

February 16, 2007

**VIA ELECTRONIC MAIL AND COURIER**

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: Department of Labor Request for Information on the Family and Medical Leave Act**

Dear Mr. Brennan:

On behalf of the National Partnership for Women & Families and ninety organizations, we thank you for the opportunity to respond to the Department of Labor's Request for Information on the Family and Medical Leave Act of 1993 ("RFI").<sup>1</sup> The passage of the Family and Medical Leave Act ("FMLA")<sup>2</sup> was a groundbreaking step forward for millions of Americans by providing workers with up to twelve weeks of leave each year to care for close family members or to address serious personal health concerns. By making leave available to all eligible workers, the law has enabled both women and men to balance their work and family obligations without sacrificing their jobs and long-term economic stability. The law also helps combat gender discrimination and pernicious stereotypes about gender roles – because both male and female workers can take FMLA leave, the law helps to ensure that women are not penalized or unfairly denied job opportunities simply because of assumptions about their family caregiving responsibilities.

Detailed below are comments in response to the questions posed in the RFI. We preface these comments, however, by outlining several overarching concerns about the RFI, its overall approach, and its potential impact on the FMLA:

- First, any examination of the FMLA should focus squarely on how to ensure vigorous FMLA enforcement and compliance with the law, and to identify ways to expand the law to more workers in need of the FMLA's protections and flexibility. We are concerned that the RFI seems to be more focused on imposing limits or constraints on the FMLA, rather than full enforcement and compliance. We believe this approach, if pursued, will impede the ability of workers to use the FMLA effectively to balance their work and family responsibilities, and will result in the erosion of the FMLA's core protections. It is crucial for the Department of Labor (DOL) to demonstrate a clear, consistent, and unbending commitment to comprehensive implementation and enforcement of the FMLA.

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<sup>1</sup> Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69,504 (Dec. 1, 2006) [hereinafter RFI].

<sup>2</sup> Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601 *et seq.* (2006)).

- Second, the RFI, perhaps unintentionally, gives the impression that the FMLA and its regulations should be reconsidered, re-thought, and revised in response to every employer complaint or court decision. While DOL certainly is required to revise a regulation in response to a Supreme Court decision or a specific change in the law, we do not believe that every legal development or research study demands a change to the FMLA regulations. Some of the questions listed in the RFI mirror issues raised in one or two lower court decisions that may not even withstand future judicial scrutiny. In other instances, the issues raised were debated and considered when the FMLA and its regulations were being developed, and the RFI is simply re-fighting legislative and policy decisions made years ago. We believe this re-hashing of decisions settled in the final statute or regulations is counterproductive and, in some instances, beyond the legal purview of an agency rulemaking. Such action only fuels FMLA opponents' efforts to roll back FMLA protections and erode their long-term effectiveness.
- Third, the lack of available data on many of the issues raised in the RFI is an unfortunate reminder of DOL's failure to conduct objective studies on the FMLA and its implementation in recent years. The RFI takes great pains to criticize the 2000 study of the FMLA undertaken by Westat and commissioned by DOL ("2000 Westat Study"). But the 2000 Westat Study, even with its limitations, has been invaluable and represents the best available source for information on FMLA usage and coverage. DOL has neglected to undertake significant efforts to update this research, thus leaving an information void. While the RFI solicits data from commenters on a long list of questions, in many cases it is DOL that has been – and is – best positioned to gather the relevant data to provide answers. We believe DOL has a particularly important role to play in conducting and commissioning objective, scientifically sound research that can be used to inform and assess implementation of the FMLA. To pursue changes to the FMLA regulations without such data, however, is unwarranted and inappropriate.

We have identified these core concerns at the outset to make clear the inherent problems we believe are reflected throughout the RFI that raise questions about its utility and could be used to undermine vital FMLA protections.

## **COMMENTS IN RESPONSE TO DEPARTMENT OF LABOR REQUEST FOR INFORMATION ON THE FAMILY AND MEDICAL LEAVE ACT**

### **1. Employee Eligibility**

We oppose any changes to the current eligibility standards that would impose additional barriers for workers seeking to take FMLA leave. The existing rules regarding eligibility were drafted to strike an appropriate balance between the needs of employers and employees. At a minimum, this balance should be preserved to ensure that workers who meet the statutory requirements for leave are able to take leave when needed. To the extent that changes to employee eligibility are under consideration, we believe the focus should be on ways to expand FMLA eligibility to

cover more workers who otherwise are unable to take leave when faced with a family or medical emergency.

