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On behalf of the
Society for Human Resource Management

Testimony before the U.S. House of Representatives
Subcommittee on Workforce Protections hearing on
"*The 15th Anniversary of the Family and Medical Leave Act: Achievements and Next Steps*"
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Introduction

Chairwoman Woolsey, Ranking Member Wilson and distinguished members of the Subcommittee, my name is Brenda Cossette and I am the Human Resources Director for the City of Fergus Falls, Minnesota. I commend the subcommittee for holding this hearing on the Family and Medical Leave Act (FMLA) and I appreciate the opportunity to provide testimony to you today.

By way of background, I am a certified senior professional in human resources with over 25 years experience in human resource management. My experience includes work in government, manufacturing, banking, wholesale/retail grocery as well as health care. In my current role, I manage the Human Resource function for the City of Fergus Falls, Minnesota, ensuring compliance with state and federal laws, negotiating and administering four labor contracts as well as establishing and administering internal policies and procedures, including the Family and Medical Leave Act.

I appear today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest professional association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

It is important for you to know that do I not sit before you today as merely an HR professional who has administered the FMLA since it was enacted in 1993, but as an employee who is personally benefited from the Act's provisions. I have been diagnosed with breast cancer,

have had two separate surgeries, and am currently undergoing chemotherapy. With cancer as a chronic condition, my need to use FMLA leave continues on an intermittent basis. The benefits afforded under the FMLA allow me to take time off as necessary for my treatments and for the often unpredictable complications of chemotherapy. The FMLA allows me to take time off without any accompanying stress or anxiety about my absence from the workplace.

Given my personal familiarity with the FMLA, my perspective on the issues before us today is based on real experience, tempered with an appreciation for the needs and concerns of employers in my home state of Minnesota. Thank you for giving me an opportunity to share my personal and professional experiences with you.

In addition, SHRM is uniquely positioned to provide insight on workplace leave policies. The Society's membership is comprised of HR professionals who are responsible for administering their employers' benefit policies, including paid time-off programs as well as FMLA leave. On a daily basis, HR professionals must determine whether an employee is entitled to FMLA leave, track an employee's FMLA leave, and determine how to maintain a satisfied and productive workforce during the employee's FMLA leave-related absences.

FMLA Overview

Both employers and employees benefit from workplaces that foster and support an appropriate balance between work and family demands, and the Family and Medical Leave Act was premised on this principle. And while I believe that HR professionals work diligently to assist employees in striking this balance, after 15 years of experience administering FMLA leaves, I am confident this important statute is in need of modest, yet important fixes to ensure that it serves the best interests of both employees and employers.

Family Leave Working as Congress Intended

Undoubtedly, the Family and Medical Leave Act has helped millions of employees and their families since it's enactment in 1993, and as an HR professional, I have personally witnessed employees reap the important benefits afforded under this law. For the most part, the family leave portion of the FMLA—which provides up to 12 weeks of unpaid leave for the birth or adoption of a child—has worked as Congress intended, resulting in few challenges for either employers or employees. As evidenced in the 2007 SHRM Survey *FMLA and Its Impact on Organizations*, only 13 percent of respondents reported challenges in administering FMLA leave for the birth or adoption of a child.

When my son was born over 23 years ago, I did not have FMLA leave protection, which caused me some anxiety as I had a complicated delivery and premature infant, requiring me to take three months of leave as well as more time to deal with the respiratory complications that came with a premature infant. I personally believe that FMLA is a wonderful benefit for working men and women who have families, as they can take leave for the birth or adoption of a child without angst over losing their job or benefits. FMLA leave allows a new parent to take time to adapt to their parenting role and bond with their child, and this would not be easily done if they had to worry about their job or benefits.

Medical Leave Challenges

Key aspects of the regulations governing the medical leave provisions, however, have drifted far from the original intent of the Act, creating challenges for both employers and employees. In fact, 47 percent of SHRM members responding to the 2007 SHRM FMLA Survey reported that they have experienced challenges in granting leave for an employee's serious health condition as a result of a chronic condition (ongoing injuries, ongoing illnesses, and/or non-life

threatening conditions). HR professionals have struggled to interpret various provisions of the FMLA, including the definition of a serious health condition, intermittent leave, and medical certifications.

HR professionals have two primary concerns with the Act's regulations: the definitions of "serious health condition" and "intermittent leave." For example, with regard to the definition of serious health condition, the Department of Labor (DOL) issued a statement in April 1995 advising that conditions such as the common cold, the flu, and non-migraine headaches are *not* serious health conditions. The following year, however, the DOL issued a statement saying that each of these conditions could be considered a "serious health condition." Practically any ailment lasting three calendar days and including a doctor's visit, now qualifies as a serious medical condition (due to DOL regulations and opinion letters). Although Congress intended medical leave under the FMLA to be taken only for serious health conditions, SHRM members regularly report that individuals use this leave to avoid coming to work even when they are not experiencing a serious health condition.

Furthermore, HR professionals encounter numerous challenges in administering unscheduled, intermittent leave. It is often difficult to track this type of leave usage, particularly when the employee takes FMLA leave in small increments. Unscheduled, intermittent leave also poses significant staffing problems for employers. When an employee takes leave of this nature, organizations must cover the absent employee's workload by reallocating the work to other employees or leaving the work unfinished. For example, 88 percent of HR professionals responding to the 2007 SHRM FMLA Survey Report indicated that during an employee's FMLA leave, their location attends to the employee's workload by assigning work temporarily to other employees. In most cases, it is not cost-effective to use temporary staff because the period to train a

temporary employee is sometimes longer than the leave itself. Furthermore, employers typically do not receive sufficient advance notice regarding an employee's need for FMLA leave, thereby making it difficult to obtain temporary help on short notice.

