



**UNITED STATES DEPARTMENT OF LABOR**  
**EMPLOYMENT STANDARDS ADMINISTRATION**

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**STATEMENT OF**  
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**UNITED STATES DEPARTMENT OF LABOR**  
**BEFORE THE**  
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**  
**COMMITTEE ON EDUCATION AND LABOR**  
**UNITED STATES HOUSE OF REPRESENTATIVES**

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**UNITED STATES DEPARTMENT OF LABOR**  
**EMPLOYMENT STANDARDS ADMINISTRATION**  
200 CONSTITUTION AVENUE, NW  
WASHINGTON, DC 20210

Good morning, Chairwoman Woolsey, Ranking Member Wilson, and Members of the Subcommittee. I am pleased to testify today about the Department of Labor's experiences in administering the Family and Medical Leave Act of 1993 (FMLA) and our recently published Notice of Proposed Rulemaking (NPRM). The FMLA provides America's working families with the ability to take job-protected leave for the birth or adoption of a child, because of one's own, or a family member's, serious health condition, and, only recently – in the case of military families – to care for our wounded warriors and to address qualifying exigencies arising from deployment. The recent expansion of the law to provide military family leave, along with the experience gained from fifteen years of enforcing the rights of workers to take job-protected leave and case law developments during this time, requires that the Department update its regulations to ensure the FMLA continues to work as well as possible.

When, on January 28, 2008, President Bush signed a bill to provide additional leave entitlements to military families, the Department fast-tracked publication of a proposal to implement these important new leave entitlements. The Department published its proposal in the *Federal Register* on February 11, 2008. A copy of the proposal is available at [www.dol.gov/esa/whd](http://www.dol.gov/esa/whd) and at [www.regulations.gov](http://www.regulations.gov).

The Department takes its commitment to servicemembers and their families very seriously, and because one of the provisions providing additional FMLA leave protection for military families cannot go into effect until the Secretary of Labor defines certain terms by regulation, we believe it is important to address those provisions completely and expeditiously. We have already reached out to the Departments of Defense and Veterans Affairs, as well as groups representing servicemembers and their families, to obtain their

input. Our proposal will allow us to finalize these regulations as quickly as possible, thus ensuring that military servicemembers and their families receive the full protection of the FMLA when they need it most.

The Department's proposal is also another step in what has been an open and transparent process of reviewing the current FMLA regulations. Although there is broad consensus that the FMLA is valuable for workers and their families, there are a number of issues that workers, employers, and health care professionals have identified as needing to be updated in order to make the law work better for everyone. This should be expected as it has been almost 15 years since the Department's first interim final rule implementing the FMLA went into effect. Much has happened since then – numerous court rulings examining the Act and implementing regulations, and statutory and regulatory developments, such as passage of the Health Insurance Portability and Accountability Act (HIPAA) that directly or indirectly impact administration of the FMLA.

## **Background**

By way of background, the FMLA generally covers employers with 50 or more employees. Employees must have worked for the employer for 12 months and have 1,250 hours of service during the previous year to be eligible for leave. As enacted in 1993, the FMLA permits eligible employees to take up to a total of 12 weeks of unpaid leave during a 12-month period for: (1) the birth of a son or daughter and to care for the newborn child; (2) placement with the employee of a son or daughter for adoption or foster care; (3) care for a spouse, parent, son or daughter with a serious health condition;

and (4) a serious health condition that makes the employee unable to perform the functions of the employee's job. Recent amendments provide for taking FMLA leave to care for a covered servicemember with a serious injury or illness incurred in the line of duty and because of qualifying exigencies arising out of a servicemember's active duty or call to active duty status.

Employees may take FMLA leave in a block or, under certain circumstances, intermittently or on a reduced leave schedule. While the employee is on leave, the employer must maintain any preexisting group health coverage and, once the leave is over, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. An employee who believes that his or her FMLA rights were violated may file a complaint with the Department or file a private lawsuit in federal or state court. If a violation is found, the employee may be entitled to reimbursement for monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, court costs, and liquidated damages.