A. Twelve-Month Work Requirement.

The FMLA establishes that employees must work for an employer for twelve months, and work at least 1250 hours during that time period, to be eligible for the FMLA's protections.<sup>3</sup> The regulations state that an employee can satisfy the twelve-month work requirement by adding together non-consecutive periods of work.<sup>4</sup> For example, an employee who works for an employer for ten months and then leaves that job, is re-hired four months later and holds the job for six months, would satisfy the twelve-month work requirement by adding together the initial ten-month work period and the current six-month work period for a total work tenure of sixteen months. Or, an employee who works for an employer for ten years and becomes eligible for FMLA coverage, then leaves for three years to care for her children, would have FMLA protection when she is re-hired, rather than waiting another twelve months to gain FMLA coverage. This construction of the law and regulations reflects the reality that many employees have breaks in work tenure with their employers. Some employees work in seasonal jobs for a limited number of months during the year; others leave the workforce entirely for extended periods of time. The law, however, does not set caps or any other time limits on how long an employee can leave a particular employer. Nor are there any provisions that would prohibit an employee from adding together non-consecutive work periods solely because they occurred too far apart.

The RFI asks whether a time limit should be established beyond which an employee would not be permitted to add together non-consecutive periods of work.<sup>5</sup> This question apparently is posed in response to a district court opinion stating that an employee whose work for an employer was separated by a five-year absence should not be able to add together months worked during two distinct work periods for purposes of determining FMLA eligibility.<sup>6</sup>

We believe there is no legal reason to change or modify the current regulations:

- Imposing a regulatory "fix" that would cap how much time can elapse between non-consecutive work periods would be flatly inconsistent with the language and intent of the FMLA statute, and thus should be rejected. Indeed, in the preamble to the final FMLA regulations, DOL specifically rejected a two-year cap on how much time could elapse between non-consecutive work periods, stating that "there is no basis under the statute or its legislative history to adopt [this suggestion]."<sup>7</sup> No evidence is cited in the RFI that these provisions regarding the combination of non-consecutive work periods have caused problems for employers or employees. Hampering the ability of an employee to utilize the FMLA's protections by imposing an arbitrary time limit on how long that employee

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<sup>3</sup> 29 U.S.C. § 2611(2)(A).

<sup>4</sup> See The Family and Medical Leave Act of 1993; Final Rule, 29 C.F.R. § 825.110(b) (2006).

<sup>5</sup> RFI, 71 Fed. Reg. at 69,508.

<sup>6</sup> See *Rucker v. Lee Holding Co.*, 419 F. Supp. 2d 1 (D. Me. 2006), *rev'd*, 471 F.3d 6, 13 (1st Cir. 2006).

<sup>7</sup> See The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2185 (Jan. 6, 1995) [hereinafter Regulatory Preamble].

can stop working for a particular employer is inconsistent with the FMLA's plain meaning. Indeed, the lower court opinion upon which the RFI relies was reversed by a higher appellate court in December 2006.<sup>8</sup>

- We believe an arbitrary time limit on how long a worker could leave the employment of a particular employer would operate as an unfair and disproportionate burden on women workers. Many women leave work for extended periods of time, for example, to stay home with young children in their formative years.<sup>9</sup> Such absences can last for several months or a few years. Not being able to count previous work tenure because it is deemed to have occurred too long ago undermines the ability of women to reenter the workforce, and make the best decisions for themselves and their families.
- A rule that would make it harder for employees to count their previous work tenure when determining their FMLA eligibility also creates the wrong incentives for employers. An employer could manipulate and prolong how long it takes for an employee to gain FMLA coverage simply by delaying any re-hiring of a former employee long enough so that that employee could not count her/his previous work tenure toward the twelve-month work requirement. Such a rule would discourage many employers from re-hiring former workers – a result that could lead to discrimination against former employees, and undercut efforts to ease the re-entry for workers into the labor market, particularly those who have been out of the workforce for a long period of time.<sup>10</sup>

#### B. Date for Determining Employee Eligibility and Employer Coverage.

The RFI notes that there are differences in how the FMLA regulations treat the eligibility/coverage requirements for employees and employers.<sup>11</sup> Section 825.110(d) requires an employee's twelve-month/1,250-hour eligibility to be determined *as of the date leave is to commence*. To determine whether an employer is covered by the FMLA, however, § 825.110(f) requires the employer to have fifty employees within seventy-five miles of the worksite *as of the*

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<sup>8</sup> See *Rucker*, 471 F.3d at 13.

