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May 3,2002

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Office of Management and Budget
NEOB, Room 10235
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RE: Comment Letter on Regulatory Burdens of the Family and Medical Leave Act of 1993

LPA is pleased to submit this Comment Letter to the Office of Management and Budget (OMB) regarding its Draft Report to Congress (hereinafter referred to as "Draft Report"), which was published in the ***Federal Register*** on March 28,2002. This is the first of two comment letters LPA will make regarding the request in the draft report. This letter focuses on regulatory areas under the Family and Medical Leave Act (FMLA), 29 U.S.C. § **2601** ***et seq.,*** administered and enforced by the Wage and Hour Division, under the Employment Standards Administration in the Department of Labor

LPA is a public policy advocacy organization representing senior human resource executives of over 200 leading employers doing business in the United States. LPA provides in-depth information, analysis, and opinion regarding current situations and emerging trends in labor and employment policy among its member companies, policy makers, and the general public. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the **U.S.** private sector workforce.

All LPA members are employers subject to the FMLA. In addition to the benefits and employee friendly policies they have adopted, LPA members also appreciate and support the goal of the FMLA, which is to ensure that employees can take unpaid time off from work to attend to their own legitimate serious health condition, the birth or adoption of a child, or the serious health condition of a family member. Thus, LPA has a strong interest in proper interpretation of the FMLA by the courts and the Department of Labor to ensure that leave is preserved for employees who legitimately need it.

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I. Executive Summary

LPA members agree that several aspects of the FMLA regulations and interpretations either explicitly exceed the authority in the FMLA or contradict the legislative intent of the Act. LPA is particularly concerned about regulations interpreting the FMLA's definition of "serious health condition" and intermittent leave, the regulations that set requirements for employee notice, and the interaction of FMLA leave with employer recognition or bonus programs for perfect attendance.

Specifically, the regulations interpreting "serious health condition" permit an employee to take protected FMLA leave even if he or she has a cold or the flu. This contravenes the legislative history, which states that the term was not intended to cover "short-term conditions for which treatment and recovery are very brief." LPA believes that FMLA leave should be reserved for those employees who truly need it.

Likewise, although the FMLA permits employees to take intermittent leave, the Department of Labor has interpreted the statute to require employers to track such leave in increments as short as six minutes. This creates an administrative headache for employers who must count very short employee absences as FMLA leave. Just as problematic is the fact that many employees with chronic conditions abuse the availability of intermittent leave and the fact that an employee is only required to request FMLA leave the first time he or she takes intermittent leave. After that, the employee can simply tell the employer that he or she must be out because of the chronic condition. LPA believes that employers should be able to track intermittent leave in not less than four-hour increments and that employers should be able to challenge the legitimacy of the health condition of an employee suspected of abusing intermittent leave by obtaining second and third medical opinions on recertification.

Currently under the FMLA, an employee may provide notice for unforeseen intermittent leave as late as two days after the leave occurred and be protected under the FMLA. In addition, if an employee fails to provide notice that allows the employer to determine whether the leave should be FMLA covered, the employee's supervisor must pry into his or her personal affairs to determine whether the employee qualifies for leave. LPA believes that employees should be required to provide at least five days advance notice for intermittent leave, except in cases of true emergencies, and that employees be required to explain the reason for the leave so that supervisors do not have to pry into employees' private lives.

Finally, the Department of Labor's implementation of the regulations prohibit an employer from counting FMLA leave against an employee's record for the purpose of an attendance bonus on the basis that it is discriminatory against those who take FMLA leave. This makes attendance bonuses less effective because employees who are absent from work for 12 weeks may still be eligible for the bonus. LPA believes that the regulations go far beyond the necessary reach of the statute and that the regulation should allow employers to count FMLA leave against attendance bonuses.

II. Background on the FMLA and Increasing Employee Abuse of FMLA Leave

The Family and Medical Leave Act of 1993 (FMLA) allows employees to take up to 12 weeks of annual unpaid leave for the birth or adoption of a child or for the employee's own serious health condition or the serious health condition of a close relative. LPA members appreciate and support the goal of the FMLA, which is to give unpaid time off to employees who have a medical event that requires them to be away from work. However, in practice, it has become all too clear that the regulations implementing the FMLA go beyond the authority of the statute or the congressional intent of the statute. The result is that the regulations render the process of providing and tracking FMLA leave overly burdensome, often because employees are able to abuse the regulations.