To implement the FMLA, the Department initially issued an interim final regulation that became effective on August 5, 1993. Except for minor technical corrections in February and March 1995, the Department's FMLA regulations have not been updated since final regulations were published on January 6, 1995. Over the last several years, the Department has engaged in a thorough and deliberative review of the current FMLA regulations, taking into account both the Department's experience in administering and enforcing the FMLA and developing case law.

The Department hosted a series of stakeholder meetings in late 2003 and 2004. In December 2006, the Department issued a Request for Information (RFI) seeking

comment on the public's experiences with the FMLA and the Department's regulations. In response to the RFI, the Department received more than 15,000 comments from workers, family members, employers, academics, and other interested parties. Many of the comments were brief emails with very personal accounts from employees who had used family or medical leave; others were highly detailed and substantive legal or economic analyses responding to the specific questions in the RFI and raising other complex issues.

After reviewing all the public comments in response to the RFI, the Department published a report in June 2007.<sup>1</sup> The RFI Report concluded that the FMLA is generally working well in the majority of cases. The FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to be absent for blocks of time while they recover from their own serious health condition or care for family members recovering from serious health conditions. The FMLA also seems to be working fairly well when employees are absent for scheduled treatments related to their own or a family member's serious health condition.

However, the Department also learned that the FMLA, like any new law, has had some unexpected consequences. While employees often expressed a desire for greater leave entitlements, employers often expressed frustration about difficulties in maintaining necessary staffing levels and managing attendance in their workplaces, particularly when employees take leave on an unscheduled basis with no advance notice. For example, the RFI Report indicated that time-sensitive industries, such as transportation operations (including local school bus systems), public health and safety operations (including

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<sup>1</sup> A copy of the RFI Report, as well as access to the public comments and RFI, are available at <http://www.dol.gov/esa/whd/Fmla2007Report.htm> and at [www.regulations.gov](http://www.regulations.gov).

hospitals, nursing homes, and emergency 911 services), and assembly-line manufacturers may be especially impacted by employees taking unscheduled, intermittent FMLA leave. Although taking FMLA leave intermittently is a statutory right, there is clear evidence that the use of intermittent leave disproportionately affects these types of industries.

The Department also learned from the RFI and a subsequent stakeholder meeting held in September 2007 with employee, employer, and health care representatives that the current medical certification process is not working as smoothly as all involved would like. Employers complained about receiving inadequate medical information from doctors, while employees and health care providers complained that the Department's certification process was confusing and time-consuming. It also appears that, despite much work by the Department, many employees still do not fully understand their rights under the Act or the procedures they must use when seeking FMLA leave.

These aspects of FMLA can have ripple effects that result in conflicts and misunderstandings between employees and employers regarding leave designation and protection. Without action to bring clarity and predictability for FMLA leave-takers and their employers, the Department foresees employers and employees taking more adversarial approaches to leave, with the workers who have a legitimate need for FMLA leave being hurt the most.

Based on 2005 data – the latest year for which data is available – the Department estimates that 95.8 million employees work in establishments covered by the FMLA, and about 77.1 million of these workers meet the FMLA's requirements for eligibility. Of these eligible workers, the Department estimates that approximately 7.0 million workers took FMLA leave in 2005, and about 1.7 million of those leave takers took some FMLA

leave intermittently. About half the workers who take FMLA leave do so for their own medical condition and the rest take it for family reasons. Most workers taking FMLA leave receive some pay during their longest period of leave, and many receive full pay during the period they are on leave.

Although there are areas where the Department believes more data would be useful (e.g., the number of workers who have medical certifications for chronic health conditions), the targeted updates in the proposed rule are well-supported by the available data and case law developments and reflect recommendations made by stakeholders who have day-to-day experience with the FMLA. This experience is from the perspective of both leave takers and employers who must manage the taking of leave. The Department also is fully aware that its proposal does not address all of the issues identified during its lengthy review of the FMLA. The Department believes that its proposal will allow the FMLA to function more smoothly for America's working families and their employers.

Turning to the specifics of the proposed rule, I want to reiterate that there is no question that the FMLA has been a benefit to millions of American workers and their families. The peace of mind that the FMLA brings to workers and their families as they face important and often stressful situations is invaluable. The Department's proposed rulemaking reflects this need. It has four main goals:

- To address the recently enacted military family leave provisions;
- To update the regulations to comport with current case law;
- To foster smoother communications among employees, employers, and health care professionals; and

- To update and clarify specific, problematic areas of the current FMLA regulations without limiting employee access to FMLA leave.

