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To: OIRA_BC_RPT@omb.eop.gov

cc:
Subject: Cost and Benefits of Federal Regulations Draft Report Comments

Attached are the comments of the FMLA Technical Corrections Coalition on the Costs and Benefits of Federal Regulations Draft Report. The comments were also faxed.

Thank you for your consideration.

Deanna R. Gelak
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FMLA TECHNICAL CORRECTIONS COALITION
7505 Inzer Street
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May 20, 2004

Ms. Lorraine Hunt
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10202
725 17th Street, NW
Washington, DC 20503

RE: Cost and Benefits of Federal Regulations Draft Report

Dear Ms. Hunt:

The FMLA Technical Corrections Coalition, founded by the Society for Human Resource Management, is a diverse broad-based, nonpartisan group of companies, associations and individuals dedicated to making the practical application of the Family and Medical Leave Act (FMLA) more consistent with its original intent. Members of the Coalition believe that, even as we recognize the benefits of the FMLA over the past 11 years, the Act's "medical leave" urgently needs to be repaired to:

- Address the inconsistent application of the law and the associated litigation explosion,
- Address costs associated with misapplication and misuse inconsistent with the statute's Congressional design,
- Preserve the integrity of the system, and
- Better serve those Congress intended to protect.

I. Background and Purpose

The FMLA Technical Corrections Coalition previously provided comments on the Costs and Benefits of Federal Regulations, (May 28, 2002) nominating the Department of Labor's Family and Medical Leave Act implementing regulations and associated non-regulatory guidance[1] for review and revision in order to address compliance problems and to allow for more effective implementation of FMLA protections. Per your specific request for "public nominations of promising regulatory reforms" relevant to the manufacturing sector we would like to nominate the Family and Medical Leave Act (FMLA) regulations for immediate revision (*29 CFR part 825, 1/6/95)* and that *Wage and Hour Opinion Letter, FMLA-86 (12/12/96)* be withdrawn.

The FMLA's medical leave has not worked as intended due to the previous Administration's Department of Labor implementing regulations and interpretations. Since these problems continue to escalate, we are pleased that the 2004 Draft OMB Report explains that OMB will continue to seek information from agencies on how they plan to address candidates for reform and we are hopeful that FMLA corrections will occur shortly. Attached for your review (ATTACHMENT #1: Nominations for Revision) is a discussion of our nominations for FMLA regulatory corrections which would strengthen the Act's integrity and would be especially helpful to small businesses and manufacturers covered by the FMLA.

II. FMLA Interpretive Problems Have Been Especially Difficult for Small Employers

The FMLA interpretive problems, associated costs and legal uncertainties have been especially difficult for small employers[2] that are covered by the FMLA but do not have extensive access to legal counsel for guidance through the FMLA interpretive minefield. Questionable unscheduled and unplanned absences related to FMLA interpretive problems are especially difficult for small employers covered by the FMLA. Most FMLA leave is not scheduled in advance[3]. Two Department of Labor studies[4] as well as two SHRM Surveys[5] have all confirmed that by far the most prevalent method that employers use to cover work during FMLA leaves is to assign it temporarily to other workers. Requiring unscheduled overtime by coworkers for leaves that may not be legitimate is sometimes unwelcome and can be particularly challenging in a small business setting.

III. FMLA Interpretive Problems Have Been Especially Difficult for the Manufacturing Sector

Unscheduled and unplanned leave taken under the Act's intermittent and serious health condition provisions have increased uncertainty and decreased productivity and effectiveness in manufacturing settings. As FMLA implementation becomes more complex, problems associated with unscheduled and unplanned leave continue to escalate. Since 48% of FMLA leave is not scheduled in advance[6], the importance of effective FMLA regulations is especially important for manufacturers. Work coverage for questionable unscheduled absences has been especially challenging in industries where safety issues are at stake. FMLA interpretive corrections would undoubtedly reduce unnecessary costs, increase effectiveness, enhance competitiveness and reduce uncertainty in the manufacturing sector.

IV. General Discussion and Justification for Nomination

Even as we recognize the benefits of the FMLA over the past 11 years, the Act's "medical leave" interpretation problems urgently need to be addressed to preserve the integrity of the system and better serve those Congress intended to protect. FMLA regulations represent a significant departure from original Congressional intent:

A. The Intent:

Enacted in 1993, the FMLA had passed Congress to require job protection for up to twelve weeks of unpaid leave for families for birth or adoption (family leave) and leave to care for a child, spouse, or an employee's own "serious medical condition" (medical leave). The Congressional intent for "medical leave" was spelled out in the then Democratic majority's committee report which stated that "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."[7]

B. The Reality:

The U.S. Department of Labor's interpretations of "serious health condition" for the Act's "medical leave" have proven to be a lesson in complexity, stretching the FMLA's "medical

[2] The FMLA applies to companies with just 50 or more workers (within 75 miles).
[3] The SHRM® 2003 FMLA Survey found that just 48% of FMLA leave is scheduled in advance.
[4] U.S. Department of Labor Commission on Leave Report, 1995; U.S. Department of Labor FMLA Surveys Update, 2000.
[5] SHRM® 2003 FMLA Survey and SHRM® 2000 FMLA Survey
[6] SHRM® 2003 FMLA Survey
[7] U.S. Congress Committee on Education and Labor, Family and Medical Leave Act of 1993, H. Rept. 103-8, February 2, 1993, p. 40

leave" far away from Congressional intent. (*See the Flow Chart of FMLA Processes presented by Kenneth Buback in his testimony to the U.S. House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs on April 11, 2002*.)

Shortly after Congress passed the FMLA, the regulators issued inconsistent and vague interpretations which:

*Converted the Act's serious health condition requirement into a national sick leave program where incidents of abuse cannot be fairly addressed,

*Caused a litigation explosion,

*Caused leave to be tracked and offered by minutes,

*Created confusion in the workplace for employees and employers, and

*Led to inconsistent application of the law.

For example, one year, the DOL issued a letter stating that the cold, the flu and non-migraine headaches were not serious health conditions (covered under "medical leave") and the next year, the Department of Labor issued a letter stating that they might be[8].