The recent U.S. Supreme Court decision in ***Ragsdale v. Wolverine*** *Worldwide* ***Inc.***, No. 00-6029 (March 19, 2002), provides an excellent example. In ***Ragsdale,*** the U.S. Supreme Court determined that the regulations governing failure of **an** employer to provide notice regarding FMLA leave constituted an "impermissible alteration of the statutory framework. . ."[1] Unfortunately, there are many other aspects of the Department's FMLA regulations which similarly contradict the statutory language and intent. We believe the ***Ragsdale*** decision sends a strong signal that these provisions need to be revisited. The purpose of our comments is to revisit these provisions and provide examples as to how the regulations are undermining the main goal **and** purpose of the FMLA and making compliance difficult for employers.

For example, many employers have observed employees covering for attendance problems by using FMLA leave as a supplemental vacation program. This, in **turn,** causes resentment by fellow employees and morale problems in many workplaces. In some companies' experience, employees have even been known to encourage others to also take FMLA leave in an abusive manner. **As** one LPA member described it, FMLA abuse "spreads like wildfire."

Although the exact costs of FMLA compliance are difficult to quantify, there is some survey data that illustrate that unscheduled absences, such as intermittent FMLA leave, are costly and increasing. For example, according to the ***2001 CCH Unscheduled Absence Survey,***[2] in 2001, nearly 10 percent of all unscheduled absences in private sector workplaces was attributed to an entitlement mentality.[3] Many employees who take intermittent FMLA leave believe that since they have 12 weeks of leave annually, they should be allowed to take it, even if they do not meet the actual requirements for the leave.

The survey data also demonstrate the negative impact that employee absence abuse is having on the work place. The CCH study indicated that between 2000 and 2001, the per-employee cost associated with unscheduled absences increased 24 percent, from $610 to $755. In addition, the amount of corporate budgets set aside for absenteeism increased in 2001 from 2.6 percent to **4.2** percent. These results were confirmed by a joint, informal survey of LPA and Equal

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[1] ***Ragsdale v. Wolverine World Wide, Inc.***, **No.** 00-6029, 2002 **U.S.** LEXIS 1936, at *28 (Mar. 19, 2002).

[2] ***Employee Absenteeism Rises Slightly, While Employers Still Struggle With High Cost of "Sick Time"***, 2001 **CCH** Unscheduled Absence Survey, Oct. 23, 2001, news release available **at** http://www.cch.com/press/news/2001/01absencemain.htm>.

[3] ***Employee Absenteeism Rises Slightly, While Employers Still Struggle With High Cost of "Sick Time,"*** 2001 **CCH** Unscheduled Absence Survey, Oct. 23, 2001, news release available at **http:ilwww.cch.comipresslnews/2001** 01absencemain.htm>.

Employment Advisory Counsel members this spring, in which respondents reported costs per employer as high as $1.3 million.[4]

III. Burdensome Regulations and Opinion Letters Under the Family and Medical Leave Act

The Draft Report requests "nominations" or suggestions for reform "to specific existing regulations that, if adopted, would increase overall net benefits to the public."[5] The report also requests "public comment on the nature and extent of problematic guidance documents in agency policymaking, the adverse impacts . . . [and] current examples of problematic guidance documents."[6] Under the FMLA, agency regulations and opinion letters are used repeatedly to impermissibly broaden the act through regulatory interpretations that exceed legislative intent and, as demonstrated by the U.S. Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.*,[7] the statutory language itself.

This section of our comments generally follows the format prescribed in the Draft Report.[8] However, there is a summary appendix at the end of the document with an abbreviated version of the format requested by the Office of Information and Regulatory Affairs covering all regulations and opinion letters that are referenced in the comments.

Although there are many areas of the FMLA that require attention, LPA wishes to focus on the definition of "serious health condition," the problems created by the interpretation of intermittent leave, an employee's notice requirements, and the interaction of FMLA protections and employer attendance policies.

A. Serious Health Condition

The regulations defining "serious health condition,"[9] go well beyond the congressional intent and compromise that underlies the FMLA. Yet, employers seeking to apply the FMLA must determine whether to extend FMLA benefits to employees based upon the regulatory definition of serious health condition. The exceedingly broad definition of the term, along with the substantial investigation required to determine whether the reason for an employee's absence fits under the definition of serious health condition, enables employees to abuse the Act in a way contrary to the statute. For this reason, it adds substantially to employer compliance costs and negatively affects employee morale.

