WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2007-08
(session year)

Senate
(Assembly, Senate or Joint)

Committee on Economic Development (SC-ED)

(Form Updated: 08/11/2009)

COMMITTEE NOTICES ...

➢ Committee Reports ... CR
**

➢ Executive Sessions ... ES
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➢ Public Hearings ... PH
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➢ Record of Comm. Proceedings ... RCP
**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL ...

➢ Appointments ... Appt
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Name:

➢ Clearinghouse Rules ... CRule
**

➢ Hearing Records ... HR (bills and resolutions)

07hr_sb0173_SC-ED_pt01

(companion bill: _____)

➢ Miscellaneous ... Misc
**

(_____ documents)

JIM KREUSER

State Representative • 64th Assembly District

DEMOCRATIC LEADER-WISCONSIN STATE ASSEMBLY

November 14, 2007

Honorable Julie Lassa
Chairperson, Senate Committee on Economic Development
State Capitol, Room 323 South
HAND DELIVER

Dear Senator Lassa,

I would like to request that you schedule Senate Bill 173 for an executive vote before the Senate Committee on Economic Development. Senate Bill 173 represents a bi-partisan effort to provide military personnel and their family time to spend together and prepare before deployment.

I think passage of this proposal before the holiday season would be a fantastic gift to Wisconsin servicemen and women and their families. This bill would help alleviate the some of the stress these families deal with by allowing service members, their spouses and parents the option of taking unpaid leave to help balance family obligations with job requirements when preparing for deployment.

Thank you for your consideration of Senate Bill 173. If you have any further questions or concerns, please feel free to contact me.

Sincerely,

Jim Kreuser
State Representative
64th Assembly District

cc: Senator Vinehout
Representative Musser

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Testimony of Cindy Cerro

On behalf of the Wisconsin Council Society for Human Resource Management
On
SB 173 Family Military Leave
Before
Committee on Economic Development, Job Creation, Family Prosperity and Housing
Wednesday, July 25, 2007
10:00 AM
300 Southeast
State Capitol

Statement to the Record

The Wisconsin Society for Human Resource Management is opposed to expanding the Wisconsin Family and Medical Leave (WFMLA) as proposed in SB173. WISHRM supports the spirit and intent of the WFMLA and supports the concept of providing military families with time off and flexibility on a volunteer basis. However, there have been many problems administering leave under WFMLA due to its interaction with the Federal FMLA, compliance with intermittent leave, and notice requirements.

The addition of this leave to the WFMLA will add more confusion to an already cumbersome and administratively difficult process. Specifically the addition to the WFMLA will allow for protected individuals to take time off without having to state a purpose, on an intermittent basis, with only minimal notice to the employer. Additionally it will subject employers that have no obligation under current WFMLA to the new provisions outlined.

Under this proposed amendment employees can take time off (either 15 or 30 days) without needing to provide any explanation of the use of this time. The proposed bill does not identify the purpose of the leave. Therefore, leave could be taken for reasons wholly unrelated to the employee's or employee's child or spouse's military service. This is particularly concerning when you consider that the employee can also take this time on an intermittent basis.

Employees can take time under WFMLA on an intermittent basis, based on the smallest amount of time currently recorded by the employers time system. In some cases that can be minutes, 10 minutes, a quarter of an hour, etc. The tracking of this type of leave is extremely cumbersome and difficult for employers. The Society for Human Resource Management (SHRM) conducted surveys in 2000 and 2003 on the FMLA and identified managing intermittent use of leave, and managing leave of less than one day as two of the top most difficult aspects of FMLA leave. In addition the attached summary compiled by SHRM of the responses to the national Department of Labor request for information on the FMLA garnered these responses:

> "The Report noted that while intermittent leave is important for employees with conditions that flare unpredictably, it presents many serious problems for employers concerned with scheduling, attendance, productivity, and co-worker morale. The executive summary indicates that from an employer's perspective, "*no other FMLA issue*

even comes close." in topping the list of vexing compliance challenges. *See* 72 Fed. Reg. 35,553."

If enacted, Senate Bill 173 will afford employees the opportunity to take military leave with minimal notice to the employer. The notice requirements for use would be the same "reasonable and practicable" which is not clearly defined in the WFMLA and would continue to cause problems and issues particularly for intermittent time off. For example, an employee could arrive late to work and claim the time as military leave. Absent the need to provide advance notice with a clear purpose for the time off the employer would be bound to honor the tardy employee's request which, in reality, may have nothing to do with military service.

This proposed legislation also will affect an entire group of employers that have never had to comply with WFMLA. If the employer of the employee employs between 15 and 50 employees, the employee is eligible to take no more than 15 days of unpaid family military leave. The provisions outlined for employers with less than 50 employees that have not been exposed to WFMLA will undoubtedly cause increased confusion, burden on small employers to comply with a difficult and cumbersome law, and will lead to increased business costs for very small employers.

In addition, the WFMLA allows for substitution of paid leave at the discretion of the employee, a benefit that would extend to the military provision. This ability to substitute paid leave has caused problems with WFMLA, will continue to cause issues with the military leave provision.

I as an HR professional have experienced many challenges administering WFMLA along with Federal FMLA particularly as it relates to intermittent leave, and notice requirements. Specifically it has been my experience that HR professionals are likely to grant leave on an intermittent basis even when we are pretty sure the reasons are not legitimate or related to the serious health condition. I fear that we will end up with the situation with military leave particularly as there is no "immediate reason" that the employee needs to give for the leave.

It has been my experience that employers who want to retain their employees will work with them to meet their needs without the need for a mandated benefit. In fact many employers are already going the extra mile for their employees with supplemental pay policies for those on military leave, flexible schedules, and support for the military persons family.

Businesses have traditionally worked with employees in creating ways that they can take the leave that they need to support their families while at the same time maintaining the needs of the business. WISHRM supports work/life balance and will continue to support employers as they work with employees to meet their needs.

SB 173

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

February 16, 2007

Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for Information on the Family and Medical Leave Act of 1993. 71 Fed. Reg. 69,504 (Dec. 1, 2006); RIN 1215-AB35

Dear Mr. Brennan:

The Society for Human Resource Management (SHRM) submits these comments to the U.S. Department of Labor ("the Department" or "DOL") in response to the Request for Information (RFI) on the Family and Medical Leave Act ("FMLA" or "the Act") of 1993. This RFI was published in the *Federal Register* on December 1, 2006. *See* 71 Fed. Reg. 69,504 (Dec. 1, 2006).

SHRM is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

SHRM's membership comprises HR professionals who are responsible for administering their employers' benefits policies, including FMLA leave. On a daily basis, HR professionals must determine whether an employee is entitled to FMLA pursuant to the Act and its implementing regulations. HR professionals must also track an employee's FMLA leave and determine how to maintain a satisfied and productive workforce during the employees' FMLA leave-related absences. The Society supports the goals of the FMLA and wants to ensure that employees continue to receive the benefits and job security afforded by the Act. In a weekly

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online survey conducted by SHRM, 71 percent of respondents stated that they have not experienced challenges in administering FMLA leave for the birth or adoption of a child. (See SHRM Weekly Online Survey, January 9, 2007.) However, 60 percent of SHRM members reported that they experienced challenges in granting leave for an employee's chronic condition. Although there are certain provisions within the FMLA regulations that work well for both employers and employees, HR professionals have struggled to interpret various provisions. These include the definition of a serious health condition, intermittent leave, and medical certifications. SHRM has taken a multi-faceted approach to obtain feedback from its members, and the views of SHRM members are reflected in the following discussions.