### **Regulatory Proposals to Implement the Military Family Leave Provisions**

Section 585(a) of the National Defense Authorization Act for FY 2008 amended the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as the military family leave provisions of P.L. 110-181). Although the provisions of P.L. 110-181 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when signed into law by President Bush, the provisions providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective, in our view, until the Secretary of Labor issues regulations defining "qualifying exigencies."

The Department's commitment to ensuring the FMLA works well for everyone, including for military family members, is clearly demonstrated by the Department publishing its proposed rulemaking to implement the new military family leave entitlements just 14 days after the provisions were signed into law. The Department's proposal includes an extensive discussion of the relevant military family leave statutory provisions and the issues the Department has identified, as well as a series of questions seeking comment on subjects and issues that may be considered in the final regulations. Even before P.L. 110-181 was enacted, the Department began preliminary consultations with the Departments of Defense and Veterans Affairs and the U.S. Office of Personnel



Management. OPM will administer similar provisions regarding leave to care for a covered servicemember for most Federal employees, except that the recent amendments to the FMLA do not authorize leave for family members of Federal employees to respond to a qualifying exigency relating to a family member's call to active duty status. The Department also has met with the National Military Families Association and a number of other military service organizations representing active duty, guard, and reserve servicemembers to discuss their views on the new military leave entitlements. As we explained in the NPRM, the Department anticipates that the next step in the rulemaking process, after full consideration of the comments received, will be the issuance of final regulations. The Department believes that this approach will allow it to ensure that America's military families receive the full protections of these new FMLA leave entitlements as soon as possible.

In the interim, the Department acted quickly to advise workers and employers of their rights and responsibilities under the new military family leave provisions. Because the statutory amendments did not provide an effective date, the day President Bush signed the National Defense Authorization Act of 2008 into law, the Department posted a notice on its website stating that the provisions in P.L 110-181 providing for military caregiver leave were effective immediately. Further, because P.L 110-181 amended the FMLA, the notice instructed employers to use FMLA-type procedures as appropriate (i.e., procedures regarding the substitution of paid leave and notice), until final regulations could be issued. While recognizing that the provisions of P.L 110-181 providing for leave because of "any qualifying exigency" are not effective until final regulations are issued, the Department encouraged employers to provide this type of

leave to qualifying employees immediately. Accordingly, thousands of military family members are currently eligible to take job-protected leave under the FMLA to care for a covered servicemember with a serious injury or illness, and others are being granted leave arising out of a family member's active duty status by their employers on a voluntary basis.

Congress's decision to incorporate the new military family leave entitlements into the existing FMLA statutory scheme, rather than as a separate leave entitlement, necessitates that the Department consider changes to the FMLA regulations as a whole. Indeed, the language of the enacting legislation raises a number of difficult issues regarding how the new military family leave provisions should be interpreted in light of existing FMLA regulations. For example, statements by the sponsoring House Members of the amendment related to "qualifying exigencies" in P.L. 110-181 suggest that the intent of the amendment was that the parents of adult children be permitted to take FMLA leave, for instance, to attend farewell or welcome home ceremonies. However, applying the current FMLA definition of "son or daughter" – which Congress did not change when implementing the military family leave provisions – would mean that the only parents who would be able to take FMLA leave because of a qualifying exigency would be those who have a son or daughter serving on active duty who is either under the age of 18 or older than age 18 and incapable of self-care because of a mental or physical disability. Similarly, because Congress provided that military caregiver leave was available to the "spouse, son, daughter, parent, or next of kin of a covered service member," the only sons or daughters who would be eligible to take FMLA leave to care for a seriously injured servicemember under the current FMLA regulatory framework

would be those who are under the age of 18 or age 18 or older and incapable of selfcare because of a mental or physical disability.