The **FMLA** permits an employee to take unpaid leave to care for his or her own "serious health condition" as well as to care for the "serious health condition" of certain relatives. The FMLA defines a "serious health condition" as meaning:

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[4] The survey was conducted among 431 member companies; 94 companies responded.
[5] Office of Management and Budget, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15103, 15033 (Mar. 28, 2002).
[6] *Id.* at 15035.
[7] No. 00-6029 (Mar. 19, 2002)
[8] Office of Management and Budget, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15103, 15034 (Mar. 28, 2002).
[9] 29 C.F.R. § 825.114.

an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or resident medical care facility; or

(B) continuing treatment by a health care provider."

The legislative history sheds light on how the phrase "serious health condition" should be interpreted. Both the Senate and House first adopted the above language when Congress considered enacting the FMLA in 1991. At that time, the definition of a serious health condition not only included "continuing treatment by a health care provider" but "continuing supervision" by a health care provider. However, the Senate, by a vote of 65 to 32,[11] and the House, by a vote of 287 to 143,[12] both adopted substitute amendments that, among other things, eliminated the "continuing supervision" language from the definition, thus indicating that the types of conditions qualifying as a serious health condition should not be read expansively.

The legislative history of the FMLA further clarifies the types of conditions that the Act considers serious health conditions. These conditions include:

> heart attacks, heart conditions requiring heart bypass of valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth, and recovery from childbirth.[13]

The legislative history also provides guidance as to the types of conditions that do not qualify:

> The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery time.[14]

Definition Is Overly Broad. LPA members agree that the types of illnesses or conditions enumerated in the above list are the types of illnesses or conditions that should be addressed in responsible leave policies. LPA members also agree that minor illnesses, such as those normally covered by sick leave policies, should not meet the FMLA's definition of a "serious health condition."

Unfortunately, the regulations implementing the FMLA and the interpretation of those regulations by the Labor Department stretch the definition of "serious health condition" well

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[10] 29 U.S.C. § 2611(11).

[11] The vote was on the substitute amendment offered by Sens. Bond and Ford. Results of the vote may be found on page S. 14181 of the ***Congressional Record*** for October 2, 1991.

[12] The vote was on the substitute amendment offered by Reps. Gordon and Hyde. Results of the vote may be found on pages H.9780-81 of the *Congressional Record* for November 13, 1991.

[13] S. Rept. 3, 103rd Cong., 1st Sess. 29 (1993), ***reprinted in*** 1993 U.S.C.C.A.N. 3, 31. Identical language can be found in the House report as well.

[14] ***Id.*** at 28.

beyond Congress's directive that the FMLA not be available for minor illnesses. Thus, the reality is that an employee that has a minor ailment, such as a migraine headache, cold, or flu can easily obtain FMLA leave. Such conditions are typically categorized as serious health conditions if the employee is absent from work for three days or more, visits a doctor once and receives a prescription or has other indicia of continued care.[15] This interpretation clearly is contrary to the intent of the FMLA and ignores the legislative history of the Act and the bipartisan amendments that narrowed the scope of "serious health condition."

A few examples help to demonstrate the problems with the current definition of "serious health condition." In many cases, employees use the definition of serious health condition to obtain more vacation time. In one LPA member company, the human resources staff labels employees who abuse the definition of serious health condition as "players." Certain of these employees boast about staying home for three days or more, seeing a doctor or other health care provider, and convincing the provider to give them a prescription so that the time off is protected under the FMLA. Other employees at the same employer who are out sick for legitimate reasons have confessed that they stayed out of work for an additional day or two so their sickness would qualify as a serious health condition. In looking at the statistics, the employer found that roughly one-third of the absences that technically qualified for FMLA, such as muscular pain or viruses, were not truly serious conditions. The vast majority of these absences were for four days.

There are many other instances of employees gaming the FMLA system to secure additional time off. One employee had the following litany of conditions within a year that the employer suspected were often used to cover for other absences:

- seven days for root canal and recuperation (antibiotics and pain medication prescribed);
- seven days for bruise suffered while moving furniture (pain medication prescribed);
- 10 days for "irreversible pulpitis" (inflammation of the root) with root canal (prescribed pain medication and ice);
- three days (by another doctor immediately following the 10-day absence) for infection secondary to root canal (prescribed antibiotics and medication); and
- six days for "abdominal pain" and referred to a gastroenterologist.

Another employee **took** all of her **FMLA** leave time during a year for various conditions, including sinusitis, depression, anxiety, and heel spurs. Upon returning to work after one absence for depression and anxiety, she indicated that she had remodeled her house while on leave. Although LPA believes that depression and anxiety are serious illnesses, employees' activities while on leave may call into question the extent to which their conditions were truly serious.