DISCUSSION

The Society applauds the DOL for requesting comments on the current FMLA regulations for the first time since DOL issued the regulations in 1995. Throughout the history of the FMLA, SHRM has supported the spirit and intent of the Act. The Society understands the challenges employees face in balancing work and family demands and their desire to feel secure in their jobs.

The original purpose of the FMLA, as envisioned by the 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. Furthermore, without clarification of the current FMLA regulations, HR professionals will continue to struggle with administrative concerns associated with FMLA leave. The following comments address the regulatory issues that the Society considers to be the most challenging for HR professionals in administering and granting leave pursuant to the Family and Medical Leave Act.

Definition of "Serious Health Condition"
Department of Labor Request for Information Section II.B

- **Section 825.114(c) states "[o]rdinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." Have these limitations in section 825.114(c) been rendered inoperative by the regulatory tests set forth in section 825.114(a)?**

- **Is there a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA?**

The Family and Medical Leave Act defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility, or continuing treatment by a health care provider. Current DOL regulations establish five categories of conditions as FMLA-qualifying under the "continuing treatment" portion of the statutory definition. Among the definitions that have

caused difficulties for employers, is the "incapacity in excess of three days plus treatment" section. The current regulatory definition of "serious health condition" remains vexing for employers who endeavor in good faith to determine whether an employee is entitled to leave under the Act. Also, the question of whether an employee is suffering from a serious health condition is one of the Act's most litigated provisions. This part of the current definition of a serious health condition conflicts with Congress's directive that a serious health condition should not include short-term conditions which would typically fall within the "most modest sick leave policies," such as minor illnesses lasting only a few days and outpatient procedures with brief recovery periods. Accordingly, SHRM recommends that Section 825.114 be revised.

The FMLA provides that an employee has two ways to satisfy the definition of a serious health condition: (i) inpatient care, or (ii) continuing treatment by a health care provider. 29 U.S.C. § 2611(11). The first category is relatively self-explanatory. The second category, however, has confused employees, employers and the courts, and has generated a body of case law that has failed to distinguish between ailments that satisfy the definition of a serious health condition and those that do not. It has also resulted in extensive litigation because the definition is very fact-intensive. Consequently, many FMLA cases cannot be decided at the summary judgment stage and, therefore, must either go to trial or be settled to avoid the expense and uncertainty of prolonged litigation. If the courts have this much difficulty in determining what constitutes a serious health condition pursuant to the FMLA, then one can imagine that HR professionals experience even more frustration in interpreting covered conditions.

Section 825.114(a)(2) defines continuing treatment by a health care provider to mean: (1) an employee or covered family member must be incapacitated for more than three consecutive calendar days; and (2) the individual must receive continuing treatment from a health care provider in one of two ways – either two or more treatments from a health care provider, or one treatment from a health care provider plus a regimen of continuing treatment.

A day after the final FMLA regulations became effective in 1995, the Department issued an advisory opinion letter that recognized the potentially expansive language of section 825.114(a)(2). In the letter, the DOL concluded that a common cold, absent complications, would not satisfy the definition of a serious health condition even if the employee met the other requirements set forth in section 825.114(a)(2) (number of absences, visits to health care provider). Op. FMLA-57 (Apr. 7, 1995).

Reliance on the Department's commonsense approach proved to be short-lived. Eighteen months later, the Department withdrew its initial opinion and replaced it with another advisory opinion. Op. FMLA-86 (Dec. 12, 1996). The Department explained that it withdrew the earlier letter because it contained an "incorrect construction" of the definition of a serious health condition. The new opinion letter stated that employees who were ill with a common cold or the flu would be entitled to FMLA protection if they met the requirements set forth in section 825.114. Moreover, the Department explained, an employee did not have to demonstrate that complications occurred to satisfy the definition. Although the Department hinted that conditions such as a common cold or flu might not routinely meet the regulatory definition of a serious

health condition, the Department concluded that there was no basis to exclude such conditions from protection if they, in fact, met the stated criterion.

As a result of the 1996 advisory opinion, the Department rendered inoperative 29 C.F.R. § 825.114(c) (exclusions from "serious health conditions"), which states that conditions such as the common cold, flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or orthodontic problems, and periodontal disease, would not qualify as serious health conditions unless there were accompanying complications.

Court cases after the DOL's 1996 advisory opinion letter have recognized as FMLA-protected myriad short-term ailments which Congress never intended to cover under the FMLA. See, e.g., *Kauffman v. Federal Express Corp.*, 426 F.3d 880 (7th Cir. 2005) (bronchitis covered); *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001) (flu covered); *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir.), *cert. denied*, 531 U.S. 871 (2000) (diarrhea and stomach cramps covered); *Wheeler v. Pioneer Developmental Servs.*, 2004 U.S. Dist. LEXIS 24960 (D. Mass. Dec. 8, 2004) (upper respiratory infection covered); *Corcino v. Banco Popular De P.R.*, 200 F. Supp. 2d 507 (D.V.I. 2002) (pharyngitis covered).

While some courts have refused to find that the Act applies to such minor conditions, uncertainty regarding the meaning of "serious health condition" has led many employers to err on the side of inclusion to avoid potential lawsuits. A poll conducted by the Society for Human Resource Management in 2003 stated that over half (52%) of human resource professionals surveyed had granted FMLA requests which they did not believe were legitimate because of DOL's shifting position on what constitutes a serious health condition.

The above authority and experience have led SHRM to conclude that the limits set forth in Section 825.114(c) have been nullified by the current approach in Section 825.114(a). To restore meaning to Section 825.114(c), the Department should revise the substantive standards contained in subsection (a). SHRM specifically recommends that the DOL revise subsection 825.114 (a) as follows: (1) increase the number of days of incapacity; (2) require that the treatment on two or more occasions take place during the time the employee or covered family member is incapacitated; and (3) delete the "treatment on one occasion" portion of the current regulation. These recommendations are explained in greater detail below.

Recommendation Number 1: Increase Consecutive Days of Incapacity. The current requirement that an employee or covered family member need only be incapacitated for a period exceeding three consecutive calendar days has enabled minor medical conditions to satisfy the definition of a serious health condition. The Society proposes that the required incapacity continue for a minimum of five business days or seven consecutive calendar days. Extending the period of incapacity would remove many minor illnesses from unintended FMLA coverage. In addition, the seven-day period tracks the waiting period contained in most employer short-term

disability plans. *Employee Benefit Research Institute, Fundamentals of Employee Benefit Programs, Part Four Other Benefits 6 (2005).*[1]

Recommendation Number 2: Treat "Two or More Occasions" to mean "While the Employee or Covered Family Member is Incapacitated." In *Jones v. Denver Public Schools*, the U.S. Court of Appeals for the Tenth Circuit addressed whether Section 825.114 limits the time-frame in which an employee must seek two or more treatments from a health care provider. *See Jones v. Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005). To date, the Tenth Circuit is the only federal appellate court have addressed this issue.

In *Jones*, the plaintiff saw his physician once during the period of his incapacity. His second visit to the doctor did not occur until approximately three weeks after his initial five-day absence. The employee remained off work for several more days due to the flu. The Tenth Circuit held that the plaintiff had failed to establish that he suffered from a serious health condition in connection with a five-day absence incurred for a back injury. In explaining why it required that the two treatments occur during the employee's period of incapacity, the court stated:

> "We disagree that the plain language of the regulation imposes no time limit on the requisite 'two or more' treatments. According to the regulation, a serious health condition that involves continuing treatment includes '[a] period of incapacity . . . . . and any subsequent treatment or period of incapacity, relating to the same condition, that *also involves* . . . treatment two or more times by a health care provider.'"(emphasis added). [citation omitted]
> ***
> That the regulation . . . frames the definition in terms of a "period of incapacity" that "involves'" at least two treatments indicates that the timing of the treatments, and not just the need for treatments, is important.