In addition to staffing problems, "intermittent leave" (as defined in the FMLA regulations) has resulted in numerous issues related to the management of absenteeism in the workplace. The most common challenge HR professionals encounter in administering medical leave, for example, is instances in which an employee is certified for a chronic condition and the health care professional has indicated on the FMLA certification form that intermittent leave is needed for the employee to seek treatments for the condition. This certification in effect grants an employee open-ended leave, allowing leave to be taken in unpredictable, unscheduled, small increments of time. The ability of employees to take unscheduled intermittent leave in the smallest time units that the employer uses, often one-tenth of an hour or six minutes, means that employees can rely on this provision to cover habitual tardiness. While serious health conditions may well require leave to be taken on an intermittent basis, limited tools are available to employers in order to determine when the leave is in fact legitimate. As a result, 39 percent of HR professionals responding to the 2007 SHRM FMLA Survey Report indicated that they granted FMLA leave for requests that they perceived to be illegitimate.

15 Years Later – FMLA Clarifications Necessary

The challenges outlined above have been well-documented over the last several years most notably in numerous congressional hearings, agency stakeholder meetings and through submissions to the DOL Request for Information on the FMLA regulations. SHRM supports the goals of the FMLA and wants to ensure that employees continue to receive the benefits and job security afforded by the Act. However, given the significant challenges HR professionals continue to

experience with FMLA administration, SHRM respectfully suggests that policymakers take steps to address the underlying problems both employers and employees encounter with the FMLA.

Last year the DOL completed a thorough review of the effectiveness of the FMLA regulations in which the Department received over 15,000 comments from employers, employees and other interested organizations. The June 2007 DOL Report on the FMLA noted that in many instances, when it comes to the "family" portion of FMLA, the regulations are basically working as Congress intended with few concerns for employers or employees. However, the report also highlighted that in other areas, particularly in the "medical" leave portions of the regulations, differing opinion letters, federal court rules and regulator guidance have clouded and sometimes undermined key provisions of the FMLA. As outlined above, these findings accurately reflect the cumulative experiences of HR professionals who have been administering FMLA leave for the last 15 years.

As you know, the Department's review of the FMLA regulations culminated in the publication of a Notice of Proposed Rulemaking (NPRM) to update the Family and Medical Leave Act regulations on February 11, 2008. The comment period for this NPRM closes on April 11, 2008, and SHRM will provide a copy of our comment submission for the hearing record.

In short, while SHRM appreciates a number of the changes proposed by the DOL, particularly the medical certification process, the Society believes the proposal fell short in two key areas – the proposed regulation fails to significantly improve the definition of a serious health condition and there still are no meaningful tools available for employers to effectively manage misuse of unscheduled intermittent leave or to address many of the unintended consequences of the existing regulations. These are important issues that are fundamental to effective FMLA

administration and as such Congress should strongly consider policy options to remedy these challenges.

Despite these shortcomings, SHRM believes this regulatory action is an important step toward restoring the balance intended by Congress between employers' business needs and employees' need for time to attend to important family and medical issues. After all, the original purpose of the FMLA, as envisioned by Congress, will never be fully realized until both the employee and employer communities feel comfortable in their determination that an employee is rightly entitled to FMLA leave.

FMLA Expansions

While SHRM shares Congress' interest in providing families additional work flexibility, we are concerned about proposals to expand the Family and Medical Leave Act, including paid leave mandates, given current problems implementing FMLA leave. As outlined above, there is already a lengthy record of problems with administering leave under the Act due to confusing and inconsistent regulations. While well intentioned, proposals that build on a flawed FMLA framework will only exacerbate the significant challenges both employers and employees currently encounter.

SHRM also has serious concerns about proposals that mandate paid leave. As members of the Subcommittee know, in addition to the benefits afforded workers under the FMLA, many employees are also eligible for paid-time-off benefits provided by their employer. In fact, many employers offer generous voluntary paid leave benefits to better assist employees in balancing work and personal needs as paid leave programs are a key recruitment and retention tool. However, paid leave benefits are only one element of an employee's total compensation package that includes not only wages but often retirement benefits, health care coverage, and other benefits.

To meet business objectives, employers have a finite pool of compensation dollars. At the same time, costs associated with complying with various federal and state mandates continue to rise along with the cost of offering employee benefit plans, consuming a larger portion of the compensation pool, thereby limiting resources for wage increases and other important benefits such as paid-time-off programs. SHRM believes that employers, not the federal government, are best situated to know the benefit and compensation needs of their employees. As such, "one-size-fits-all" paid leave mandates restrict an employer's flexibility in designing and implementing employee benefit plans, which often times works against employees. Therefore, SHRM respectfully requests that Congress fix the documented shortfalls of the FMLA before considering additional leave mandates that curtail an employer's flexibility, including paid leave proposals.

Conclusion

SHRM applauds the Subcommittee's examination of the Family and Medical Leave Act to gage whether this leave law is meeting the needs of both employees and employers and appreciates the opportunity to provide testimony on this important leave statute. As noted earlier, HR professionals and their organizations are committed to both the proper application of the FMLA in the workplace as well as assisting their employees in balancing their work and family demands. The Society looks forward to working with the Subcommittee to craft practical workplace flexibility policies that meet the needs of employees, their families, and employers.