Chronic Conditions. The problems caused by the overbroad definition of "serious health condition" are further complicated by the regulatory requirement involving chronic illnesses – those that involve a need for sporadic treatment. In those cases, the regulations provide that employers permit leave for short periods of time without a physician's consultation. As noted above, LPA members believe that workplace policy should appropriately provide for the needs

[15] **29** C.F.R. § 825.114(a)(2)(i)(B).

of chronically ill employees. However, in the experience of many LPA members, the FMLA regulations on chronic illnesses are particularly susceptible to abuse.

While most employees would not seek to abuse regulations designed to provide treatment time to those who are chronically ill, an increasing number of employees have abused the existing regulations. These employees find it extremely easy to obtain a certification of their chronic condition from a physician; at the same time, employers have found the procedures available to challenge the certification or to require a new certification to be inadequate. Many companies have reported predictable use of intermittent leave by employees they believed to be abusing FMLA leave evidenced by regular, periodic absences, such as on Monday mornings. Our members report that this type of FMLA abuse is particularly harmful to employee morale, especially among those who must pick up the work for the employee on leave.

For example, a customer service representative who had a history of attendance problems asked whether she could come in later in the morning but still work a full 8-hour day. The employer rejected the request because customer service representatives were needed to cover core business hours. Following the rejection of flexible hours, the employee suddenly came down with migraine headaches. She provided a single doctor's note, and then started calling in once or twice a week stating she had a migraine headache and would come into work by mid-morning. The employer was skeptical and required the employee to provide a doctor's note with each absence, but the resourceful employee worked out a system where the doctor's office would fax a certification to the employer for each day she was absent. The employer felt it was clear that the employee never saw the doctor, but it had little recourse to prevent her from abusing the system.

Thanks to cost-effective medical technology, asthma is another chronic condition for which treatments are particularly difficult to verify. One employer has employees that arrive anywhere from 15 minutes to two hours late and claim that it was due to asthma treatments administered at home. Most employees have in-home machines that eliminate the need for frequent visits to the doctor. However, this also means that employers have no way of determining whether employees or their families had a legitimate asthma attack or whether asthma is merely a convenient excuse to be late. In this particular employer's case, asthma absences occur frequently on Mondays and Fridays.

Another asthma case involved an employee with a poor attendance record. On a regular basis, the employee's husband would call a supervisor about an hour before work and indicate that the employee was having trouble breathing and would call in when she could speak. A half an hour later she would call in and indicate that she would not be able to work due to asthma. The employee used all 12 weeks of FMLA leave in two consecutive years that way.

Yet another type of abuse involving chronic conditions involves those conditions for which an absence is not really necessary. One employer had an employee who had used seven weeks of intermittent FMLA leave with "epitaxis" or nose bleeds with mild sinusitis. The employee qualified for FMLA leave because he had seen a nose specialist and received prescription medication. However, he typically left work after receiving a nosebleed, even though the employer did not believe that the condition was that serious. The company nurse noted that there were several ways to stop nosebleeds at the office, and the employee was under a doctor's order to have his nose cauterized if the bleeding did not stop after a short time. Yet, over a six-month

period, the employee had only had one cauterization procedure. This led the employer to conclude that the employee was using his physical condition to leave work early.

One way of reviewing whether employees are abusing the chronic condition aspect of the serious health conditions definition is to look at new employee attendance before and after the employee becomes eligible for FMLA benefits. To be eligible for FMLA benefits, the employee must have worked for the employer for 12 months and have worked 1,250 hours in the last 12 months. One employer reported that a new employee had perfect attendance up until her one-year anniversary. The next year, she was out for 12 weeks due a chronic serious health condition.

Need to Clarify Medical Certification Increases Regulatory Burden. **As** a general rule, most employers require employees who request FMLA leave due to a serious health condition to submit an FMLA medical certification form.[16] The form enables the employer to determine whether the employee's condition meets the FMLA definitions. However, the form is often incomplete, and the employer is forced to ask the employee for permission to talk directly with the health care provider and to seek clarification of the information. This process increases exponentially the amount of time and effort employers must spend in order to determine whether the condition meets the regulatory criteria.