Jones, 427 F.3d at 1320-21. The Tenth Circuit further observed that permitting an "indefinite timeframe" for scheduling two or more treatments "would place employers in a position of uncertainty regarding their FMLA obligations" and would invite employees to engage in "strategic behavior" by scheduling a second doctor's visit "long after all symptoms have subsided, solely to bolster their claim of entitlement to FMLA leave in anticipation of litigation. We find it difficult to believe that the Congress intended such a result." *See also Lightfoot v. District of Columbia*, 2006 U.S. Dist. LEXIS 1358 (D.D.C. Jan. 10, 2006) (adopting the reasoning of *Jones*).

Recommendation Number 3: Eliminate Section 825.114(a)(2)(B), which currently lets an employee or covered family member satisfy the definition of a serious health condition by receiving treatment on one occasion, plus a regimen of continuing treatment. Like the current period of incapacity, this provision has enabled employees to obtain FMLA protection for medical conditions that Congress never intended to be covered under the Act. By defining a

[1] This means that before an employee is eligible to receive short-term disability benefits, s/he must be sick for a minimum of seven consecutive calendar days.

"regimen of continuing treatment" to include a prescription for antibiotics, for example, the Department has lowered the threshold that virtually any medical condition today can be FMLA-qualifying. Given the overuse of antibiotics today,[2] a prescription drug regimen, by itself, is a poor way to gauge whether someone is suffering from a serious health condition.

The above-proposed revisions are needed to eliminate current uncertainty surrounding the definition of a serious health condition. Moreover, the FMLA's original purpose will be fully realized only when employers are able to discern which employees are genuinely entitled to FMLA leave. Absent these revisions, employers, employees, and the courts will continue to struggle with how to apply the definition, extending FMLA protection where it is not warranted and generating unnecessary and costly litigation.

Different Types of FMLA Leave
Department of Labor Request for Information Section II.F

- **Does intermittent leave present different problems or benefits from leave taken for one continuous block of time?**
- **Does the fact that the leave is intermittent impact this coverage [of work of employees taking intermittent leave]?**
- **Is there any evidence that employees are misusing FMLA leave? If so, how does this compare to other types of leave?**
- **Is there a way to appropriately balance employer absence control policies and legitimate employee use of unscheduled, intermittent leave?**

Under the Act, an employee may take up to twelve workweeks of leave for an FMLA-qualifying event during a 12-month period. The twelve weeks of leave can be taken all at once, intermittently, or on a reduced schedule basis, depending on the reason for the leave. 29 U.S.C. §§ 2612(a) and (b). The Act does not specify the minimum increment of intermittent or reduced schedule leave. Intermittent leave unquestionably poses more problems for employers than leave taken as one continuous block of time. Current regulations specify that there is no minimum increment of intermittent or reduced schedule leave, but an employer may limit it to the shortest period of payroll time used to account for absences, provided that period is one hour or less. 29 C.F.R. § 825.203(d). This regulatory provision poses substantial administrative difficulties because most employers have payroll systems which account for absences of less than an hour. Indeed, this increment is oftentimes as small as one-tenth of an hour, since many payroll systems round to the nearest tenth of an hour. Consequently, both human resource professionals and payroll staff are burdened by having to track intermittent leave particularly when, as is often the case, the leave is not scheduled in advance.

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[2] Centers for Disease Control & Prevention, About Antibiotic Resistance (Apr. 21, 2006) (visited Jan. 10, 2007), at http://www.cdc.gov/drugresistance/community/antibiotic-resistance.htm.

Unless intermittent leave is taken in previously agreed upon and regularly scheduled intervals, the employer must reallocate work or leave the work uncompleted.[3] Under such circumstances, lost productivity often results from temporary short-staffing on a given shift/project. Other costs of unscheduled intermittent leave include overtime and reduced morale of employees left to cover the work of the unexpectedly absent employee.

Intermittent leave is also much more difficult to track than continuous leave. According to a survey conducted by the Society for Human Resources Management ("SHRM") in November 2006, 73% of respondents reported problems tracking intermittent leave. Intermittent leave is also more vulnerable to abuse, particularly if it is taken sporadically instead of at previously agreed upon and regular intervals. In the November 2006 SHRM survey, 66% of respondents reported chronic abuse of unscheduled intermittent leave among their employee ranks. Chronic conditions which commonly give rise to intermittent leave and which may result in abuse include migraine headaches, complications from allergies or sinusitis, back pain, depression, stress disorder, arthritis, or other chronic or recurring conditions. In many instances, the employer cannot verify the employee's self-reported condition every time an employee takes unscheduled intermittent leave (assuming the employee has been previously certified and approved for such leave). For example, if an employee is disinclined to work on a Friday afternoon and has been previously certified/approved to take intermittent leave, the employee can simply choose not to work that afternoon and report the absence as an FMLA-qualifying absence. The employee can then call the employer, claiming, for example, that s/he had a sudden migraine headache or a flare-up of arthritis or sinusitis. Employer approaches to covering work when an employee is on unscheduled intermittent leave vary based upon such factors as the nature and size of the employer's business, the employee's position, the number of individuals available to provide coverage in the employee's department, and business needs in that department. Employers may cover the leave-taker's work with: (i) hiring a temporary worker; (ii) asking current employees to work overtime; (iii) spreading the work among current employees; or (iv) rearranging other employees' schedules to provide coverage. Sometimes, however, employers are unable to cover the work, particularly in situations involving unscheduled intermittent leaves. These situations can and do result in missed deadlines, lost production, and other business losses.

When an employee requests scheduled FMLA leave for a continuous block of time, HR professionals are more likely to hire a temporary worker to cover the leave-taker's position. Similarly, if the leave is to be for an extended period, the employer may train another employee to perform the leave-taker's duties. In some situations, if the leave is for a short period of time or is unscheduled, no one will complete the open assignments and projects, at least not until the leave-taker returns. This is particularly true where the employee's duties are unique—and thus not easily covered by others, or if coverage is otherwise unavailable.

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[3] The Department's Section II.F. requests suggest that intermittent leave is typically *scheduled*. As indicated above and detailed below, that is oftentimes not the case. Among the most vexing issues for employers are those presented by employees who take intermittent leave with little or no advance notice to the employer – often for bona fide conditions but conditions which make it impossible to plan in advance for the employee's sporadic absences.

Intermittent leave initially was intended to permit scheduled leave for planned medical treatments or physical therapy. Since the FMLA's enactment, however, regulatory interpretations of a "serious health condition" have brought many chronic conditions under that umbrella, thus enabling some employees to expand FMLA protections to the point of abuse. *See* discussion on the Definition of "Serious Health Condition." For instance, if an employee is approved for intermittent FMLA leave related to a chronic episodic condition for which there is no date certain when leave will be needed (arthritis and allergies), the employee may take unscheduled leave whenever s/he likes without further medical substantiation that the condition actually incapacitated the employee on each leave date. Under this frequent scenario, the employer has no ability to require confirmation that the employee was actually ill each time leave is taken. Conversely, if an employee attempts to take sick leave for a non-FMLA qualifying condition, the employer can require medical substantiation for each absence and can discipline the employee if medical or other substantiation for each absence is not provided, specifically based on employer policies.

Moreover, some employers' sick or personal leave policies penalize repeated absences, even illness-related absences, which do not qualify for FMLA protection. (These are commonly called "no-fault" policies.) For a non-FMLA qualifying condition, the employer can discipline and even terminate an employee who is repeatedly absent. This follows from the principle that regular attendance is generally required of every job and is essential to productive and smooth operations. With an FMLA-qualifying condition, however, the employer may not discipline the employee for any absences, no matter how frequent, unless and until the employee's leave entitlement is exhausted.