Other examples of the awkward interrelationship between the current FMLA regulations and the new military family leave provisions exist. For example, the military family leave provisions of P.L. 110-181 amended FMLA's certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. FMLA's certification requirements, however, focus on providing information related to a serious health condition — a term that is not relevant to leave taken to care for a covered servicemember. Moreover, Congress did not explicitly require in P.L. 110-181 that a sufficient certification for purposes of military caregiver leave provide information regarding whether the covered servicemember's serious injury or illness was incurred by the member in the line of duty while on active duty in the Armed Forces, or whether the serious injury or illness may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating, even though those criteria trigger in part the right to take FMLA leave to care for a covered servicemember. Furthermore, the FMLA provides that an employer may request a medical certification issued by the health care provider of the employee's son, daughter, spouse, or parent in order to support a request for FMLA leave to care for a child, spouse, or parent with a serious health condition (29 U.S.C. 2613). Although the leave entitlement provisions of P.L. 110-181 permit an eligible employee who is the next of kin of a covered servicemember to take military family leave, P.L. 110-181 certification requirements appear to permit an employer to obtain a certification issued by the health care provider of the employee's next of kin, rather than the covered servicemember.

These are not easy questions to answer, and they present a number of drafting challenges to meet the needs of military families they were designed to address. The Department raised all of these issues in its NPRM on February 11, 2008 (73 FR 7876). Now that the record is about to close for the rulemaking, we look forward to the input we expect to receive from the regulated community and public as to how to make these new entitlements work within the underlying FMLA regulations as Congress intended (just as we received many thoughtful comments in response to our Request for Information). Given the difficult choices that must be made regarding how to interpret the military family leave statutory provisions, the Department believes that its approach provides the fastest mechanism for these new leave entitlements to be fully implemented. Addressing these important questions regarding the military family leave provisions along with other needed updates to the FMLA regulations will allow the Department to integrate fully the military family leave entitlements with the procedures employees and employers follow for requesting and granting other types of FMLA leave. This approach makes sense for both employees and employers, neither of whom would be served by having to follow completely different rules depending on the type of FMLA leave requested. Importantly, no military family can be denied caregiver leave during the rulemaking process as those provisions are already in effect.

#### **Regulatory Proposals to Address Intervening Court Decisions**

Since the enactment of the FMLA, hundreds of reported federal cases have addressed the Act or the Department's implementing regulations. In many cases, these decisions have created uncertainty for employees and employers, particularly those with

multi-state operations. The Department anticipates that our proposed rule will bring clarity to these issues and reduce uncertainty for all parties.

The most significant of these decisions is the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). *Ragsdale* ruled that the "categorical" penalty for failure to appropriately designate FMLA leave under the current regulations was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave, and was contrary to the statute's remedial requirement to demonstrate individual harm. Several other courts have invalidated similar categorical penalty provisions of the current regulations. The proposed rule removes these categorical penalty provisions, while making clear that an employee who suffers individualized harm because of an employer's actions remains entitled to a remedy under the statute.

The Department also is proposing changes to address a court of appeals ruling that the regulation that establishes standards for determining whether an employer employs 50 employees within 75 miles of an employee's worksite for purposes of FMLA coverage (the 50/75 standard) was arbitrary and capricious as applied to an employee working at a secondary employer's long-term fixed worksite. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (10<sup>th</sup> Cir. 2004). The current regulation provides that, when two or more employers jointly employ a worker, the employee's worksite is the primary employer's office from which the employee is assigned or reports. The Department proposes to change the standard for determining the worksite for FMLA coverage purposes in a joint employment situation from the primary employer's location in all cases to the actual physical place where the employee works, if the employee is stationed at a fixed worksite for at least a year.

The Department also is proposing to address the possibility of combining nonconsecutive periods of employment to meet the 12 months of employment eligibility requirement. In *Rucker v. Lee Holding, Co.*, 471 F.3d 6, 13 (1<sup>st</sup> Cir. 2006), the First Circuit held that “the complete separation of an employee from his or her employer for a period of [five] years . . . does not prevent the employee from counting earlier periods of employment toward satisfying the 12-month requirement.” Based on the Department’s experience in administering the FMLA, the First Circuit’s ruling in *Rucker*, and comments received in response to the RFI, the Department proposes to provide that, although the 12 months of employment generally need not be consecutive, employment prior to a break in service of five years or more need not be counted. Although employers are certainly free to do so, so long as they uniformly apply their policy. Periods of employment prior to longer breaks in service also must be counted if the break is occasioned by the employee's National Guard or Reserve military service, or was pursuant to a written agreement concerning the employer's intent to rehire the employee. The Department believes that this approach strikes an appropriate balance between providing re-employed workers with FMLA protections and not making the administration of the Act unduly burdensome for employers.