Are Health Care Providers Part of the Problem? When health care providers fill out the medical certification form, employers voice concerns that health care providers are either knowingly or negligently certifying conditions as serious health conditions when they are not. Often this involves the number of days the employee must be off of work to recuperate. For example, in certain facilities, employees work two 12-hour days and then are off for two days. One employer reported that often, physicians note on the FMLA certification form that employees must be away from work for a four-day period, even though the four-day period includes two scheduled days off. Under the regulations, even days off count toward the three-day minimum and allow the employees to be certified for FMLA leave for the two work days.

In another case, an employee provided documentation showing that she needed five days off of work to recuperate from a root canal procedure. Upon further investigation, it was discovered that the employee, unbeknownst to the dentist, had instructed the office receptionist to fill out the form with five days' absence. In this case, the dentist clarified that the employee should be excused only for one day, but in other cases, employees are able to take advantage of health care providers who are overloaded with paperwork.

Other health care providers are concerned about legal consequences for not providing a certification for an employee's condition, regardless of whether it is truly a serious health condition. One doctor told an employer: "doctors will pretty much do what their patients want them to do as a result of malpractice suits."

However, it is certain that as more medical providers certify employees for conditions that are not actually serious health conditions under the FMLA, more employees will attempt to have their conditions certified as health conditions. To do this, they will seek medical care, even when it is not medically necessary, further driving up the cost of health care. Thus, the FMLA is helping to increase health care costs, just as health care costs are increasing at three times the rate of inflation.

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[16] *See* 29 C.F.R. § 825.305, 306.

Recommendation

LPA believes the regulations must specifically state that FMLA leave may not be taken for short-term illnesses or other impairments for which treatment and recovery are very brief. In addition, the statements on the medical certification form should reinforce this idea. Such a modification would make the regulations and DOL interpretations consistent with congressional intent and would go a long way toward solving the problems posed by existing interpretations. Employers should also be allowed to seek clarification of the information on the certification form directly from the health care provider.

B. Intermittent Leave

The FMLA permits employees to take leave intermittently, or on a reduced leave schedule, in certain circumstances.[17] When the leave is to care for the employee's own or a family member's serious health condition, then intermittent leave may be taken "when medically necessary.""

Although the concept of intermittent leave was introduced to help employees and employers cope with short, regularly recurring or sporadic medical absences, the regulations have imposed excessive administrative burdens on employers in tracking intermittent leave. Employers want to accommodate those employees with legitimate health conditions requiring periodic time off from work, such as for dialysis. Unfortunately, the current regulations also allow abuse to cover otherwise poor attendance that is not a result of a chronic health condition, even though the employee relies on the chronic condition as the reason.

The regulations require the employer to track intermittent leave in the smallest increment of time the employer uses to track hours worked, provided the unit of time is no more than one hour.[19] For employers who track time in small increments, such as defense contractors, this can mean tracking time in 6-minute intervals. As one LPA member asked, "The FMLA is supposed to provide leave for those who are incapacitated from their jobs. How can someone be incapacitated from their job for 6 minutes?'

Intermittent leave tracking is particularly difficult for many employers when it involves employees who are exempt from overtime under the Fair Labor Standards Act (FLSA). Although the FLSA requires employers to track the hours of employees who must receive overtime, most employers do *not* regularly track the hours of exempt employees. Thus, by requiring such detailed tracking of hours, the FMLA imposes additional regulatory burdens on employers with respect to exempt employees.

In addition to the time increments tracked, the Department of Labor has taken the position that an employee may take intermittent leave whenever he or she wants *without additional advance notice,* once the employee notifies the employer of the condition and provides certification that leave is needed on an intermittent basis.[20] In other words, the employee can call in at the beginning of his or her work shift and still receive FMLA protection. The employees who abuse the act leave employers and the employees who must substitute for the absent employees, in a bind. Some practical illustrations of this problem include:

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[17] 29 U.S.C. § 2612(b)(1).
[18] *Id.*
[19] 29 U.S.C. § 825.203(d).
[20] ***See*** Dep't of Labor **Op.** Ltr. FMLA-90 (July 3, *1997).*

- employees who show up for work between 15 minutes and 2 hours late due to in-home asthma treatments;
- the alleged migraine headache sufferer who came into work late once or twice per week;
- the nose bleed sufferer who repeatedly missed two to three hours at the end of the day;
- an employee who requested two hours FMLA leave to pick up prescriptions for her father, who was cared for by her mother; and
- an employee who requested intermittent leave to take his wife to cancer treatments but who never actually accompanied her.
- an employee who claimed intermittent leave to help his son cope with asthma called in at 10 p.m. the night before a Saturday shift, scheduled specifically to complete work for an important customer. However, the employee possessed unique skills, and without him, no work could be done, and due to the provisions in a collective bargaining agreement, the employer had to pay all employees on the shift for 4 hours and send the employees home without completing any of the work.