Inconsistent interpretations have led to a litigation explosion. For example, the validity of thirteen DOL FMLA regulations has been challenged in 68 court decisions[9]. Moreover, on March 19, 2002, the Supreme Court struck down a portion of the existing DOL regulations as inconsistent with Congressional intent in the first FMLA case before the Supreme Court *(Ragsdale v. Wolverine Worldwide, Inc.)*. Additional such litigation is expected unless FMLA technical corrections are established.

According to SHRM® 2003 FMLA Survey, half (50%) of human resource professionals indicated that they have had to grant FMLA requests that they did not believe were legitimate because of the Labor Department's medical leave interpretations and approximately a third (34%) of human resource professionals were aware of employee complaints in the past 12 months due to coworker's questionable use of FMLA.

A survey conducted by former President Clinton's Department of Labor confirmed FMLA implementation problems. The DOL report found that the share of covered establishments reporting that it was somewhat or very easy to comply with the FMLA has declined 21.5% from 1995 to 2000[10].

V. A Solid Record Has Been Established: A sea of evidence has been presented in **seven** Congressional hearings, numerous letters and public comments documenting the serious and extensive nature of the Department of Labor's FMLA misinterpretations. These problems are also documented in a review of FMLA litigation. For example, the Spencer Fane Britt & Browne LLP litigation survey[11] revealed that the validity of 63 FMLA regulations has already been challenged in 13 court decisions.

[8] *Wage and Hour Opinion Letter, FMLA-86 (12/12/96).*
[9] REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED, Spencer Fane Britt & Browne LLP, August 2003.
[10] The Family and Medical Leave Act of 1993, Public Law 103-3, Sec. 403.
[11] "Reported Court Cases in Which the Validity of an FMLA Regulation has been Challenged", Spencer Fane Britt & Browne LLP, review of cases through March 20, 2002.

On March 19, 2002, the Supreme Court struck down a portion of the existing DOL regulations in the first FMLA case before the Supreme Court (*Ragsdale v. Wolverine Worldwide, Inc.*). Although the Court only focused on one particular DOL regulation, there are a number of other DOL regulations that impose "across the board" penalties that will not meet the Court's standard which should be addressed by the Department. Consequently, other DOL regulations that include penalty provisions are now in question will probably not withstand judicial scrutiny, and will probably be held invalid by various courts unless the DOL amends the regulations to be consistent with the Supreme Court's recent decision.

In light of the historic *Ragsdale* decision and the fact that many other parts of the Department of Labor regulations are similarly inconsistent with Congressional intent, an increasing number of lawsuits challenging FMLA regulations are expected. If the DOL does not act soon to amend similarly problematic interpretations, continued adherence with these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions and the courts) additional time, effort and money. This would be a regrettable waste of resources—a waste that is avoidable if the DOL restores its regulatory interpretations to properly reflect the original Congressional intent.

We believe that the FMLA implementing regulations and interpretations could be revised to be more efficient and effective without undermining the intent of the statute. More employers would establish and expand paid leave policies if the current FMLA misinterpretations--which currently foster misapplication, create confusion and invite litigation--are addressed.

VI. Conclusion

The costs of FMLA interpretive problems to employers (including small employers and manufacturers) are enormous. We respectfully urge the Administration to revise the FMLA regulations and interpretations detailed in these comments. We urge the Department of Labor to immediately begin the rulemaking process to accomplish this objective.

In conclusion, the members of the FMLA Technical Corrections Coalition urge you to designate FMLA implementing regulations and associated non-regulatory guidance as discussed in these comments as "high priority" in order to address compliance problems and to allow for more effective implementation of FMLA protections. We also urge you to designate withdrawal of Wage Hour Opinion Letter, FMLA-86 (12/12/96) as a high priority.

Please feel free to contact me at (703) 256-0829/workfuture@aol.com if we can be helpful as you finalize your report.

Sincerely,

Deanna R. Gelak, SPHR
Executive Director
FMLA Technical Corrections Coalition

Attachment: Nominations for Revision

ATTACHMENT #1: NOMINATIONS FOR REVISION
SUBMITTED BY THE FMLA TECHNCIAL CORRECTIONS COALITION

The coalition recommends the following FMLA regulatory and interpretive irregularities for revision.

1. Definition of Serious Health Condition *(Note: This improvement is especially critical since it has a ripple effect on many aspects of FMLA administration.)*
2. Intermittent Leave
3. Request for Leave and Two Day Notice Requirement
4. Substitution of Paid Leave
5. Definition of "Unable to Perform"
6. Health Care Provider Certification
7. Address Across the Board Penalties that will not Meet the Supreme Court's Standard (i.e. as Manifest in Ragsdale v. Wolverine Worldwide, Inc.)
8. Perfect Attendance Awards

The following brief discussion sections are provided for each nomination:

*Regulatory References
*Why this Clarification is Necessary
*Examples
*Summary

NOMINATION #1 -- DEFINITION OF "SERIOUS HEALTH CONDITION"

Revise Regulation 29 CFR 825.114(c)and Rescind Wage and Hour Opinion Letter FMLA-86 (12/12/96)

Why this Clarification is Necessary:

In passing the FMLA, Congress stated that the term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief, recognizing that "it is expected that such condition will fall within the most modest sick leave policies."[12] The Department of Labor's current regulations are extremely expansive, defining the term "serious health condition" as including, among other things, any absence of more that three days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor's visit, or a prescription, or a referral to a physical therapist) – such a broad definition potentially mandates FMLA leave where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve; the regulations also define as a "serious health condition" any absence for a chronic health problem, such as arthritis, asthma, diabetes, etc., even if the employee does not see a doctor for that absence and is absent for less than three days.

Most of the leave taken under the FMLA has been for employees' own illnesses, most of which were previously covered under sick leave policies. The FMLA has become a national sick leave program – contrary to the strong assertions of the bill's original supporters.[13]

[12]H.R. REP. NO. 103-8 at p. 40 (1993).
[13] Proponents of the FMLA insisted the Act would be utilized only in times of real emergency. For example, Rep. Bill Clay, D-Mo.: "**enables workers to provide necessary, crucial care at times of family crisis without jeopardizing the economic livelihood of the family**" (Nov. 7, 1991); Rep. Marge Roukema, R-N.J.: "**And by family medical crisis I don't mean a child with the sniffles or the flu – but an illness serious enough to require hospitalization or extended home convalescence. I mean a child or employee who has cancer and needs time**

The Department of Labor has been inconsistent and vague in its opinion letters, leaving employers and workers guessing as to what DOL and the Courts will deem to be "serious":

- April 7, 1995 DOL opinion letter No. 57 said 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)**."