The Society submits that the following four revisions to the regulations would help balance employer absence control policies and employees' legitimate FMLA rights. First, employees, together with their health care providers, should be required to supply more meaningful information about how much leave is anticipated. Currently, many intermittent leave-takers proffer certifications stating the need for leave is "unknown," "lifelong," or "as needed," with no estimate of (a) the number of days off to be taken, (b) whether full or partial days are needed, or (c) the anticipated frequency of absences. To address this imbalance, Title 29 C.F.R. § 825.306 and the Certification of Health Care Provider Form should be modified to require detailed estimates of the frequency and duration of the employee's need for intermittent leave. Notations such as "life time," "as needed," or other similarly vague statements ought not suffice. Health care providers in particular should be required to provide as much detail as possible on the total amount of intermittent leave that is needed or allow employers to deny the leave.

Second, SHRM recommends that DOL require employees to take unscheduled leave in half-day increments, at a minimum. The smaller leave increments would facilitate employer tracking of employee FMLA leave usage, which is consistent with Congress's expressed intent to provide 12 weeks—no less but no more—of job-protected leave per year. This also would dissuade employees who use their intermittent leave from sidestepping their employer's attendance policies—to avoid disciplinary action for arriving late to work—and encourage them to be more selective and provide more notice about when they take their leave.

Third, employees seeking intermittent leave for periods exceeding six months should be required to renew their certification every six months for as long as they need to take such leave. As to such leave, the medical certification should only be good for a six-month period.

Fourth, when an employee is taking intermittent leave, an employer should be able under certain circumstances to require medical substantiation that the serious health condition actually incapacitated the employee on the leave date. These circumstances should include a suspicious pattern of absences (for example, Friday/Monday absences), when information casts doubt upon the employee's stated reason for the absence, and when the employee has taken more than ten single days of intermittent leave in a three-month period. *See* FMLA2004-2-A (permissible to inform health care provider of employee's pattern of suspicious absences or apparent excessive absences which occurred during previously certified intermittent leave).

Light Duty
Department of Labor Request for Information Section II.G

- **At least two courts have interpreted section 825.220(d) to mean than an employee uses his or her 12-week FMLA leave entitlement while on a light duty assignment. Should "light duty" work count against the employee's FMLA leave entitlement and/or reinstatement rights?**

As currently written, the regulations disallow an employer from requiring an employee to accept a light duty assignment in the event the employee is unable to perform *any* essential job function.[4] The Society recommends that the Department revise Section 825.220(d) to permit an employer to require an employee to accept light duty consistent with the employee's medical restrictions. Assuming employers may require such assignments, the Society recommends that the DOL clarify that an employer shall not count time spent performing a light duty assignment against the employee's 12-week FMLA allotment.

For many employees, an extended, unpaid leave of absence imposes financial hardship. Many employers have implemented light duty programs so that injured workers can continue earnings while they recover from a work-related injury. Some employers limit such programs to those injured at work; others provide light duty to those injured off the job as well. The Society believes it is unnecessary, and often ill-advised, to allow an employee to refuse light duty that is consistent with the employee's restrictions. Experience has shown that employees with minor injuries generally recover more quickly if they are working, gradually returning to their former capabilities. Sitting at home can prolong the recovery period and make it more difficult, both mentally and physically, for an employee to successfully return to work. *American College of Occupational & Environmental Medicine, Preventing Needless Work Disability by Helping People Stay Employed (visited Jan. 10, 2007), available at http://www.acoem.org /guidelines.aspx?id=566#.*

[4] As used herein, "light duty" means an assignment other than that usually performed by the employee, either inside or outside the employee's regular department. Such an assignment could entail modifications to the employee's regular job, which would allow the employee to continue working instead of taking unpaid FMLA leave.

Any light duty assignment must be consistent with the employee's medical restrictions, so that alternate duties can be performed safely. It is in no one's interest to have an employee re-injure himself or herself while on light duty. Both employers and employees will benefit when an employee accepts a light duty assignment consistent with his or her medical restrictions. Employers will be able to maintain a certain level of work productivity, and employees will benefit from having a continued income stream.[5] Finally, permitting employers to require light duty is consistent with the Department's view that time spent on light duty does *not* count against an employee's FMLA leave allotment. Op. FMLA-55 (Mar. 10, 1995).

SHRM also recommends that mandatory light duty include safeguards to ensure that employees: (1) are not asked to perform work outside their medical restrictions, and (2) receive the same pay and benefits provided by their usual job.

Communication Between Employers and Their Employees
Department of Labor Request for Information II.J.

- **Although there is evidence that some employers are failing to advise workers that their leave is being charged to FMLA, the Supreme Court in *Ragsdale* held that an employee is not automatically entitled to additional FMLA leave if the employer fails to properly advise the worker that the leave is being charged to FMLA because such a categorical penalty is inconsistent with the statute. What methods are used to notify employees that their leave has been designated as FMLA leave? What improvements can be made so that employees have more accurate information on their FMLA leave balances?**

Many employers adhere to the specific notice requirements for designating leave as set forth in 29 C.F.R. § 825.301(b) (specific notice of FMLA rights and responsibilities) and 29 C.F.R. § 825.208(b)(2) (designating FMLA leave as such on the employee's payroll stub or through written correspondence). However, some employers believe the only designation obligation is the specific notice of rights and responsibilities. Many are unaware of the "paystub" requirement due to the density and somewhat confusing organization of the current regulations. Moreover, as discussed below, the specific notice sent out two days after the employee requests leave may compromise the designation process, since the leave may not be definitively designated as FMLA leave because an employer does not have enough information to make such a determination within that timeframe.

SHRM recommends that the Department revise Section 825.301 to permit employers to send employees the official "designation" notice after sufficient information is received from the employee to determine whether the leave is FMLA-protected. Specifically, the DOL should revise Section 825.301(c) to provide that employers have ten business days, at a minimum, to

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[5] Under many employer plans, rejecting light duty means no short-term disability benefits will be paid. Similarly, under most state laws, rejecting light duty will result in the termination of workers' compensation temporary benefits.

provide notice.[6] This provides a realistic time for the employer to provide a meaningful designation notice. Once the official designation has been sent, no further designation or accounting should be required of the employer. However, employers can and should provide employees with FMLA leave balance information upon request, just as they would with regard to other leave available to the employee (i.e., vacation or sick leave).

- **What changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?**

In *Ragsdale v. Wolverine WorldWide, Inc.*, 535 U.S. 81, 89, 93-95 (2002), the U.S. Supreme Court invalidated the portion of 29 C.F.R. § 825.700(a) which provides:

> 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.

The Supreme Court struck down this provision for two reasons. First, the regulation relieved employees of the burden of showing that their rights had been impaired or that they had been prejudiced by the employer's failure to properly designate their leave. Second, the regulation in effect amended the Act's most fundamental right — the guaranteed 12 workweeks of leave during any 12-month period. The employer in *Ragsdale* had provided far more leave than the 12 weeks required under the FMLA; however, the employer had not specifically designated the leave as FMLA-qualifying. By penalizing the employer for not designating the leave pursuant to the FMLA, the regulation effectively extended the statutory leave period.

Following the decision in *Ragsdale*, federal courts have held that an employee has no claim against an employer for failing to timely designate leave unless the employee can show that s/he was prejudiced by the employer's actions or would have exercised his or her rights under the FMLA differently had proper notice been given. In the dozen or so cases that have been decided since *Ragsdale*, most plaintiffs have been unable to satisfy this burden — usually because they were medically unable to return to work after having exhausted their leave rights.[7]

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[6] 29 C.F.R. § 301(c) currently provides: "... The notice shall be given within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible."