Many RFI commenters asked the Department to clarify the current regulation’s provision that states, “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” Federal circuit courts have disagreed as to whether this language means an employee and employer cannot independently settle past claims for FMLA violations (e.g., as part of a settlement agreement), as opposed to meaning that

an employee can never waive his/her prospective FMLA leave rights.<sup>2</sup> The proposed rule clarifies that employees may settle claims based on past employer conduct. The current regulation's waiver provision was intended to apply only to the waiver of prospective rights, and the proposed rule amends the provision to reflect explicitly this intention. The Department's position has always been that employees and employers should be permitted to agree to the voluntary settlement of past claims without having to first obtain the permission or approval of the Department or a court.

The Department also is proposing to change the current regulatory requirements regarding the interaction between FMLA leave and light duty work. At least two courts have interpreted the Department's current regulation to mean that an employee uses up his or her 12-week FMLA leave entitlement while working in a light duty assignment.<sup>3</sup> These holdings differ from the Department's interpretation of the current regulation, which provides that, although the time an employee works in a voluntary light duty position counts against the employee's FMLA rights to job restoration (i.e., the employee's restoration right lasts for a cumulative period of 12 weeks of FMLA leave time and light duty time), the employee's light duty time does not count against his or her FMLA leave balance.<sup>4</sup> The Department is proposing changes to ensure that employees retain both their full FMLA leave entitlement and their right to reinstatement for a full 12 weeks while in a light duty position. If an employee is voluntarily performing light duty assignment work, the employee is not on FMLA leave and the employee should not be

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<sup>2</sup> Compare *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 75 U.S.L.W. 3226 (Oct. 22, 2007) (No. 07-539) with *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003).

<sup>3</sup> See *Roberts v. Owens-Illinois, Inc.*, 2004 WL 1087355 (S.D. Ind. 2004); *Artis v. Palos Community Hospital*, 2004 WL 2125414 (N.D. Ill. 2004).

<sup>4</sup> Wage and Hour Opinion Letter FMLA-55 (Mar. 10, 1995).

deprived of future FMLA-qualifying leave or FMLA job protection while performing such work.

**Regulatory Proposals to Foster Better Communication Between Employees, Employers and Health Care Providers**

The comments to the RFI indicate that, despite the extensive outreach done by the Department over the years and the widespread use of FMLA leave, gaps in the knowledge about FMLA-related rights and responsibilities remain. The Department believes that a key component of making the FMLA a success is effective communication between employees and employers. However, it appears that many employees still do not know their rights under the law, how the FMLA applies to their individual circumstances, or what procedures they need to follow to request FMLA leave. This lack of understanding may contribute to some of the problems identified with the medical certification process and with employers' ability to properly designate and administer FMLA leave. Accordingly, the Department is proposing a number of changes to the FMLA's notification and certification processes. These changes are intended to foster better communication between workers who need FMLA leave and employers who have legitimate staffing concerns and business needs.

The proposed rule consolidates all the employer notice requirements into a "one-stop" section of the regulations. The proposal also imposes increased notice requirements on employers so that employees will better understand their FMLA rights and the FMLA leave available to them. The proposal further seeks to improve the accuracy and completeness of communication by extending the time for employers to send out eligibility and designation notices from two business days to five business days.



In addition, the proposal specifies that, if an employer deems a medical certification to be incomplete or insufficient, the employer must return it to the employee, specify in writing what information is lacking, and then give the employee seven calendar days to cure the deficiency. These changes will help ensure that employees are not denied leave because they did not understand how much leave they had available or what additional information their employer needed in order to approve the request.

The Department also believes that employees must do all they can to inform their employer as soon as possible when FMLA leave is needed. The lack of advance notice (*e.g.*, before the employee's shift starts) for unscheduled absences is one of the biggest disruptions employers identify as an unintended consequence of the current regulations. Although the current regulation provides that employees are to provide notice of the need for FMLA leave "as soon as practicable under the facts and circumstances," the rule has routinely been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days *after* an absence, even if notice could have been provided sooner.

