to track than continuous leave because current regulations permit employees to take time off in increments as small as the employer’s

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<sup>9</sup> 29 C.F.R. § 825.114(a).

<sup>10</sup> In its RFI comments, the National Federation of Independent Business (NFIB) recommended 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).” Comment Letter from Dan Danner, Executive Vice President, NFIB to DOL (*NFIB RFI Comment*) (Feb. 5, 2007).

<sup>11</sup> 73 *Fed. Reg.* at 7887. This section will be relabeled 29 C.F.R. § 825.115 (Continuing treatment).

<sup>12</sup> *Id.*

<sup>13</sup> 73 *Fed. Reg.* at 7888.

<sup>14</sup> The National Coalition to Protect Family Leave, which has small business representatives, recommended in its RFI comments the following additional reforms: a) the number of consecutive days of incapacity for a serious health condition be increased from three consecutive days to five work days or seven consecutive calendar days; b) the “two or more visits” occur while the employee or covered family member is incapacitated; and c) the elimination of section 825.114(a)(2)(B), that enables an employee or covered family member to satisfy the definition of a serious health condition by receiving treatment from a health care provider on one occasion plus a regimen of continuing treatment. Comment letter from the National Coalition to Protect Family Leave to DOL (*Coalition RFI Comments*)(Feb. 16, 2007).

<sup>15</sup> Advocacy and small business representatives commented in the RFI that intermittent leave is the most challenging aspect of the FMLA, due to the difficulty in tracking small increments of time and scheduling staff due to the number of unplanned and fraudulent absences for minor or chronic conditions.

payroll will capture, which can be as little as six minutes.<sup>16</sup> 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.”<sup>17</sup>

During Advocacy’s roundtable, small business representatives commented that the current rule does not allow them to adequately staff their businesses and have a predictable workforce, as it is very difficult to find replacement employees to cover these often unscheduled absences for these short increments.<sup>18</sup> Roundtable attendees recommended that DOL increase the minimum increment of intermittent leave to half a day or 4 hours.<sup>19</sup> This reform of intermittent leave would ease the burden for employers, by decreasing the administrative paperwork and making it easier to cover effectively for absent employees. Advocacy is concerned that DOL has not proposed any significant changes in the definition of intermittent leave and recommends that DOL consider reforming this provision.

### **3) Employer and Employee Notice Provisions (Section 825.300, 825.302)**

#### *Employer Notice Provisions*

Attendees at Advocacy’s small business roundtable were supportive of DOL’s proposals for employer notice. DOL is proposing to extend the compliance deadline for employers to notify employees of their eligibility to take FMLA leave and their FMLA designation (whether their FMLA request was approved or denied) from 2 days to 5 days.<sup>20</sup>

#### *Employee Notice Provisions*

Advocacy and roundtable participants strongly support DOL’s proposals clarifying the following employee notice requirements:<sup>21</sup> a) the timing of the notice<sup>22</sup> (employees would be required respond to employer requests regarding inadequate notice and can no

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<sup>16</sup> According to a Society of Human Resources Management survey in 2006, 73 percent of respondents reported administrative problems tracking intermittent leave. *Coalition RFI Comments*, at 28.

<sup>17</sup> 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/inforeg/2004\\_cb/8.pdf](http://www.whitehouse.gov/omb/inforeg/2004_cb/8.pdf).

<sup>18</sup> In response to DOL’s RFI, the American Bakers Association (ABA) commented that “intermittent leave causes huge disruptions to critical operations (both on the production floor and in the office areas) of the workplace, making scheduling difficult and affecting our bottom line.” Comment letter from the ABA to DOL (Feb. 16, 2007). The National Restaurant Association (NRA) also commented that its members experience abuse of the FMLA, “ultimately leading to problems such as outlets being short-staffed and extensive cost burdens for operators.” Comment Letter from Donna Garren, Ph.D., Vice President, Health and Safety Regulatory Affairs, NRA to DOL (Feb. 5, 2007).

<sup>19</sup> Comment letters in response to DOL’s RFI from the Office of Advocacy, the Chamber of Commerce, the National Association of Manufacturers, the National Coalition to Protect Medical Leave, and NFIB also recommended that DOL increase the minimum increment of intermittent leave to half a day or 4 hours.

<sup>20</sup> 73 *Fed. Reg.* at 7901.

<sup>21</sup> 73 *Fed. Reg.* at 7907.

<sup>22</sup> *Id.*

longer provide notice two days after taking FMLA leave); b) the content of notice<sup>23</sup> (employees would be required to provide sufficient information on their FMLA leave request); and c) the notice call-in procedures<sup>24</sup> (absent unusual circumstances, employees would be required to follow established call-in procedures and failure to do so may cause delay or denial of FMLA leave requests).

#### **4) Medical Certifications (Section 825.305-825.308)**

Roundtable participants are supportive, but seek further guidance on the following DOL proposals revising the medical certification requirements: a) the new medical certification form requirement;<sup>25</sup> b) employer contact with an employee's health care provider<sup>26</sup> (employers would be permitted to directly contact an employee's health care provider for verification or clarification purposes); and recertification<sup>27</sup> (employers would be permitted to require recertification for every six months for conditions with unknown durations and could seek recertification each new leave year).

#### **DOL Should Complete a Section 610 Periodic Review**

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.<sup>28</sup> 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 objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of small entities.<sup>29</sup>

Under a Section 610 review, 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.<sup>30</sup>

In its comment letter in 2007, Advocacy recommended that DOL treat its Request for Information as a 610 periodic review, by specifically analyzing the small business comments it received on compliance burdens of the FMLA regulations.<sup>31</sup> However, DOL did not ask for small business comments in the RFI and did not specifically address any small business comments it received from the RFI in its 160-page RFI report.

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<sup>23</sup> 73 *Fed. Reg.* at 7908.

<sup>24</sup> 73 *Fed. Reg.* at 7909.

<sup>25</sup> *Id.* at 7915.

<sup>26</sup> *Id.* at 7916.

<sup>27</sup> *Id.* at 7918.

<sup>28</sup> 5 U.S.C. § 610(a).

<sup>29</sup> *Id.*

<sup>30</sup> 5 U.S.C. § 610(b).

<sup>31</sup> *Advocacy RFI Comment*, at 2.

Advocacy supports the regulatory clarifications that DOL has made in its NPRM; we hope that DOL considers these and other comments that advocate additional reforms that would reduce the compliance burden on small businesses. Advocacy recommends that the DOL perform a Section 610 periodic review of this rule specifically focused on small business impacts.

### **Conclusion**

Fifteen years after the FMLA was enacted, covered small businesses are trying to balance providing flexibility to their employees and maintaining a reliable workforce. Advocacy supports the helpful revisions in this proposed rule, and we recommend that DOL reform the definition of “serious health condition” and the “intermittent leave” provisions to minimize the costs of this rulemaking on small entities. Advocacy also recommends that DOL perform a review of this rule specifically focused on small business impacts.

Advocacy is pleased to forward the comments and concerns of small businesses. Please feel free to contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//

Thomas M. Sullivan  
Chief Counsel for Advocacy

//signed//

Janis C. Reyes  
Assistant Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley, Administrator, Office of Information and  
Regulatory Affairs