In most cases, the employer must spend time finding a replacement for the suddenly absent employee and other employees are inconvenienced because they must either work when they are not scheduled or work longer hours to make up for the absence. Significant anecdotal evidence from several LPA members indicates that intermittent leave absences often occur on Mondays and Fridays, leading to the conclusion that many employees abuse the generous provisions involving intermittent leave to obtain additional time off.

However, an employee is able to take intermittent leave without providing a medical certification for each absence.[21] In addition, the regulations on certification prohibit an employer from challenging an employee's claim that he or she has a serious health condition on recertification by obtaining a second or third medical opinion.[22] Thus, an employee who abuses the availability of intermittent leave is virtually assured of not being discovered.

Recommendation

The FMLA regulations provide employers with inadequate flexibility in offering intermittent leave. Six-minute time blocks can impose extremely heavy costs on employers without providing a corresponding benefit to employees or employers. The **FMLA** regulations should be revised to allow an employer to track intermittent leave in no less than half-day increments and should permit second and third opinions on recertifications. The regulations should also be revised to require the employee to provide advance notice of intermittent leave, except in the case of true emergencies.

C. Leave Requests and Notice

Under the FMLA and its implementing regulations, employees are required to notify employers of the need for FMLA leave. As noted above, most employees take medical leave for their own serious health conditions or the serious health conditions of close relatives. In most cases, they should be able to provide advance notice to the employer that they will need leave

[21] 29 C.F.R. § 825.308(b)(2), (c).
[22] 29 C.F.R. § 825.308(e).

and provide a sufficient explanation to enable the employer to determine whether the employee qualifies for FMLA protections. However, the regulations permit employees whose leave is "unforeseeable" to provide notice up to two days after they take the leave. In addition, where an employee fails to provide a sufficient explanation of why he or she is taking leave, the employee's supervisor often has to pry into the employee's personal affairs to determine whether the employee's condition qualifies for FMLA protection. LPA believes that the notice provisions need to be strengthened to ensure that employers receive advance notice of intermittent leave, with limited exceptions, and that the employee be required to provide a sufficiently detailed explanation to reduce the need for employers to pry into employees' personal lives.

The Timing of the Notice. The FMLA provides that if the employee is undergoing planned medical treatment, the employee must provide at least 30 days notice, unless the treatment will occur in less than 30 days.[23] In that case, the employee must provide leave "as soon as practicable." The regulations interpret these sections as requiring the employee to notify the employer of his or her need for leave "within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible."[24] However, as noted above, more employees are claiming chronic conditions as serious health conditions and are claiming the need for intermittent leave (*e.g.*, a day here or there) in these situations. The Department has interpreted this provision as allowing an employee who has a need for leave that is unforeseeable to wait for two days after the condition arises to give notice.[25]

Where an employee's need for intermittent leave is unforeseeable, current DOL regulations allow the employee to provide notice of the leave to his or her employer "as soon as practicable." The regulations indicate further that the employee will be expected to give notice of the leave to his or her employer The Department has interpreted this regulatory provision as allowing an employee to wait for up to two days before giving notice when the need for leave is unforeseeable. See Dep't of Labor **Op.** Ltr. FMLA-101 (January 15, 1999).

This interpretation means that an employer cannot enforce a policy requiring an employee to notify his or her employer the day the employee is absent because the procedure is protected under the FMLA as unforeseeable intermittent leave. The policy would contravene the regulation that allows an employee to give notice within two days of learning of the need for leave.

The Content of the Notice. The FMLA and its implementing regulations require an employee to notify the employer that he or she needs leave, and to state an FMLA-qualifying reason for taking the leave.[26] However, the regulations make clear that an employee "does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice."[27] In certain situations, such as when the employee requests paid leave and fails to adequately explain the reasons for it, the regulations require the employer to "inquire further about the reason for the leave to determine whether it qualifies as FMLA-

[23] **29** U.S.C. § 2612(e)(2)(B).
[24] **29** C.F.R. § 825.303(a).
[25] **Dep't** of Labor **Op.** Ltr. FMLA-101 (Jan. **15,** 1999).
[26] 29 C.F.R. § 825.208(b).
[27] *Id*.

protected."[28] This requires employers to pry into employees' personal lives to find out the precise reason for the leave.