- December 12, 1996 DOL opinion letter No. 86 then said letter No. 57 "expresses an incorrect view," that, in fact, with respect to "**the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.,**" 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 that also involves qualifying treatment (continuing treatment by a health care provider), "**then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for 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.**"

Inclusion of all these various absences in the definition of "serious health condition" loses sight of what the FMLA statute was meant to do – protect employees who had serious medical problems in their families from losing their jobs.

- Since confusion over the definition of "serious health condition" has a ripple effect on many other aspects of the FMLA's medical leave administration, e.g. intermittent leave tracking issues, it is no surprise that serious health condition misapplications have been central to Congressional criticism of FMLA misinterpretation.

Examples:

- "Because of the overly broad nature of the definition of what constitutes a 'serious health condition' under the Act's implementing regulations, an inordinate amount of difficulty has resulted. I have seen the following situations certified by physicians as serious health conditions under the FMLA: P.M.S., various respiratory infections, asthma, ear aches, and emotional problems. Unfortunately, several marginal employees with absentee problems have learned that by characterizing situations as "chronic" conditions, they can avoid disciplinary action. Almost any situation can become a federally protected "serious health condition" qualifying for the FMLA by allowing the absence to continue more than three consecutive days and by seeking treatment more than one time. This treatment could include one doctor's visit and a prescription." Senate testimony of Libby Sartain, vice president for people, Southwest Airlines, May 9, 1996, p. 19.

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for chemotherapy treatments. Serious illness means an elderly parent who suffers a broken hip and whose employed child needs time from work to assist their parent with home care. Serious illness means the employee who is in a car accident and requires hospitalization beyond the standard 2 weeks of paid sick leave typically given to employees ... What we are talking about here are severe medical emergencies" (Nov. 13, 1991); Rep. Waters, D-Cal.: "**The likelihood of anyone taking any form of unpaid leave, especially extended unpaid leave, except under serious circumstances, is ridiculous**" (Nov. 13, 1991); Sen. Deconcini, D-AZ: "**We are not talking about a parent with the flu. We are talking about a child with cancer who must have radiation treatments. We are talking about an elderly parent recovering from a stroke who needs home care**" (Oct. 2, 1991).

- A Lake Charles, Louisiana employer had to settle with an employee for $20,000, after spending more than $50,000 on legal fees after a machine operator took a month off for an infected ingrown toenail. [the employee often called in sick – 49 days one year; once took off four days because her cat died]. Since the employee never mentioned needing medical leave, a district court granted summary judgment in favor of the employer after the employee sued following her firing, but the 5th Circuit ruled an employee need not expressly invoke the FMLA when notifying employer of need for leave. [Manuel v. Westlake Polymers Corp. 66 F.3d 758 (5th Cir. 1995); story featured by Forbes Magazine, May 5, 1997 and highlighted in the *NBC Nightly News* "In Focus" piece, "The High Cost of Good Intentions," May 3, 1997. The *NBC Nightly News* piece was played by the U.S. House Subcommittee on Oversight and Investigations at the beginning of the June 10, 1997 hearing, Report No. 105-44, p. 35-38].

- "The aspect of determining whether the event is a "serious health condition" under the FMLA has been extremely difficult for our company. In fact, up to this point we have felt compelled to approve all requests as long as there is a physician willing to complete the certification form" Testimony of Dixie Dugan, Cardinal Service Management, House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs February 15, 2000, p. 2.

- "NYNEX Corporation experienced a 42 percent increase in the percentage of incidental absences in the period 1992 to 1995, despite a reduction in the work force of 7,000 employees. Incidental absences are those of seven days or less for an employee's own illness. Annual costs increased 41 percent from $21 million to $30 million in just three years. NYNEX also experienced a dramatic increase in the duration of these illnesses. In 1989, the average absence for employees was 2.8 days. That figure has increased to over five days in 1994 after the FMLA went into effect." House testimony of Thomas Burns, corporate director of benefits and compensation, NYNEX, N.Y, June 10, 1997, p. 14.

- "Extremely broad Department of Labor regulations and guidance on the definition result in employers being required to certify all kinds of mild or minor conditions as FMLA-protected, including such things as bad colds, simple outpatient procedures not contemplated by the Congress which do not require extensive recovery times, and vague diagnoses of "depression", "stress", or "back pain". Despite an original opinion letter from the Department of Labor indicating that the cold, flu and non-migraine headaches were not serious health conditions, the Department issued a contradictory opinion letter the following year saying they could be. (These opinion letters are attached to my statement.) The conclusion of many employers is that the loose definition currently in use makes the Act a target for abuse. Many Connecticut employers have experienced the situation where an employee facing disciplinary action promptly brings in a doctor's form verifying an often-vague condition requiring immediate time off. This is extremely frustrating to employers, but it is equally disturbing to coworkers who are left with the work. One of the biggest frustrations I hear from supervisors is their inability to effectively address employee concerns about a coworker whose manipulation of well-intentioned leave provisions leaves them with extra work and additional stress." House Testimony of Kimberly Hostetler, Human Resources Subcommittee, Committee on Ways and Means, March 9, 2000, Report No. 106-114, p. 65.

These problems have placed the worst of all factors into companies' decision-making process regarding expanding paid leave policies -- growing legal uncertainties. **Unfortunately, this has had a chilling effect on the expansion of paid leave policies:**

- "Ironically, as a result of the FMLA, some employers are moving toward eliminating pre-FMLA generous programs and other companies are being discouraged by consultants from adopting them." Senate Testimony of Deanna R. Gelak, SPHR on behalf of the FMLA Technical Corrections Coalition and the Society for Human Resource Management, July 14, 1999, p. 22.

- "To address the need for some employees for paid family leave: First and foremost, address current problems with the FMLA's regulations and interpretations that are actually serving as a disincentive for companies to offer or expand paid leave policies." Testimony of Kimberly Hostetler, Human Resources Subcommittee, Committee on Ways and Means, March 9, 2000, Report No. 106-114, p. 70.

Summary:

- A strong case has been established on the need for the Department of Labor to address confusion over interpretations with what constitutes a "serious health condition" for medical leave under the FMLA. The record has identified that it is important to alleviate this current state of interpretive and legal confusion which is actually serving as a disincentive for companies to offer or expand paid leave policies.