<sup>9</sup> See Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C.L. REV. 707, 717, 732-36 (2000) (reporting on research showing that many women leave the workforce for some period of time to have or raise children); Kristin Smith, et. al., U.S. Census Bureau, *Maternity Leave and Employment Patterns: 1961-1995*, Table J (Nov. 2001) (citing that from 1991-1994, almost 22% of women working full-time while pregnant did not return to work within the first year after giving birth.).

<sup>10</sup> Sandra L. Hofferth & Sally C. Curtin, *Parental Leave Statutes and Maternal Return to Work After Childbirth in the United States*, 33 WORK AND OCCUPATIONS No. 1, 73 (2006) (finding that women who had a child post-FMLA returned to work more quickly and were more likely to return to the same job); Lawrence M. Berger & Jane Waldfogel, *Maternity Leave and the Employment of New Mothers in the United States*, 17 J. POPULATION ECON. No. 2, 331 (2004) (reporting that among mothers who were employed pre-birth, those in jobs that provided leave coverage are more likely to take a leave of up to twelve weeks, but return to work more quickly after twelve weeks); Charles Baum, II, *The Effects of Maternity Leave Legislation on Mothers' Labor Supply after Childbirth*, 69 S. ECON. J. No. 4, 772 (2003) (finding that the FMLA increases the number of women who return to their jobs after taking childbirth leave); Jenny Anderson, *The Fork in the Road*, N.Y. TIMES, Aug. 6, 2006 (discussing the difficulty women face in returning to corporate jobs after leaving the workforce and the business costs of the attrition of female talent); Ellen Rosen, *Derailed on the Mommy Track? There's Help to Get Going Again*, N.Y. TIMES, Feb. 12, 2006 (explaining the need to facilitate mothers' reentry into the workforce after childbirth and child-rearing).

<sup>11</sup> RFI, 71 Fed. Reg. at 69,508.

*date the leave request is made.* The RFI seeks comment on these two different regulatory tests, but does not specify a particular problem or what, if anything, needs to be resolved.

There are valid, commonsense reasons to explain the differences between the employee eligibility and employer coverage tests, and they are entirely appropriate and consistent with the law:

- An employee’s FMLA eligibility changes incrementally on a daily (and indeed hourly) basis. It is sensible to measure an employee’s eligibility for FMLA leave *as of the time that leave is to commence* because it ensures that all of the time worked by the employee is counted when making the eligibility determination. If an employee’s eligibility was determined from the date the leave request is made, an employee could be denied her/his request even though she/he would be eligible by the time the leave was supposed to commence. Such a result would discourage employees from requesting leave in advance, and make it harder for employers and other employees to make appropriate preparations for an employee’s absence. The current regulations, thus, benefit both employers and employees by ensuring that employees can count all time worked up until the time the leave is supposed to begin, and providing ample notice of leave to employers.
- The requirement to count whether an employer has fifty employees within seventy-five miles of the worksite *as of the date that the leave request is made* to determine an employer’s FMLA coverage is also appropriate and fair. First, if an employer is covered by the FMLA because it meets the “fifty-employees-within-seventy-five-miles-of-the-worksite” criteria when an employee makes a leave request, then the employer is obligated to comply with the law. The employer should not be able to avoid FMLA compliance simply by asserting that it might not be a covered employer at some unknown point in the future. Allowing an employer to delay the determination of whether it meets the “fifty-employees-within-seventy-five-miles-of-the-worksite” criteria until the time the leave is supposed to commence would leave employees in limbo and have the practical effect of suspending their right to leave and putting it in the hands of the employer. Such “delayed compliance” also would be inconsistent with the intent and spirit of the FMLA, and create the wrong incentives for employers to take advantage of the time between the leave request and the date the leave is to commence to avoid FMLA coverage. By determining FMLA coverage as of the date the leave request is made, both the employer and employee have sufficient notice and time for proper planning and preparation. If the employer’s eligibility determination were to be made when the leave commenced, an employee could plan on taking FMLA leave and then lose her ability to do so by the time it was scheduled to start if the employer downsized.
- In response to a comment to the 1993 interim FMLA regulations questioning the distinction between employee and employer eligibility determinations, DOL relied on all of these arguments to explain why both the text and purpose of the FMLA support the current eligibility requirements.<sup>12</sup> There is no reason why DOL’s initial conclusion should be reconsidered.

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<sup>12</sup> See Regulatory Preamble, 60 Fed. Reg. at 2186.