[7] *See, e.g., Fogleman v. Greater Hazleton Health Alliance*, 2004 U.S. App. LEXIS 26861 (3d Cir. Dec. 23, 2004) (no prejudice found); *Miller v. Personal-Touch of Va., Inc.*, 342 F. Supp. 2d 499 (E.D. Va. 2004) (no interference with plaintiff's FMLA rights found); *Wright v. Owens-Illinois, Inc.*, 2004 U.S. Dist. LEXIS 8535 (S.D. Ind. May 14, 2004) (no harm to plaintiff found); *Roberts v. Owens-Illinois, Inc.*, 2004 U.S. Dist. LEXIS 8534 (S.D. Ind. May 14, 2004) (no prejudice found); *Donahoo v. Master Data Ctr.*, 282 F. Supp. 2d 540 (E.D. Mich. 2003) (no prejudice found); *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033 (D. Ariz. 2003) (no prejudice or detrimental reliance found); *Phillips v. Leroy-Somer N. Am.*, 2003 U.S. Dist. LEXIS 5349 (W.D. Tenn. Mar. 28, 2003) (no prejudice found); *Kelso v. Corning Cable Sys. Int'l Corp.*, 224 F. Supp. 2d 1052 (W.D.N.C. 2002) (no prejudice found); *Summers v. Middleton & Reutlinger, P.S.C.*, 214 F. Supp. 2d 751 (W.D. Ky. 2002) (no prejudice found).

The above-quoted part of Section 825.700(a) should be removed from the regulations. Further, the regulations should be revised so that an employer is not penalized for failing to timely or properly designate an employee's leave, so long as the employee receives the substantive benefits of the Act (i.e., job protected leave and continuation of benefits). This construction is consistent with the Supreme Court's analysis in *Ragsdale*.

- **Employers have reported that some employees do not promptly notify their employers when they take unforeseeable FMLA leave. The Department requests information on the prevalence and causes of employees failing to notify their employers promptly that they are taking FMLA leave and suggestions as to how to improve the situation.**

Employers routinely struggle with employees who notify supervisors at the last minute that they need FMLA leave. The Act provides that an employee shall give the employer at least 30 days' notice before FMLA leave is to begin unless the need for leave is unforeseeable, in which case the employee shall provide such notice as is "practicable." 29 U.S.C. § 2612(e).[8] Current regulations provide that, when 30 days' notice is not possible or the timing of needed leave is unforeseeable, employees must provide notice "as soon as practicable." 29 C.F.R. §§ 825.302 and 825.303. "As soon as practicable" is defined as "as soon as both possible and practical taking into account all of the facts and circumstances in the individual case." The present regulations also provide that for foreseeable and unforeseeable leaves, "as soon as practicable" ordinarily means at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee, except in extraordinary circumstances where such notice is not feasible. 29 C.F.R. § 825.302.[9]

The phrase "as much notice as is practicable" is not well-defined, which puts employers in the difficult position of having to approve leaves where questionable notice has been given. The current regulatory definition – within one or two business days – has been applied by the Department to both foreseeable and unforeseeable leaves, and to protect employees who provide notice within two days, even if notice could have been provided sooner under the particular facts and circumstances. (See Opinion Letter No. 101 (FMLA) (1/15/99) (proposed attendance policy, which would require employees taking intermittent FMLA leave to report absence within one hour after the start of employee's shift unless employee was unable to do so due to circumstances beyond employee's control, violated FMLA because employees have two days to notify employer that absence is for FMLA-covered reason).

Scheduled FMLA leave is generally much less problematic for employers than unscheduled leave. With scheduled leave, the employer can anticipate and plan for the employee's absence by reallocating work to other employees or by rearranging other employees'

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[8] This subsection (1) technically applies only to leave taken for birth or placement; subsection (2) addresses the issue of foreseeable leave for a serious health condition.

[9] The regulations explain that "not practicable" could include lack of knowledge of when leave will need to begin, a change in circumstances, or a medical emergency. 29 C.F.R. § 825.302(a).

work schedules to cover the work assignment and, therefore, avoid losses in production or service. Employers covered by the FMLA have internalized scheduled leave as a cost of doing business. They also recognize that providing necessary, scheduled leave to eligible employees helps the employer retain qualified employees, most of whom return from leave on schedule as productive contributors. Conversely, unscheduled leaves of absence, or scheduled leaves that turn into protracted absences, are extremely difficult to manage, and often reflect abuse.[10]

Unscheduled leaves are widespread and create significant problems for employers. According to the 2004 Commerce Clearing House Unscheduled Absences Survey, unscheduled absences are now at a five-year high (2.4 percent in 2004, up from 1.9 percent in 2003). A survey published by the Employment Policy Foundation reported that nearly 50 percent of all FMLA leave-takers do not provide notice before the day leave is taken. The survey also reported that in more than 30 percent of cases, employees provide notice after the leave has started. EPF, Issue Backgrounder, *The Cost and Characteristics of Family and Medical Leave* (April 19, 2005).

Coverage for unscheduled absences is challenging for all employers, but especially for smaller employers. Two Department of Labor studies, as well as the SHRM 2000 and 2003 FMLA Surveys, have confirmed that the most prevalent method used to cover work when employees are out on FMLA leave is to assign the work temporarily to other on-site employees. Because FMLA interpretive regulations require little or no notice, employers often have to require other employees to work overtime in order to cover the work of an unexpectedly absent employee. Overtime is typically paid at time-and-a-half. Because it is often assigned at the last minute and unwelcome, overtime can adversely affect employee morale. Some employees want overtime, even protracted overtime, because of the added income. Of those, however, many want overtime only when they are able to plan non-work arrangements around it. Mandatory, unexpected overtime is thus typically a personal burden on employees, notwithstanding its obvious financial benefit.

Unforeseeable leaves are the most difficult for employers to cover because the employee often fails to give notice until the day the leave is taken. It is not unusual for an employer to receive notice of the employee's absence after the employee's shift has begun. By that time, it is usually too late to hire a temporary worker or call in another employee. Under such circumstances, the leave-taker's duties may simply go uncovered. If another employee is assigned to perform the leave-taker's duties, that employee's duties in turn go unperformed. The Department's current interpretation permits employees to provide notice two business days *after* the leave has been taken, which is too late to plan for coverage.

Employer failures to grant FMLA leave are sometimes a function of the employee's inadequate notice of the need for leave. Courts have frequently been asked to resolve questions regarding the sufficiency of an employee's notice. In these cases, employers often maintain that they were unaware of the employee's need for FMLA leave. Courts and the Department agree

[10] In the November 2006 SHRM Weekly Online Survey, 66 percent of respondents reported consistent abuse of intermittent leave among their employee ranks.

that employees need not specifically assert their FMLA rights, or mention the statute by name, in order to trigger the Act's protections. In several court decisions of great concern to employers, however, managers have been required to "read between the lines" by grasping unspoken behavioral clues that an employee may need FMLA leave. *See, e.g., Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir.), *cert. denied*, 540 U.S. 881 (2003) (employee discovered sleeping at work whose performance had recently declined in effect notified employer of need of FMLA leave; reversing summary judgment for employer); *Lozano v. Kay Mfg. Co.*, 11 WH Cases 2d 663 (N.D. Mar. 28, 2005) (employer on notice where it knew plaintiff had been hospitalized for a psychiatric condition, continued to receive out-patient treatment, and experienced a decline in job performance after returning to work). Under this approach, an employee may give adequate notice of a need for FMLA leave where: 1) the employee exhibits noticeable behavioral changes or a deterioration in job performance, and 2) the employee's inability to more clearly articulate a need for leave is related to the underlying medical or psychological condition giving rise to the need for leave.[11] *Byrne* and like decisions place employers (and their front-line managers) in the position of having to navigate between compliance with the FMLA (by recognizing an obscure request for leave) and compliance with the Americans with Disabilities Act, 42 U.S.C. § 12112(d)(4) (which restricts medical inquiries of employees and prohibits employers from "regarding" individuals as disabled). Supervisors who have been trained not to ask employees about medical conditions cannot reasonably be expected to recognize and act on potential symptoms of illness—absent a request for leave articulated by the employee. Based on the notice requirement discussed above, SHRM recommends that the DOL require employees to: (1) provide advance notice of their request for FMLA leave, except when the leave request is unforeseeable; and (2) notify the employer of the employee's request for leave.