- This is merely clarifying the Department of Labor's mixed signals from conflicting interpretations over the definition of "serious health condition" which has led to enormous confusion and unnecessary litigation, will result in employment policies which are more fair to all employees and which still achieve and protect the intent of the original FMLA law.

- Workers as well as employers should have more consistency (regardless of which legal circuit they reside in) in terms of what conditions are expected to be protected as FMLA leave.

- This addresses unintended consequences which have affected people like Dixie Dugan who utilized the FMLA herself, but explained to Congress how contradictory interpretations are hurting people. She stated the following:

  > "Personally, I utilized the Family and Medical Leave Act during the last few months of my mother's terminal cancer. . .Cardinal Service Management provided generous paid leave benefits to accommodate our employees before the law was enacted. Especially in this time of a tight labor market, we have to be concerned with meeting the needs of all of our employees. We have every interest in following existing laws but hope that some clarification and definition of the Department of Labor's "serious health condition" interpretations will allow us to do so within the letter of the law. I am glad that the FMLA is here to stay, but the Department of Labor's regulations and interpretations have broadened the Act and made compliance difficult. We are concerned that DOL opinion letters are l) not readily available to all employers and 2) going beyond the original intent of the law." Testimony of Dixie Dugan, Cardinal Service Management, Government Reform Committee, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs February 15, 2000, p. 1.

Basic Statement of Corrective Action Needed:

- Reverse the detrimental impact of 1996 opinion letters which expanded the scope of the FMLA to include minor illnesses which were not intended by Congress to be subject to the protections of FMLA.

- Reaffirm that incapacity for three days and continuing treatment by a health care provider do not convert a minor illness into a "serious health condition" covered by the FMLA.

NOMINATION #2--MINIMUM INCREMENTS OF INTERMITTENT LEAVE

Revise Regulation 29 CFR 203(d)

Why a Correction is Necessary:

Congress drafted the FMLA to allow employees to take leave in less than full day increments. The intent was to address situations when an employee may need to take leave for intermittent treatments, e.g., for chemotherapy or radiation treatments, or other medical appointments. Granting leave for these conditions has not been a significant problem. However, the regulations provide that an employer "may limit leave increments 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." 825.203(d). Since some employers track in increments of as small as six or eight minutes, the regulations have resulted in a host of problems related to tracking the leave and in maintaining attendance control policies. In many situations, it is difficult to know when the employee will be at work, and in many positions, an employee who has frequent, unpredictable absences can play havoc with the productivity and scheduling of an entire department when employers do not know if certain employees will be at work. Allowing an employer to require an employee to take intermittent leave in increments of up to one-half of a work day would ease the burden significantly for employers, both in terms of necessary paperwork and with respect to being able to cover efficiently for absent employees.

Examples:

- Even the earliest research conducted by the U.S. Commission on Leave found that approximately 40 percent (39.2 percent) of employers were experiencing serious difficulties attempting to comply with the intermittent leave provisions. These problems are exacerbated by the FMLA's vague definition of serious health condition and the fact that no penalty exists for employees who fail to provide advance notice to the employer of their need for leave.

- "The use of intermittent leave for chronic illnesses of an unpredictable nature, such as migraines, asthma, and other conditions, sometimes results in the employee being gone unpredictably as often as every week." House testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Inc., Kansas City, Missouri, June 10, 1997, p. 71.

- "An employee, for example, can be absent every week for one day, or every day for 1.5 hours, and never exhaust FMLA leave time. Hallmark has had several employees turn in medical certifications for migraines or other chronic conditions, and then be absent on a weekly basis for a day or two." Hupp House testimony, Id. at p. 81.

- "We have one intermittent leave taker who basically comes and goes as she pleases, attributing this to her FMLA-covered condition, a condition which I believe to be genuine. But as other employees witness the goings and comings of this leave taker, the stage is being set for other employees to manipulate the system and utilize FMLA leave to arrive and depart as they please. Employers should have the right to require that intermittent leave be taken in minimum blocks of 4 hours. This would minimize the misuse of FMLA by employees to excuse tardiness and justify early departures before the end of a work shift." House testimony of George Daniels, president, Daniels Manufacturing Company, Orlando, Florida, June 10, 1997, p. 8.

- "The intermittent leave provisions of the FMLA may be the most problematic part of the Act. An employee can have regular tardiness and never run out of FMLA leave time. [An example from my hospital]: An employee who is scheduled to work a shift that begins at 7 a.m. and ends at 3:30 p.m. has a child with cerebral palsy. The employee is consistently tardy, although the amount of time she is tardy fluctuates, due to problems getting her child situated in the morning. Her department felt it would be easier for her to have a shift that started later in the day and easier for her department since a night shift employee has to stay until he is relieved by this individual. She was offered the exact same job at the exact same rate of pay on a shift starting later. She did not want to do this, saying it would cause her daycare problems at the end of the day. We solicited an opinion from the area DOL office and were told that requiring the employee to change her shift to a later time would not be substantially the same job and therefore would not be allowable. The DOL also said that the change in shift start time would likely constitute a denial of her rights to FMLA leave and would also be another basis for a violation. Since her child's cerebral palsy is a permanent condition, this employee is seemingly forever immunized from tardiness." House testimony of Laura Avakian, senior vice president, human resources, Beth Israel Deaconess Medical Center and Caregroup, Boston, Mass., June 10, 1997, House Report, No. 105-44, p. 188-89.

- "And now, people are characterizing short-term illnesses as chronic conditions. That, coupled with the intermittent leave, you have to let people off for the shortest period of time your payroll system will calculate. One-third of our employees travel in an airplane, and it is very difficult – as you can imagine, it is impossible – and we cannot comply with that, because if we let a flight attendant off the plane, obviously, he or she cannot continue to work the rest of the week. So they miss the whole rest of the work week if they go off for even 15 minutes, because the flight leaves without them." Senate testimony of Libby Sartain, vice president, people, Southwest Airlines, May 9, 1996, p. 17.