If a supervisor does not ask the necessary probing questions and improperly fails to classify the leave as covered by the FMLA, he or she could be personally liable for the FMLA violation. For example, in an Illinois case, a federal judge ruled that liability for FMLA violations can extend tokmployees who partially control the ability of another employee to take leave under the FMLA.[29]

The current regulations place an undue burden on employers and also hamper employee privacy by requiring disclosure of sensitive personal or family medical matters. In an age where medical privacy is increasingly important, the FMLA regulations should not require employers to hunt employees down regarding why leave is taken.

Recommendation

LPA recognizes that employees have serious health emergencies that physically prevent them from notifying the employer that they are sick. However, except for those extremely rare cases, the FMLA should permit employers to provide at least five days' advance notice. This change requires the employee to take responsibility for his or her leave time. Most importantly, it would help preserve employee privacy of often sensitive personal or family medical matters.

D. Attendance Bonus Policies

The FMLA contains strong antidiscrimination provisions to protect employees' rights to FMLA leave. Yet, in protecting FMLA leave, these provisions have undermined the effectiveness of employer attendance incentive programs. These programs usually involve giving employees a bonus if they have perfect attendance over a certain time frame, such as a calendar quarter or a year. As a result of the FMLA's excessive protections, many employers have scrapped their attendance bonus programs altogether.

Section 220(c) of the FMLA regulations prohibits an employer from discriminating against an employee because he or she takes FMLA leave.[30] In the Preamble to the final regulations, the Department notes that FMLA leave may not count against an attendance bonus if the employee was eligible for an attendance bonus (*e.g.*, had perfect attendance) on the date that he or she went out on leave.[31]

This policy significantly increases recordkeeping for employers because they are required to count employee absences due to FMLA in several different ways. For the purposes of attendance, FMLA leave counts as work, provided the employee was eligible for the bonus when he or she took leave. However, for FMLA purposes, the employee's leave time must be counted against his or her leave entitlement. Employees taking leave that does not qualify under the FMLA are counted as absent. This makes recordkeeping cumbersome for employers and their managers.

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[28] 29 C.F.R. § 825.208(a).
[29] ***Freemon v. Foley***, 911 F. **Supp.** 326 (N.D. Ill. 1995).
[30] 29 C.F.R. § 825.220(c).
[31] The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180,2218 (Dep't of Labor Jan 6, 1995) (Final Rule).

The effect of the DOL opinion has been absurd. One year, an employee who used all of her available FMLA leave through intermittent leave (allegedly because of asthma) still qualified for the company's attendance bonus in two out of the four quarters. Other employees, who were legitimately sick for one or two days, reported staying out another day or two so that their absence qualified for FMLA leave and they were not penalized in the employer's attendance bonus program.

The Department's broad interpretation of the Act's antidiscrimination provisions has also rendered employer attendance bonus programs significantly less effective. Employees are less apt to try for perfect attendance when they know that a coworker was gone for six weeks but still received the attendance bonus. Moreover, the Department's interpretation has led employers to end their attendance bonus programs because they are no longer effective.

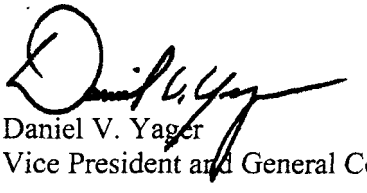
Recommendation

LPA does not condone the practice of employers denying employees their legitimate right to take FMLA leave. Yet, simply factoring an employee's leave into an attendance bonus program does not result in depriving that employee of any of the protections of the FMLA. With an increasing number of employees gaming the system, it is time that DOL reverse its position and allow employers to count FMLA time against an employee's attendance. This would help rein in the employees who game the system while providing FMLA leave to those who most need it.

Conclusion

The FMLA will continue to serve its intended purposes in the years to come, but many aspects of the regulations exceed the authority provided in the statute and encourage employees to use FMLA leave as additional vacation time. These aspects must be addressed today or employers that provide more generous leave to their employees will gradually eliminate it because of the excessive costs that result. We encourage the Office of Management and Budget to look carefully into these problems and to urge the Department of Labor to review its regulations.