1. Advance Notice Should Generally Be Required. Section 825.302 should be revised to require advance notice except in truly unforeseeable situations, like medical emergencies.[12]

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[11] Other courts have rightly recognized that *Byrne* is the rare exception to the general rule that employees must provide actual as opposed to constructive notice of the need for leave. *See Stevenson v. Hyre Elec. Co.*, 2006 U.S. Dist. LEXIS 64043 (N.D. Ill. Aug. 24, 2006), (rejecting argument that plaintiff's suddenly erratic behavior and different demeanor placed employer on notice that she was suffering from a serious health condition; noting that plaintiff's medical condition in *Byrne* was the "source of his inability to communicate" his need for FMLA, whereas Stevenson's ability to communicate with her employer had not been compromised by her medical condition); *Burnett v. LFW, Inc.*, 2005 U.S. Dist. LEXIS 32717 (N.D. Ill. Dec. 7, 2005) (plaintiff with prostate cancer was terminated after refusing to meet with his supervisor, saying he was sick and going home; the court rejected argument that plaintiff's insubordinate conduct – refusal to meet with supervisor – in effect notified employer of need for leave because, unlike the plaintiff in *Byrne*, Burnett's changed behavior and inability to give sufficient notice did not stem directly from medical condition giving rise to his need for FMLA leave).

[12] While the Act does not say specifically that notice must be given *before* leave is taken, this is the plainly intended general rule (applicable except in unusual situations like medical emergencies). The Act's legislative history recognizes the statute's "extensive notice requirements," including the 30-day notice for foreseeable leave. The legislative history further states that "Such 30-day advance notice is not required in cases of medical emergency or other unforeseen events--for example, a premature birth or sudden unforeseen changes in a patient's condition that require a change in scheduled medical treatment. ... Section 102(e) is intended to require 30 days notice of the need for leave to the extent possible and practical. Employees who face emergency medical conditions or unforeseen changes will not be precluded from taking leave if they are unable to give 30 days' advance notice. Family and Medical Leave Act, S. Rep. No. 103-3, at 25 (1993), *reprinted in* 1993 U.S.C.C.A.N. 27.

Such situations should be the relatively rare exception, rather than the rule. Under this approach, employees would be required to provide notice to the employer of the need for FMLA leave "as soon as practicable" for all leaves, and "as soon as practicable" would be given its plain meaning—as soon as possible and practical, based on the circumstances, rather than the current artificial definition of two business days.

Under most circumstances, an employee will be able to report an absence before the leave is taken. In situations where that is unrealistic, the employee will still be protected. But this should be limited to those extreme situations where an employee is too ill to make a call and no family member is available to do so. With the explosion in the use of cell phones and e-mail, the regulations (drafted nearly 12 years ago) are simply out of date.

The current interpretation provides employees with no incentive to give employers reasonable advance notice of their need for leave, which adversely impacts an employer's ability to provide coverage for unplanned intermittent leaves. The recommended approach protects FMLA leave-takers by not requiring that they provide more notice than is possible under the circumstances, while at the same time allowing employers to require reasonable notice of an employee's absence so the employer can effectively manage covering the employee's duties during the absence.

The above approach would allow employers to enforce their standard absence-control policies requiring advance notice of absences and to discipline FMLA leave-takers who do not comply with such policies (unless the employee is unable to comply due to circumstances beyond the employee's control, such as unconsciousness or complete incapacity). Unless the employee can show such circumstances, the employee would not be entitled to FMLA leave until proper notice is given, and could be disciplined for non-compliance with the employer's legitimate policy. This approach is consistent with 29 C.F.R. § 825.302(d) (employer may require employee to comply with employer's usual and customary notice and procedural requirements for requesting leave), as well as Section 825.303 ("When the approximate timing of the need for leave is not foreseeable an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. ...") There is no legitimate reason why employees who are able to comply with an employer's reasonable absence reporting requirements should not be held accountable for failing to do so.

2. Clarify Employee Notice of Request for Leave Requirement. The Department should specify the information an employee needs to communicate to an employer in order to request FMLA leave. The Society suggests that the DOL require the employee to notify a supervisor, verbally or in writing, of the need for "a leave of absence," "unpaid leave," "unpaid time off," or "FMLA leave." These suggestions are intended to be illustrative, not exclusive. In every instance, however, the employee must articulate a request that would put a reasonable supervisor on notice that the employee is, in fact, requesting FMLA leave , as opposed to requesting a paid day off or a vacation day, or failing to articulate any request at all. This would alleviate the current lack of clarity in the regulations regarding what information an employee

needs to convey so as to trigger the FMLA process. It would also reduce costly and conflicting court decisions over this issue.

FMLA Leave Determinations/Medical Certification
Department of Labor Request for Information II.K.

- **Does the regulatory provision (section 825.307) that permits an employer to contact the employee's health care provider (for purposes of clarification and authentication only) through the employer's health care provider result in unnecessary expenses for employers (e.g., by requiring them to hire a health care professional for purposes of this contact) and/or delay the certification process? How should the FMLA be reconciled with the ADA, which governs employee medical inquiries and contains no such limitation on employer contact? What are the costs and benefits to having this limitation?**

Section 825.307(a) of the current FMLA regulations provides that a health care provider working for an employer can contact the employee's health care provider with the employee's permission for purposes of clarification and authentication of the medical certification after the employee has been given the opportunity to cure any deficiency pursuant to section 825.305(c). In a recent SHRM survey, SHRM members reported concerns with having their organization's health care providers contact the employee's health care provider directly. Sixty-four percent of SHRM members expressed difficulty in obtaining factual support for the employee's condition. (See SHRM Weekly Online Survey, January 9, 2007.) SHRM members also experienced delays in the certification process and increased financial costs associated with hiring a health care provider. Because HR professionals are responsible for administering and granting FMLA leave, they must locate a health care provider to make contact with the employee's provider, and also educate the employer's health care provider on the employee's information that must be clarified. There is no good reason why such a requirement is needed for purposes of determining whether leave qualifies for the FMLA protections. In those situations where clarification is needed, it is in the interest of the employee to obtain the appropriate information. Accordingly, employers should be able to get clarification without seeking permission from the employee.[13]

The FMLA's statutory provisions directly address what medical information an employer can obtain from an employee to substantiate a FMLA leave request. 29 U.S.C. § 2613. Within that scope, the statute contains no prohibition on medical inquiries related to that information. Thus, the limitations associated with the clarification process were created solely by the regulations. Such limitations contradict what was expressly addressed and permitted by Congress when enacting the ADA just three years before the FMLA. The ADA's statutory language specifically addresses what medical inquiries employers may make of employees, and in no way prohibits direct employer contact with an employee's health care provider as the

[13] The regulations also focus on the scenario where an employee's serious health condition is at issue, not the family member's condition. When the family member's condition is at issue, it is extremely difficult to facilitate the process to obtain permission for a clarification and/or the second opinion process. As a result, many employers do not do so.