- "In the healthcare industry, managing intermittent leave is particularly difficult. Given the expansive definition of "serious health condition" and the broad entitlement to intermittent leave, employers are put in a very difficult position when employees use intermittent leave. For example, ailments such as migraine headaches, allergies, asthma, and back pain have all recently been the subject of intermittent certification in our organization. In this situation, we must allow the employee up to 480 hours off of work to tend to these conditions. More often than not, the time off comes without any advance notice. It may come moments before a shift begins, during a shift or at the end of the day. The regulations prohibit us from requiring a note from the employee once we've received an initial certification for an ongoing condition. For example, a certification for intermittent leave for migraine headaches may say, "employee may be absent intermittently, 3-4 times per month." As a result, we must arrange to cover the employee's patient care responsibilities without advance notice and without adversely impacting our patients or our other valued employees. Additionally, none of the intermittent absences subject the employee to any coaching or counseling on absenteeism until after the expiration of the 480 hours, or 60 days. Even then, the employer's policy on unscheduled absenteeism would not be implicated until the unprotected absences have already reached an intolerable level." House Testimony of Kenneth A. Buback, April 11 2002, pp. 7-8.

- Intermittent leave is an important component of the FMLA; however, the expansive definition of serious health condition has changed the nature of most types of intermittent leave. Treatments such as chemotherapy, radiation, and kidney dialysis were the types of conditions contemplated by Congress, but are among the more infrequent uses of FMLA intermittent leave. It is much more common to have multiple employees in a single department or work unit certified for intermittent leave for conditions such as migraine headaches, back aches, allergies, etc. which Congress assumed would be covered under an

employer's sick leave plan rather than the FMLA. The nature of these conditions makes advance planning for staffing virtually impossible. Id., p. 8.

Summary:

- Minimize unnecessarily convoluted tracking and administrative burdens ("administrivia") while maintaining the original intent of the law, by permitting employers to require employees to take "intermittent" leave (FMLA leave taken in separate blocks of time due to a single qualifying reason) in increments of up to one-half of a work day.

Basic Statement of Corrective Action Needed:

- Reduce the tracking difficulties and scheduling disruption caused by employees taking FMLA leave in frequent, small increments.

NOMINATION #3 -- REQUEST FOR LEAVE AND TWO DAY NOTICE REQUIREMENT

Revised Regulation 29 CFR 825.302(d)

Why a Correction is Necessary:

Shifting the burden to the employee to request leave be designated as FMLA leave eliminates the need for the employer to question the employee and pry into the employee's and the employee's family's private matters, as required under current law, and helps eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations which even attorneys have a difficult time understanding. Under current law, it is the employer's responsibility in all circumstances to designate leave, paid or unpaid, as FMLA-qualifying. 825.208. An employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice. Sections 825.302(c) and 825.208(2). An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by the FMLA, does not need to assert such right either. Id. Employees often call in sick and supervisors are unaware that the mere mention of illness triggers obligations to determine FMLA coverage and to notify the employee of rights and obligations under the Act. This has led to supervisors being held personally liable for incorrect decisions.

Examples:

- Mistakenly ignoring or misreading the complex FMLA regulations can put employers in court or out of business. The courts have held that there is personal liability for employers under the FMLA and that an individual manager may be sued and held individually liable for acts taken based upon or relating to the FMLA. See Freemon v. Foley, 911 F. Supp. 326 (N.D. Ill. 1995) (in case of first impression in 7th Circuit, court stated, "We believe the FMLA extends to all those who controlled 'in whole or in part' [plaintiff's] ability to take leave of absence and return to her position").

- "Individual supervisors are personally liable under FMLA ... It is really unfair for a supervisor to lose his or her home and life savings for having made a mistake in the administration of a law as complicated as FMLA. FMLA requires activities prohibited by the Americans with Disabilities Act . . .The FMLA (Sec. 825.302) actually requires employers to interrogate employees, not only about the employee's own medical conditions, but also about the medical conditions of some of the employee's relatives which might trigger FMLA leave eligibility on the part of the employee. Many of our supervisors find conducting such interrogations to be personally distasteful ... Our supervisors literally are put in the position of

having to violate one law in order to comply with another law. No one should be put in this position." House testimony of George Daniels, president, Daniels Manufacturing Company, Orlando, Florida, June 10, 1997, p. 8.

- Potential liability for individual supervisor liability is increased by court decisions like Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995), which hold that employees need not mention the FMLA and employers are left guessing as to whether an employee needs FMLA leave. This case involved an ingrown toenail and company settled for $20,000 after spending more than $50,000 on attorney's fees.

The two-day notice requirement is not practical and needs to be expanded:

"The law provides employers two days to designate employee absences as FMLA time off once the employer knows the leave is needed for an FMLA required reason. However, in many organizations, determining if absence is FMLA time most frequently occurs when time records are submitted for payroll processing - generally once a week or once every other week; the result is that the employer representative responsible for providing FMLA notice doesn't learn of the situation until well after the two day notice period has expired, and the employer cannot correct these entries retroactively." House Testimony of Kimberly Hostetler, Ways and Means Committee, Subcommittee on Human Resources, Report No. 106-114 p. 65.

"For most companies, it is almost impossible for employers to provide written guidance to the employee within 2 days all of the employee's rights and obligations under the FMLA in addition to a notification as to whether or not the leave that they have taken appears to be covered by the FMLA. Given the various certification processes it may be weeks before employers can confirm that the leave actually qualifies under the FMLA. Also, physicians and employees often refuse to provide the necessary information on a timely basis. In fact, many physicians are so irritated by the excessive paperwork requirements of the FMLA that they are now charging employees, or employers for this certification (on a per page rate)." House Oversight and Investigations Subcommittee, Testimony of Lynn Outwater, Report No. 105-44, pp. 52-53.

- "One recent example involved a health care employee with a significant history of absenteeism. This employee was told that she could not have any unexcused absences for the next 90 days. This employee knew that absences due to her asthma, which had previously been certified as intermittent leave, and absences due to her workers' compensation injury would not be counted against her. On the 89th day, the employee called up and said she wouldn't be at work because her back hurt and she would be going to the doctor. After confirming that the absence was not due to her asthma or workers' compensation leave, the employer counseled this employee. The employee saw her physician who gave her anti-inflammatory medication and told her to alternate between ice and heat when her back hurt. As a result, the employee was eligible for FMLA and the employer's counseling had violated the FMLA." House Testimony of Kenneth A. Buback, April 11, 2002, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, p. 9.