The Department proposes to maintain the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case, but is eliminating the so-called "two-day" rule. Absent an emergency situation, the Department expects that in cases where an employee becomes aware of the need for foreseeable FMLA leave less than 30 days in advance, it will be practicable for employees to provide notice of the need for leave either on the same or the next business day after the need for leave becomes known. For unforeseeable leave, the Department expects that, in all but the most extraordinary circumstances, employees will be able to

provide notice to their employers of the need for leave at least prior to the start of their shift. The proposal also provides, as does the language of the current regulation, that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence (except one that imposes a more stringent timing requirement than the regulations provide). The Department believes that these changes reflect a common-sense approach that better balances the needs of employees to take FMLA leave with the interests of employers and other workers.

The Department also is proposing changes to the medical certification process in order to address concerns heard from employees, employers and health care providers – all of whom agree that the current system is not working as smoothly as it could. In addition, the passage of HIPAA and the promulgation of regulations by the Department of Health and Human Services that provide for the privacy of individually identifiable health information,<sup>5</sup> provide additional reasons for the Department to reexamine the process used to exchange medical information under FMLA.

The proposal improves the exchange of medical information by updating the Department's optional medical certification form and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification. Comments to the RFI suggest that, in practice, it may be difficult to provide sufficient medical facts without providing the actual diagnosis. However, the Department does not intend to suggest by including such language that a diagnosis is a necessary component of a complete FMLA certification.

The Department also believes that HIPAA's privacy protections for patient (employee) health information have made some of the requirements in the current FMLA

regulations unnecessary. Thus, in lieu of the current regulation's requirement that the employee give consent for the employer to seek clarifying information relating to the medical certification, the proposed rule highlights that contact between the employer and the employee's health care provider must comply with the HIPAA privacy regulation. Under the HIPAA Privacy Rule, the health care provider of the employee must receive a valid authorization from the employee before the health care provider can share the protected medical information with the employer.

The proposed rule also makes clear that, if authorization under HIPAA is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient. In addition, as long as the requirements of the HIPAA health information privacy regulations are met, the proposal permits an employer to contact an employee's health care provider directly for purposes of clarification and authentication of a medical certification form. As under the current rules, however, employers may *not* ask health care providers for additional information beyond that required by the certification form. The Department believes that these changes will address the unnecessary administrative burdens the current requirements create and, in light of the extensive protections provided by the HIPAA privacy regulations, will not impact employee privacy. It has always been the case, as the statute allows, that employees must provide a complete and sufficient medical certification if requested to do so by the employer, and that failure of the employee to comply with the request jeopardizes the employee's FMLA protection.

The Department also believes that clarifying the timing of certifications will improve communications between employees and employers. The proposal, therefore,

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<sup>5</sup> 45 CFR Parts 160 and 164 (referred to as the "HIPAA Privacy Rule").

codifies a 2005 Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The proposal also clarifies the applicable period for recertification. Under the current regulations, employers may generally request a recertification no more often than every 30 days and only in conjunction with an FMLA absence, unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed. Because many stakeholders have indicated that the regulation is unclear as to the employer's ability to require recertification when the duration of a condition is described as "lifetime" or "unknown," the proposal restructures and clarifies the regulatory requirements for recertification. In all cases, the proposal allows an employer to request recertification of an ongoing condition at least every six months in conjunction with an absence.

In addition, the Department is proposing two changes to fitness-for-duty certifications. The current FMLA regulations allow employers to enforce uniformly applied policies or practices that require all similarly situated employees who take leave to provide a certification that they are able to resume work. Under the current regulations, however, the certification need only be a "simple statement" of the employee's ability to return to work. The Department believes that an employer should be able to require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, as long as the employer has provided the employee with appropriate notice of this requirement. Second, the proposal would allow an employer to require a fitness-for-duty certification up to once every 30 days before an employee returns to work after taking intermittent leave when reasonable

job safety concerns exist. The Department believes that these two changes appropriately balance an employer's duty to provide a safe work environment for everyone with the desire of employees to return to work when ready.

### **Other Regulatory Proposals**

The Department is proposing a number of additional targeted updates to the current FMLA regulations to resolve ambiguities and problematic workplace consequences, without limiting employee access to FMLA leave. A few of the more important updates are discussed below.