FMLA regulations do. *See* 42 U.S.C. § 12112(d)(4)(A) (permitting inquiries when job related and consistent with business necessity). The Equal Employment Opportunity Commission (EEOC) has stated that the "job-related and consistent with business necessity" standard is triggered, in part, when triggered by "some evidence," to determine if an employee having difficulty performing his/her job can perform the *essential functions* of the job (with or without reasonable accommodation). *See* EEOC Technical Assistance Manual, Chapter 6.6 at VI–13-15 (emphasis added).[14]

The ADA does not have any limitation on an employer's contact with the employee's health care provider if it needs to obtain further clarification on medical information provided by an employee to substantiate, for example, the existence of a disability and/or the need for an accommodation. Nor does the ADA provide that contact can only be made through the employer's health care provider. By reconciling the processes permitted by the ADA with the FMLA, needless time and expense associated with the FMLA approval process will be eliminated. Moreover, reconciling such requirements is more consistent with congressional intent. Therefore, SHRM recommends that the DOL modify the FMLA regulations to permit direct employer contact with the employee's health care provider, as long as the inquiries are limited to those issues directly related to the certification requirements for FMLA leave as prescribed by the FMLA."[15]

- **Does the model certification form (WH-380) seek the appropriate medical information? If not, what improvements could be made to the form to make it clearer and easier for health care providers to complete, so that it is more likely that the necessary and appropriate information will be reported?**

Employers have a statutory right to obtain sufficient medical certification from an employee to substantiate the existence of a serious health condition. (See 29 U.S.C. §2613(a) and (b)). SHRM members expressed concerns that the model certification form does not adequately facilitate HR professionals in obtaining such information. DOL can make the form more user-friendly by streamlining the information requested instead of asking health care providers to

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[14] Moreover, Congress enacted the Health Insurance Portability and Accountability Act addressing the privacy of health information after the enactment of both the ADA and the FMLA. These standards apply only to "covered entities," defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction as defined in the privacy regulations. *See* 45 C.F.R. § 160.102(a) and 45 C.F.R. § 160.03. HIPAA contains no limitations on an employer's contact with a health care provider. Indeed, employers are not even covered entities under the statute.

[15] The Department should be aware that under HIPAA, the health care provider will need the employee's permission to discuss the medical information on the certification with the employer. Therefore, the Department must confirm, consistent with its Opinion Letter dated May 25, 2004 that, if the employee chooses not to give the health care provider such permission, and does not cure any deficiency pursuant to subsection § 825.305(c), the employee will not be entitled to the protections of the Act if the information contained on the certification does not meet the "sufficiency" standard set forth in the statute. *See* WH Admin. Op. FMLA 2004-2-A (May 25, 2004), Wage and Hour Manual 99:3148.

respond to a page-and-a-half of specific questions.[16] Indeed, it should not be the health care provider's role to specify whether a "serious health condition" exists—itself a legal conclusion—by having to examine the six subparts of the regulatory definition. The certification request can be modified to ask for all symptoms, diagnoses and treatment plans related to the medical condition at issue. Duration and frequency also should be specified. In the case of intermittent leave, the medical necessity for the intermittent or reduced schedule also should be specified in accordance with 29 C.F.R. § 825.117 (not currently required on the model form).

Definition of What Constitutes a "Complete" Certification Form

If health care providers still do not provide direct responses to the questions, the regulations should be modified to specify that the certification is not considered "complete" for purposes of the employee's certification obligations, thereby not qualifying the employee for FMLA leave. SHRM members routinely report that in the case of chronic conditions, they receive certifications that indicate the frequency or duration of a condition is "undetermined."

It should be the employee's obligation to return a completed certification that contains responsive information to all questions asked. For example, the certification form should contain at least an estimate of duration and frequency of the condition, even if a definitive response cannot be given. Such a mandate will eliminate unnecessary confusion and litigation related to whether an employee has returned a completed certification form. *See,* e.g., *LaDuca v. Norfolk Southern Railroad*, 2006 U.S. Dist. LEXIS 86897 (S.D. Ohio 2006) (Jury issue whether certification was complete).

Timely Return of Certification Form

The regulations also should specify what happens if an employee does not "timely" return a "completed" certification form. The current regulations specify that if an employer finds the certification form to be incomplete, the employer "shall advise an employee" as to what is complete, and "provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.306(d). HR professionals often have difficulty in determining how many times an employer must give an employee an opportunity to "cure" a deficiency, and how long to allow them to provide such a complete certification. Thus, DOL should modify the regulations to explicitly state that if the employee returns an incomplete certification after the initial 15-day time period (applicable in the case of unforeseen leave as specified in 29 C.F.R. 825.305), the employer must only give the employee an additional seven days to provide the completed certification, and only one opportunity to do so. By adding these requirements to the regulations, DOL will alleviate delay and uncertainty in the FMLA approval process as well as unnecessary administrative burdens associated with repeated follow-up communications related to the certification process.

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[16] One of the more common concerns SHRMmembers also report is that health care providers frequently charge employees for completing such forms. Indeed, one member reported that a health care provider charged $100 for completion of the certification.

- **Does the two-day timeframe (for providing notification to employees that their FMLA leave request has been approved or denied) provide adequate time for employers to review sufficiently the information and make a determination?**

SHRM members have repeatedly stated that the two-day timeframe is not adequate. Therefore, SHRM recommends that the Department permit an employer to notify the employee within 10 business days after the employer receives a medical certification from the employee.

- **Additional Comments Regarding Contact with Health Care Providers**

SHRM members have reported challenges with information provided by health care providers. HR professionals are responsible for determining whether an employee's health condition is covered by the FMLA regulations. Thus, it is imperative that HR professionals have confidence that the information provided by the health care provider is complete and accurate. SHRM members also had challenges in obtaining completed medical certification forms when the forms are completed by: (1) health care providers with little or no expertise with the employee's health condition; or (2) health care providers located outside of the United States.

Another area of concern to HR professionals is an increasing tendency for family or general practitioners to be the "employee's health care provider of choice" in submitting medical certifications. For example, a SHRM member reported that a dermatologist provided a medical certification for an employee requesting twelve weeks of FMLA leave for a heart condition. Therefore, SHRM recommends that the regulations require that a competent medical specialist for the condition in question must examine the employee and provide the medical certification. SHRM believes that requiring a specialist in the relevant field to issue the medical certification will help reduce misuse of intermittent leave for chronic conditions, as most of those certifications are currently issued by family practitioners.

SHRM members have also reported difficulty in working with health care providers based outside the United States. This usually occurs when an employee requests FMLA leave for the care of a parent residing in another country. The review of foreign medical certifications has created numerous problems for employers. First, HR professionals are not certain whether the health care provider has training and credentials equivalent to U.S.-licensed health care providers. Second, HR professionals have difficulty in verifying whether the foreign health care providers actually completed the form. Finally, HR professionals experience problems in obtaining second and third opinions, due to language barriers and administrative expenses associated with completing the opinions. Therefore, SHRM recommends that the DOL require an employee's health care provider to consult a health care provider based in the U.S.

CONCLUSION

The Society for Human Resource Management appreciates the opportunity to submit these comments on the current FMLA regulations. SHRM looks forward to working with the

Department of Labor to provide education and outreach to both the employer and employee communities on any developments.

Respectfully submitted,

Michael P. Aitken
Director, Governmental Affairs
Society for Human Resource Management

KATHLEEN VINEHOUT
STATE SENATOR

Wednesday, July 25, 2007

Testimony from Senator Vinehout on the Family Military Leave Bill

Thank you Chairperson Lassa and committee members for this opportunity to testify in support of Senate Bill 173, the Family Military Leave Bill.

I introduced this bill following a conversation I had with a constituent, Paul Syverson. His daughter, Megan, is part of a mobile security detachment stationed in San Diego. Megan is currently serving in her third deployment to Iraq.