Summary:

Where the employer does not exercise its right to require the employee to substitute other employer-provided leave under the FMLA, shifts to the employee the need to request leave be designated as FMLA leave, and requires the employee to provide written application within five working days of providing notice to the employer for foreseeable leave, and within a time period extended as necessary for unforeseeable leave, if the employee is physically or mentally incapable of providing notice or submitting the application.

Basic Statement of Corrective Action Needed:

- Allow employers to plan coverage for employees' absences by requiring employees to apply for FMLA leave as they would apply for any other employer-provided leave.

NOMINATION #4 -- SUBSTITUTION OF PAID LEAVE

Support Legislation to:

Amend Section 102(d)(2) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(d)(2)) as follows:

> *Add at the end the following: "(C) PAID ABSENCE- Notwithstanding subparagraphs (A) and (B), with respect to leave provided under subparagraph (D) of subsection (a)(1), where an employer provides a paid absence under the employer's collective bargaining agreement, a welfare benefit plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), or under any other sick leave, sick pay, or disability plan, program, or policy of the employer, the employer may require the employee to choose between the paid absence and unpaid leave provided under this title."*.

Why a Correction is Necessary:

Despite the common belief that leave under the FMLA is necessarily unpaid, most FMLA leave has become paid leave. This is due to employers' generous sick leave policies or employee-friendly sick leave programs which have been worked out with unions in collective bargaining agreements. Department of Labor regulation 825.700 states that an employer must observe any employment benefit program or plan than provides greater rights than the FMLA. The regulations also provide that either employees or employers can substitute any category of paid leave for FMLA leave (Section 825.207). To further complicate the situation, DOL regulation 825.220(c) states that employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. Thus, the DOL regulations prohibit employers from using disciplinary attendance policies to manage employees' absences, even though employers are required to pay for the absences under their short-term disability programs if either the employee or the employer elects to substitute paid leave.

Examples:

- "It was assumed that the FMLA's leave entitlement would not lead to overuse because it was unpaid, and only those employees truly in need would exercise this right. However, because of many employers' existing paid leave policies and collective bargaining agreements, the leave under the FMLA is fully paid in many instances. According to the U.S. Commission on Leave, 66.3 percent of FMLA leave is paid (46.7 percent fully paid). This existing paid leave sandwiched on top of the broad, yet vague, FMLA definitions has resulted in employees requesting or characterizing a variety of minor situations as FMLA leave." House testimony of Lynn Outwater, on behalf of the Society for Human Resource Management and the FMLA Technical Corrections Coalition, June 10, 1997, p. 48.

- "In 1996, approximately 79 percent of the FMLA leave time at Hallmark was paid. Paid absence at Hallmark has increased at least 35 percent since 1993." House testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Kansas City, Missouri, June 10, 1997, p. 8.

- "Hallmark offers paid sick leave (short-term disability) at full pay for up to six months. Under the DOL regulations, employees can choose to substitute this paid leave for their own serious health conditions. There is no incentive for employees to choose unpaid leave instead of paid leave, because by choosing paid leave, the employee get all the benefits of the FMLA (job protection and protection from any discipline for being absent) and also gets paid." House testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Kansas City, Missouri, June 10, 1997.

- "Prior to the FMLA, an employee who repeatedly was absent for more than three days at a time would likely have faced disciplinary consequences; today, most absences of more than three days are protected by the FMLA. Hallmark has lost the flexibility to address employee absences since the effective date of the FMLA ... Employers cannot manage any absence that qualifies as a 'serious health condition' under the broad definition in the DOL regulations." June 27, 1997 statement by M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, submitted for record of June 10, 1997 House hearing.

- "Would it be [Congress'] intent that employers should go back and limit the amount of benefits that they offer? The problem has been that we had a system in place that we could work with employees to discuss with them what was an acceptable attendance standard and what was not. Now we are paying them for the 12 weeks that they can take off under FMLA." Hupp's House testimony, Id., p. 23.

- "NYNEX Corporation's sickness disability benefit plan provides up to 52 weeks of paid salary continuation for each illness. Since the FMLA was enacted, NYNEX has experienced a 42 percent increase in the percentage of incidental absences from 1992 to 1995, despite a reduction in the work force of 7,000 employees. Incidental absences are those of seven days or less for an employee's own illnesses. As a result, annual costs increased 41 percent from $21 million to $30 million in just three years." House testimony of Thomas E. Burns, corporate director of benefits and compensation, NYNEX Corporation, New York, NY, June 10, 1997, p. 14.

- "Two things have happened since the enactment of FMLA. First, the definition of 'serious health condition' has enabled practically all absences to qualify for the FMLA. Second, NYNEX can no longer use its absence control program to monitor absences if an employee successfully qualifies for FMLA. NYNEX does not have a sick bank that uses a certain number of sick days to give employees time off. Instead, we have unlimited sick leave. If an employee is sick, we want that individual to stay home from work until he or she has recuperated. At the same time, we will keep track of these absences. We have established standards for punctuality and attendance. Before the FMLA, these standards were generally met by employees. Since FMLA ... the absence control plan has been useless." Burns' House testimony, Id., p. 15.

- "We had paid leave long before FMLA was contemplated, and what we paid for is sickness also, up to a year. And what has really happened is that we have intermingled the requirements of FMLA so that if a person claims under FMLA, we are in the unintended result of having to pay for FMLA, because you couldn't, under the law, take away the benefits that you previously had given to employees because of the imposition of FMLA." Burns' House testimony, Id., p. 19-20.

- "Unfortunately, the generous companies that provided paid leave long before FMLA was enacted are experiencing many disastrous results. Because of the vague and overly broad FMLA definitions, these companies are now finding paid-leave programs to be most difficult to administer and sometimes unaffordable. Ironically, as a result of the FMLA, some employers are moving toward eliminating pre-existing generous programs and other

companies are being discouraged by consultants from adopting them." House testimony of Lynn Outwater, SHRM and FMLA Technical Corrections Coalition, June 10, 1997, p. 55-56.

- "Because of the problems associated with leaves under the FMLA for minor conditions, many employers' 'perfect attendance' programs have come to be viewed as meaningless by those employees who earn the awards without any absences. Several employers have discontinued their award programs for this reason." House testimony of Lynn Outwater, Id., June 10, 1997, p. 52.

- "At Southwest Airlines, three employees have come back to the company as much as two years later asking for leave to be counted retroactively as FMLA leave, in order to avoid being terminated for attendance issues." Libby Sartain's Senate Testimony, May 9, 1996.