Sincerely,



Daniel V. Yager
Vice President and General Counsel

02-59

Appendix: List of LPA Recommended FMLA Regulatory Changes

Serious Health Condition – Definition

Citation:	29 C.F.R. § 825.114
Authority:	29 **U.S.C.** § 2611 (1 1)
Description of Problem:	The regulatory definition of serious health condition broadens the statutory definition and contradicts the legislative history that underlies the term. The result is that employees are encouraged see a doctor, obtain a prescription and stretch their medical absence to three days to meet the regulatory definition of a serious health condition. This harms other employees, who must cover the work of absent employees. It also imposes several unnecessary costs on employers, who effectively are required to obtain a certification form from employees and in many cases verify the certification with the employee's health care provider.
Proposed Solution:	Revise the regulations to clarify that FMLA leave is not intended to cover short-term conductions for which treatment and recovery are very brief.
Economic Impact	Economic impact would depend upon the actual change adopted, but any helpful change would yield substantial results.

Serious Health Condition -- Medical Certification -- Clarification

Citation:	29 C.F.R. §§ 825.305-306
Authority:	29 **U.S.C**§ 2613 (a).
Description of Problem:	Medical certifications often do not provide sufficient information for an employer to determine that an employee has a serious health condition that qualifies for FMLA leave. However, employers are not allowed to contact the employee's health care provider directly, resulting in lost time requesting additional information through the employee.
Proposed Solution:	Allow employers to contact the health care provider for the purposes of clarifying the medical certification.
Economic Impact	Undetermined

Intermittent Leave – Tracking Time

Citation:	29 C.F.R. § 825.203(d);
Authority:	29 U.S.C. § 2612(b)(1)
Description of Problem:	Employer must track intermittent leave in the smallest increment of time employer uses to track time, as little as 6 minutes, but no longer than 1 hour. This results in a significant administrative burden because many employees take intermittent leave in small increments.
Proposed Solution:	Allow employers to track leave in half-day increments.
Economic Impact	Undetermined

Intermittent Leave -- Recertification

Citation:	29 C.F.R. § 825.308(b)(2), (c), (e)
Authority:	29 U.S.C§ 2611 (11)
Description of Problem:	Employee may take intermittent leave without providing certification for each absence and employer is prohibited from obtaining second and third opinions in the case of intermittent leave, making it difficult to determine whether employee is abusing definition of serious health condition.
Proposed Solution:	Allow employers to obtain second and third opinions for employees taking intermittent leave.
Economic Impact	Undetermined

Intermittent Leave – Advance Notice

Citation:	29 C.F.R. § 825.303; Dep't of Labor Op. Ltr. FMLA-101 (Jan. 15, 1999)
Authority:	29 U.S.C. § 2612 (e)
Description of Problem:	The Department of Labor Regulations state that an employee taking unforeseeable intermittent leave may provide notice within 2 days of learning of the need for leave. This allows the employee to provide notice **up** to 2 days *after* the employee has taken leave. Too many employees characterize their need for intermittent leave as unforeseeable and provide the employer notice after the leave has occurred. This makes it difficult for employers to find employees to fill in for the absent employees. Intermittent leave is supposed to be used when medically necessary, not in order to cover for personal absences that are not related to actual medical conditions.
Proposed Solution:	Require 5 days advanced notice for intermittent leave, except for in cases of actual unforeseen medical emergencies.
Economic Impact	Undetermined

Intermittent Leave – Advance Notice

Citation:	29 C.F.R. § 825.303; Dep't of Labor Op. Ltr. FMLA-90 (July 3, 1997);
Authority:	29 U.S.C. § 2612 (e)
Description of Problem:	Intermittent leave is supposed to be available to employees only when medically necessary, but an increasing number of employees are using it to cover up for unauthorized absences. Regulations currently do not require employees to provide advance notice of the need for unforeseeable intermittent leave once the employee has provided the initial certification for intermittent leave. This allows employees to provide notice *after* the leave has occurred and still receive FMLA coverage. DOL has confirmed this interpretation in its opinion letters. This deprives employers of sufficient notice to plan for workforce absences and allows employees to use the FMLA to protect them from discipline for otherwise unauthorized absences
Proposed Solution:	In cases where unforeseeable intermittent leave is needed, require employees to provide reasonable notice to employers on the day of the absence.
Economic Impact	Undetermined

Employer Attendance Bonus Programs

Citation:	29 C.F.R. § 825.220(c)
Authority:	29 U.S.C. § 2615(a)(2)
Description of Problem:	Department of Labor regulations prohibit employers from counting FMLA leave against programs that provide employees a bonus for perfect attendance. This discourages employees from striving for perfect attendance because those on FMLA leave will receive a bonus even if they are absent from work. Many employers have discontinued such programs as a result.
Proposed Solution:	Revise regulations to allow employers to count employee FMLA absences as absences for purposes of perfect attendance bonus programs.
Economic Impact	Undetermined