Megan told her father she was aware of an Illinois law that allowed military personnel and their families to take unpaid leave to prepare for deployment. She talked about how important this leave would be to military families and that Wisconsin needed to pass a Family Military Leave bill. She was speaking from her experience as well as that of her military colleagues.

Megan said that many military personnel don't have the time to get their affairs in order and see their family prior to deployment. Spending time with family was a struggle for Megan prior to her last deployment.

She planned to come back to Wisconsin to spend her golden birthday with her family on June 22nd. Unfortunately, Megan was put on stand-by alert which meant she had to stay in California. If her family was going to spend time together, they would need to travel to see her.

Megan's mom was not able to see her daughter prior to deployment because her employer would not give her time off. A Family Military Leave law would have made it possible for this mother and daughter to have some special time together. Time is precious. We can't take if for granted because it is not guaranteed. And some of the most treasured time is spent with our loved ones.

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Military families will tell you just how much they treasured the time spent together before deployment. And this is just as true for the service member being deployed as those left at home.

A mom contacted my office to say thanks for introducing this bill because her son was deployed to Iraq and she needed to give him a hug one more time – maybe for the last time. Being able to take unpaid leave would have allowed her the travel to see her son.

Another mother called to say she remembered how chaotic their lives were before her son-in-law shipped out to Kosovo. She said that a Family Military Leave law would have eased their stress.

And the parents of Jeffery, who died in Iraq, wrote; "We thought that we had all the time in the world yet the cruel reality was that we didn't...and we never had the time to say good-bye".

This bill helps address the chaos and stress these families deal with by allowing service members, their spouses and parents the option of taking unpaid leave to help balance family obligations with job requirements when preparing for deployment.

Each time Megan was deployed, she needed time to prepare.

This included reviewing critical documents such as wills and medical directives, insurance policies, investments and accounts, power of attorney agreements. She also needed to make sure her family had access to all of her accounts and important documents.

And then there are any financial obligations to deal with such as apartment leases, cell phone contracts, arranging for payment of bills and informing creditors, banks and any other investment representatives of her deployment.

Megan had to call the post office to hold or forward mail. She also needed to compile a precise list of contacts in case of an emergency.

Megan is single. You can imagine how much more complicated the list of items to take care of is for married military personnel.

Many of those who have received orders to deploy will tell you that they were very distracted on the job because they were thinking about all the things that needed to be done before they left and what needed to be done in case they never returned.

This bill will allow eligible employees to take unpaid, job-protected leave to be with a spouse or child who has been called into military service for a period lasting longer than 30 days. Employers with between 15 and 50 employees must provide up to 15 days of leave. Employers with more than 50 employees must provide up to 30 days. Qualifying employees are required to give notice to their employer prior to taking leave and employees returning from family military leave must be restored to the same position or to a position with equivalent seniority, benefits and pay.

In addition to Illinois, similar proposals have been adopted in Kentucky, Maine, Indiana and Nebraska.

Military family leave legislation has been supported by the Military Officers Association of America, the Enlisted Association of the National Guard of the United States, The Reserve Officers Association, The National Guard Association of the United States, the National Military Family Association, and the National Partnership for Women and Families.

We owe it to our military personnel and their families to do all we can to support them in difficult times. When it comes to helping military families, we should always be asking what more we can do. I know this legislation will provide an important measure of relief for our military families and I urge the committee to support it.

Wisconsin Manufacturers & Commerce

REPRESENTING WISCONSIN BUSINESS

Memo

TO: Senate Committee on Economic Development, Job Creation, Family Prosperity and Housing

FROM: John Metcalf, Director, Human Resources Policy

DATE: July 25, 2007

RE: SB 173 – Family Military Leave

Background

Under current Wisconsin law, an employer, employing at least 50 individuals on a permanent basis must permit an employee who has been employed by the employer for more than 52 consecutive weeks and who has worked for the employer for at least 1,000 hours during the preceding 52–week period (employee) to take six weeks of family leave in a 12–month period and two weeks of medical leave in a 12–month period. Family leave may be taken for the birth or adoptive placement of a new child or to care for a child, spouse, or parent who has a serious health condition. Medical leave may be taken when the employee has a serious health condition that makes the employee unable to perform the employee's employment duties. An employee is not entitled to receive wages or salary while taking family or medical leave, but may substitute, for portions of family or medical leave, other types of paid or unpaid leave provided by the employer.

When an employee returns from family or medical leave, the employer must immediately place the employee in the employment position that the employee held before the leave began or, if that position is filled, in an equivalent employment position. An employee is not entitled to accrue any seniority or employment benefits while on family or medical leave, but is entitled to have his or her group health insurance coverage maintained under the conditions that applied before the leave began.

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Leave Eligibility

The bill entitles an employee who is a member in the U.S. armed forces, the national guard of this state or of any other state, or the state defense force in a period of 30 days of active service or more, as well as their spouse and children, to take family military leave.

Leave Entitlement

The bill permits an eligible employee of an employer that employs between 15 and 50 individuals on a permanent basis to take no more than 15 working days of unpaid family military leave during a period of active service, and an employee of an employer that employs more than 50 individuals on a permanent basis to take no more than 30 working days of unpaid family military leave during a period of active service.

Substitution of Paid Leave

An eligible employee is not entitled to receive wages or salary while taking family military leave, but may **substitute**, for portions of family military leave, paid or unpaid leave of any other type provided by the employer. When an employee returns from family military leave, the employer must immediately place the employee in the employment position that the employee held before the leave

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began or, if that position is filled, in an equivalent employment position. An employee is not entitled to accrue any seniority or employment benefits while on Family Military Leave, but is entitled to have his or her group health insurance coverage maintained under the conditions that applied before the leave began.

Leave Certification
An employer may require certification from a military branch of service as to the eligibility of the service personnel. However, the bill does not specify any of the circumstances under which leave may be taken.

Notice
The bill requires notice of 14 days in advance of leave increments of five days or more. However, leave of less than five days requires only reasonable notice. The allowable increments of leave are not specified.

WMC Position – Oppose
WMC is opposed to any expansion of the existing Wisconsin Family and Medical Leave Act. Many Wisconsin employers have found it extremely difficult to comply with the dual state and federal FMLA's. Adding an additional form of leave – Family Military Leave – to the existing Wisconsin FMLA structure will increase the complexity of compliance. Further, additional forms of mandated leave are frequently proposed at both the state and federal levels – e.g. school activity leave legislation is currently pending before the Wisconsin legislature.

Most Wisconsin employers provide general banks of paid leave for any purposes that employees may need, leave benefits that should accommodate the needs of most military families during a period of service. Further, many Wisconsin companies provide for additional leaves of absence on an as needed basis, for events like military service call-up.

Further, Federal law provides an extensive protection for military personnel on leave from work when called up for active duty. It also has specific employment related protections for military service personnel returning to work from active duty.

Underlying problems with the state FMLA include the breadth of the substitution of paid leave provision which permits the substitution of employer provided leave for which an employee is not otherwise qualified. For example, the Wisconsin FMLA permits the substitution of employer provided disability leave where the employer is not otherwise disabled. The substitution provision of the existing Wisconsin FMLA has proved costly, and has also created problems with employer provided disability benefits programs.

The Wisconsin FMLA also permits leave to be taken in very small increments of time. This often results in disruption in the workplace, and creates challenges for employers to properly track leave. This legislation sets no limits on the increments of leave that may be taken, nor does it identify the bases for taking leave, and will potentially exacerbate these compliance problems.

Conclusion
For these reasons we urge the members of the Senate Economic Development, Job Creation, Family Prosperity and Housing Committee to oppose Senate Bill 173.