The Department is proposing to provide guidance on two terms in the current regulatory definition of a serious health condition. One of the definitions of serious health condition requires more than three consecutive calendar days of incapacity plus "two visits to a health care provider." Because the current rule is open-ended, the Tenth Circuit has held that the "two visits to a health care provider" must occur within the more-than-three-days period of incapacity. *See Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1323 (10th Cir. 2006). Rather than leaving the "two visit" requirement open-ended, the Department proposes that the two visits must occur within 30 days of the beginning of the period of incapacity, absent extenuating circumstances. By clarifying that the period should be 30 days, the Department believes it is providing greater FMLA protection than the stricter regulatory interpretation offered by the Tenth Circuit.

Second, the Department proposes to define "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year. The Department is aware that some employers have defined this term, which is currently undefined in the regulations, narrowly to the detriment of employees. At the same time, other employers

have expressed concern that the current open-ended definition does not provide sufficient guidance to employers who must approve or disapprove leave and risk making the wrong decision. The Department believes a reasonable solution is to define “periodic” as twice or more a year, based on an expectation that employees with chronic serious health conditions generally will visit their health care providers at least that often, but they might not visit them more often, especially if their conditions are fairly stable.

The Department also proposes changes to the current regulatory requirements for perfect attendance awards when an employee is on FMLA leave. The Department proposes to allow an employer to disqualify an employee from a perfect attendance award because of an FMLA absence. However, an employer would not be permitted to disqualify only those individuals on FMLA-qualified leave and allow other employees on equivalent types of non-FMLA leave to receive such an award without violating the FMLA’s non-discrimination requirement. This change addresses the unfairness perceived by workers and employers as a result of allowing an employee to obtain a perfect attendance award for a period during which the employee was absent from the workplace on FMLA leave.

Finally, the Department also proposes to update the regulation addressing the substitution of accrued paid leave for unpaid FMLA leave. The proposed updates reflect the trend of employers providing employees with “Paid Time Off” (PTO), instead of reason-based leave (i.e., sick leave, vacation leave). The revisions also respond to comments indicating that an unintended consequence of the current regulation (which has been interpreted as prohibiting employers from applying their normal leave policies to employees who are substituting their paid vacation and personal leave for unpaid FMLA

leave) is that employers may be encouraged to scale back their provision of paid vacation and personal leave. Such leave policies are more generous than what is required by the Act. The proposed update also is consistent with how the Department's enforcement position on this issue since 1995. Since then, in a series of opinion letters, the Department has recognized that an employee's right to use paid vacation leave is subject to the policies pursuant to which the leave was accrued.<sup>6</sup>

The proposed rule applies the same requirements to the substitution of all forms of accrued paid leave. Under the proposed rule, an employee may elect to utilize accrued paid vacation or personal leave, paid sick leave, or paid time off, concurrently with FMLA leave when the employee has met the terms and conditions of the employer's paid leave policy. The Department also believes certain safeguards for employees are necessary. Therefore, the proposed rule clarifies that an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that he or she remains entitled to unpaid FMLA leave even if he/she chooses not to meet the terms and conditions of the employer's paid leave policies.

### **Conclusion**

Fifteen years ago, Congress recognized that maintaining a careful balance between the legitimate rights of employees and employers in the workplace was the key to making the FMLA a success. Today, after 15 years of experience in administering and enforcing the FMLA, the Department is pleased to report that the FMLA is generally working well in the majority of cases and has succeeded in allowing working men and

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<sup>6</sup> Wage and Hour Opinion Letter FMLA-75 (Nov. 14, 1995); Wage and Hour Opinion Letter FMLA-81 (June 18, 1996); *see also* Wage and Hour Opinion Letter FMLA-61 (May 12, 1995).

women to better balance family needs and work responsibilities. However, the Department also knows that the FMLA has not worked well in every case as evidenced not only by responses to the RFI but also by the various court decisions that have overturned specific provisions of the current rule.

It is time to make targeted changes to the current FMLA regulations, and, at the same time, implement the new law providing leave for the families of military servicemembers. We look forward to reviewing the comments on the NPRM.

Thank you for the invitation to appear before this committee. I will be happy to answer any questions you may have.