Summary:

With respect to leave taken because of the employee's own serious health condition, legislation could permit an employer to require the employee to choose between taking unpaid leave provided by the FMLA or paid absence under an employer's collective bargaining agreement or other sick leave, sick pay, or disability plan, program, or policy of the employer. This change would **provide an incentive for employers to continue their generous sick leave policies** while **providing a disincentive to employers considering getting rid of such employee-friendly plans, including those negotiated by the employer and the employees' union representative.** Paid leave would be subject to the employer's normal work rules and procedures for taking such leave, including work rules and procedures dealing with attendance requirements.

Basic Statement of Corrective Action Needed:

- Eliminate conflict between FMLA and employers' voluntary paid sick leave policies.

- Avoid converting unpaid FMLA leave entitlement into an entitlement to paid FMLA leave.

NOMINATION #5 – DEFINITION OF "UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION"

Revise Regulation (29 CFR 825.115)

Why a Correction is Necessary: An employee is able to take FMLA leave whenever the employee is restricted from performing just one of the job's essential functions (as opposed to situations where the employee is unable to perform the majority of the functions of the employee's position).

Examples:

- An employee has a job in a warehouse that requires lifting up to 75 lb. The employee is medically restricted from lifting over 30 lb. The employer is willing to have the employee come to work and do the light lifting, assigning all the over-30-lb. lifting to coworkers. Today, the employee can stay home on FMLA leave.

- Same employee is restricted from any lifting. Employer is willing to have him do clerical work until he can lift again. Today, the employee can stay home on FMLA leave. We think that's wrong. People who can work should be at work if their employers are willing to honor their medical restrictions.

Summary:

- Consistent with other employment law and back-to-work practice, employers should be permitted to provide "light duty" or other alternative work to employees who are unable to perform their regular jobs.

Basic Statement of Corrective Action Needed:

- Limit FMLA leave to situations where the employee is unable to perform the majority of the functions of the employee's position, rather than allowing an employee to take FMLA leave whenever the employee is restricted from performing just one of the job's essential functions.

- Permit employers to provide "light duty" or other alternative work to employees who are unable to perform their regular jobs.

NOMINATION #6 -- HEALTH CARE PROVIDER CERTIFICATION

Revise Regulation 29 CFR 825.306 and 29 CFR 825.307(a)

Why a Correction is Necessary: Health care providers are accustomed to responding to telephone inquiries from employers and the information they provide on the FMLA certification form is often internally inconsistent or does not support a finding of incapacity. Due to the limits imposed by the Department of Labor's regulations, the employer's health care provider cannot even call the employee's health care provider if the employee declines to give permission. Nor can the employer's health care provider obtain the usual documentary support for a disability. These limitations either lead the employer to deny FMLA coverage due to lack of sufficient certification, or to grant FMLA coverage despite the lack of sufficient factual support just to avoid a dispute. This clarification would simply give the employer more information upon which to determine whether or not a leave request qualifies under the FMLA.

Examples:

- "Under the Department of Labor's regulations, a certification form is the only way that the employer can verify the leave. The employer cannot call and speak to the doctor or caregiver." Testimony of Dixie Dugan, Cardinal Service Management, Government Reform Committee, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, February 15, 2000, Report No. 106-171, p. 84. Note: Ms. Dugan attached a copy of the Department of Labor's Certification of Health Care Provider Form to her testimony (Testimony Attachment #1, found on pp. 89-92 of Committee Report 106-171).

- "The medical certification process as defined by the DOL is cumbersome. Employers have little means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense ... Each of these steps is likely to take at least an additional 15 days ... It could easily be two months or more before the employer has sufficient information to determine whether an absence should be covered by the FMLA." Senate testimony of M. Theresa Hupp, human resources director, manufacturing, Hallmark Cards, Inc., Kansas City, Missouri, May 9, 1996, p. 67.

- "Further compounding the problems caused by the DOL regulations is the fact that many doctors are unfamiliar with the FMLA and the requirements that employees submit medical certification forms. Hallmark has had several doctors in the Kansas city metropolitan area

complain that Hallmark has imposed the lengthy medical certification form on the medical community; they simply do not recognize that this is a federal regulatory requirement." Id.

- "Under the regulations, employers have little or no means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense ... The second and third opinion process is extremely expensive. Hallmark has had quotes of more than $1,000 from physicians for providing second opinions. Hallmark has actually incurred costs of more than $700 for a physician to provide a second opinion on an absence for a back injury, and more than $600 for a second opinion on an absence for a mental illness. Hallmark had over 1,900 employees take FMLA leave during 1996. With this rate of FMLA usage, the cost of obtaining second and third opinions is a real deterrent to Hallmark's attempts to manage FMLA leaves. If each second opinion were to cost $600, Hallmark would spend over $1 million just on second opinions, quite apart from the cost of third opinions where the first and second opinions disagreed." House testimony of Ms. Hupp, June 10, 1997, p. 78-79.

- "In one recent situation we had an employee who returned with a fitness for duty evaluation from her physician following back surgery. The note indicated that she was fit to "return to full duty." This employee was a nurse in the Critical Care unit and had various lifting, pushing and pulling requirements that we questioned. The employee refused to allow us to talk with her physician. Under the FMLA regulations, this employee needed to be returned to her position without delay. Subsequent observations of this employee indicated that she was unable to perform her job duties and she was subsequently removed from patient care pending an evaluation." House testimony of Kenneth A. Buback, April 11, 2002, p. 9.

The following line of questioning from Human Resources Committee Chairperson Nancy Johnson to Hearing Witness Kimberly Hostetler also documents this problem:

> "Chairperson JOHNSON. Is there any form—you know, workman's comp, you have a form. You can have a doctor evaluate.
> Ms. HOSTETLER. No, there is not. You can't talk to the doctor. The employer is not even able to discuss with the physician, not ask any questions. That is prohibited by the regulations. The employer is also prohibited from using their own physician—if they've got a company doctor, so to speak, that they've used for worker's comp or some of these other statutory requirements they're not allowed to use that provider in the case of family medical leave. That seems another odd twist that makes it more difficult for employers.
> Chairperson JOHNSON. This is really quite a different system in every way than either our unemployment comp or our workman's comp system.
> MS. HOSTETLER. Completely.
> Chairperson JOHNSON. This really makes my point. I know I was pretty tough on the guy from the Department of Labor but to do this *[propose the Baby UI rule—clarification added]* without looking at what has been happening and how we might need to refine or amend former law to provide paid leave when you don't even have the tools to determine whether the person was really sick, this is unheard of, unprecedented, and I am—I'm a moderate Republican." Exchange between Chairperson Nancy Johnson and Witness Kimberly Hostetler, March 9, 2000, Report No. 106-114, p. 100.

Summary:

- Problems faced in determining the validity of an employee's FMLA certification need to be addressed by clarifying that sufficient certification under the FMLA must allow employers to verify FMLA leaves the same way they verify other employee absences for illness.
- This will allow employers and health care providers to communicate so that health care providers understand the requirements of the employee's job.

Basic Statement of Corrective Action Needed:

- Allow employers to verify FMLA leaves the same way they verify other employee absences for illness.

- Permit employers to communicate with health care providers to ensure that they understand the requirements of the employee's job and the employer's willingness to make alternative work (such as "light duty") available to the employee.

NOMINATION #7 -- ADDRESS ACROSS THE BOARD PENALTIES THAT WILL NOT MEET THE SUPREME COURT'S STANDARD (I.E., AS MANIFEST IN *RAGSDALE V. WOLVERINE WORLDWIDE, INC.*)

Why a Correction is Necessary:

On March 19, 2002, the Supreme Court struck down a portion of the existing DOL regulations in the first FMLA case before the Supreme Court (*Ragsdale v. Wolverine Worldwide, Inc*.). The Court reviewed one particular regulation (one sentence) promulgated by the DOL, which states as follows:

> "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR Section 825.700(a).

The Court decided that this regulation is invalid because it contradicts the remedy provisions provided by Congress in the FMLA Act itself. In essence, the Court said that the DOL regulation contains a remedy that contradicts the remedies passed by Congress.

Although the Court only focused on one particular DOL regulation, there are a number of other DOL regulations that impose "across the board" penalties that will not meet the Court's standard. The Court did not decide whether any other penalty provisions contained in the DOL regulations are invalid. However in light of the rationale used by the Court in reaching its decision, it is likely that other penalty provisions in the DOL regulations will be invalidated using the same rationale. Consequently, other DOL regulations that include penalty provisions are now in question will probably not withstand judicial scrutiny, and will probably be held invalid by various courts unless the DOL amends the regulations to be consistent with the Supreme Court's recent decision.

In light of the historic *Ragsdale* decision and the fact that many other parts of the Department of Labor regulations are similarly inconsistent with Congressional intent, an increasing number of lawsuits challenging FMLA regulations are expected. Had the Department of Labor more closely reflected the intent of Congress in its FMLA implementing regulations in the first place, this litigation and confusion could have been avoided. If the DOL does not amend its other problematic interpretations, continued adherence with these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions and the courts) additional time, effort and money. This would be a regrettable waste of resources—a waste that is avoidable if the DOL restores its regulatory interpretations to properly reflect the original Congressional intent.

Summary:

- The Department of Labor should address the various penalty provisions that go beyond Congressional intent and have been challenged in court while eliminating the erroneous rules struck down by the Supreme Court (permitting employees to claim more than 12 workweeks of FMLA leave per year even if they have not been harmed by the employer's late designation of FMLA leave).

NOMINATION #8 -- PERFECT ATTENDANCE AWARDS

Revise Regulation 29 CFR 825.215 (c)(2) and Revise 29 CFR 825.220

Why a Correction is Necessary:

The time an employee takes away from work under the Family and Medical Leave Act may not be counted against the employee for the purpose of perfect attendance awards.

The FMLA states "the taking of leave shall not result in the loss of any employment benefit accrued prior to the date of the leave". Employment benefits are defined as "all benefits provided or made available to an employee by an employer". The Department of Labor regulations have interpreted that to mean attendance awards, but the benefits contemplated in the law are "group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions" - clearly Congress was concerned about the loss or reduction of significant health and welfare benefits.

Examples:

- "An employee who has taken three months off under FMLA - or missed 38 days intermittently due to a chronic condition - may still be eligible for a perfect attendance award. Coworkers find this impossible to understand. Morale is affected when those rewarded for perfect attendance are recognized together with colleagues who no one has seen in months. To include perfect attendance programs - when attendance is the essence of the program - seems to go beyond congressional intent. Not only is such an interpretation unfair to employees who do have perfect attendance, but it is also unfair to employees who may need to miss time for equally compelling reasons that may not qualify for FMLA (such as having to take time for the funeral of a family member). We are not suggesting that absences covered by FMLA be counted for attendance control purposes or for performance evaluation, but only in the single instance of attendance award programs where it would make so much sense to employees and employers alike." House Testimony of Kimberly Hostetler, Ways and Means Committee, Subcommittee on Human Resources, Report No. 106-114, p. 55-56.

- "Because of the problems associated with leaves under the FMLA for minor conditions, many employers' 'perfect attendance' programs have come to be viewed as meaningless by those employees who earn the awards without any absences. Several employers have discontinued their award programs for this reason." House testimony of Lynn Outwater, SHRM and the FMLA Technical Corrections Coalition, June 10, 1997, p. 52.

- "Unfortunately, the FMLA has also forced many employers to abandon their attendance reward policies, because the Act prohibits them from successfully administering such policies. Because of the problems associated with leaves under the FMLA for minor conditions, many employers' 'perfect attendance' programs have come to be viewed as meaningless by those employees who earn the awards without any absences." Testimony of Lynn Outwater, SHRM and the FMLA Technical Corrections Coalition, House Subcommittee on Oversight and Investigations, June 10, 1997, Report No. 105-44, p. 52.

- "Some employers have eliminated perfect attendance awards." House Testimony of Kimberly Hostetler, Ways and Means Committee, Subcommittee on Human Resources, Report No. 106-114, p. 66.

Summary:

- Addresses an incorrect interpretation which has been counter intuitive and unfair to workers who earn perfect attendance awards.
- Addresses an unintended conflict between the FMLA and attendance recognition programs.
- Employees who work hard to earn perfect attendance awards without any absences will be better served.

Basic Statement of Corrective Action Needed:

- Clarify that employers may record FMLA leaves as absences for purposes of perfect attendance awards only (the only "employee benefit" that could be so affected by FMLA use).