### C. Joint Employment

The RFI requests comment on the need for changes to § 825.111(a)(3) which governs how employee FMLA eligibility is determined in joint employment situations.<sup>13</sup> The current regulation states that when an employee is jointly employed by two or more employers, the employee's worksite is the office of the primary employer from which the employee is assigned or reports.<sup>14</sup> What constitutes an employee's worksite is important because that worksite is used to determine whether the employer meets the "fifty-employees-within-seventy-five-miles-of-the-worksite" criteria required for FMLA coverage. The RFI points to a recent decision in the Tenth Circuit Court of Appeals that partially invalidated § 825.111(a)(3) and ruled that an employee's long-term fixed worksite at a secondary employer should be counted to determine FMLA coverage.<sup>15</sup>

We believe the current regulations are sound and do not require change:

- A review of the preamble to the FMLA regulations makes clear that DOL gave much consideration to the question of how best to determine an employee's worksite.<sup>16</sup> In its discussion, DOL stresses that the concept of an employee's "worksite," according to the FMLA's legislative history, was to be construed the same as the term "single site of employment" under the Worker Adjustment and Retraining Notification ("WARN") Act<sup>17</sup> regulations.<sup>18</sup> The WARN Act regulations state in part that, for employees who move from site to site or have no fixed worksite, the office from which their work is assigned or to which they report is the single site of employment.<sup>19</sup> The purpose of designating this office as the worksite is to ensure that the employer with the primary responsibility for the employee's assignment is the one held accountable for compliance with these regulations.
- The FMLA regulations explicitly address situations where an employee is jointly employed and does not have a fixed worksite. In such cases, the office of the primary employer is considered the worksite.<sup>20</sup> The regulations do not discuss, however, the specific fact pattern in *Harbert* – where an employee is jointly employed and has a long-term fixed worksite. But we believe the same principles articulated in the regulations with regard to "no fixed worksite" situations also should apply to this factual scenario as well. In cases where employees have long-term assignments, we believe the purposes of the FMLA are best served by using the primary employer from which the employee is assigned as the worksite for determining FMLA coverage.

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<sup>13</sup> RFI, 71 Fed. Reg. at 69,508-09.

<sup>14</sup> See 29 C.F.R. § 825.111(a)(3).

<sup>15</sup> See *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004).

<sup>16</sup> Regulatory Preamble, 60 Fed. Reg. at 2187-89.

<sup>17</sup> Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101(a)(3)(B) (2006).

<sup>18</sup> Regulatory Preamble, 60 Fed. Reg. at 2189 (citing the WARN Act regulation defining "single site of employment," 20 C.F.R. § 639.3(i)(6)).

<sup>19</sup> 20 C.F.R. § 639.3(i)(6).

<sup>20</sup> 29 C.F.R. § 825.106(c).

## 2. Serious Health Condition

We strongly oppose any efforts to restrict or narrow the definition of a serious health condition. The FMLA enables eligible workers to take family or medical leave for serious health conditions,<sup>21</sup> and its regulations establish objective criteria to be used to determine whether conditions qualify for leave.<sup>22</sup> While the regulations set parameters to help define serious health conditions, they do not include an exhaustive list of conditions deemed “serious” or “not serious.” As explained in the preamble of the FMLA regulations, DOL “did not consider it appropriate to include . . . the ‘laundry list’ of serious health conditions listed in the legislative history *because their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally ‘serious,’ rather than apply the regulatory standard.*”<sup>23</sup> The regulations are intended to create a standard that can be applied in individual cases with sufficient flexibility to adjust for differences in how individuals are affected by illness – what can be a serious life threatening illness for one individual can be a minor illness for another.

The RFI poses two questions for discussion. First, it asks whether the regulatory test for what constitutes a serious health condition in § 825.114(a) makes “inoperative” the limits on the serious health condition definition described later in § 825.114(c). Second, it asks whether there is a way to maintain the “substantive standards” of § 825.114(a) while still retaining the meaning and intent of § 825.114(c). Both questions really focus on one central issue – whether the regulatory test used to define a serious health condition is too broad (or has been interpreted too broadly) and, as a result, undermines the limitations on the serious health condition concept contemplated in the regulations and envisioned by Congress.

We believe the current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid criteria that could hinder the ability of workers to take leave when necessary:

- The current regulations set forth broad, objective parameters for defining a serious health condition. Consistent with the statute, § 825.114 states in part that a serious health condition “means an illness, injury, impairment or physical or mental condition” involving inpatient care (such as a hospital stay) or continuing treatment by a health care provider.<sup>24</sup> In cases of continuing treatment, a serious health condition typically involves a period of incapacity lasting more than three consecutive calendar days that prohibits the employee from working.<sup>25</sup> The regulation also indicates that more routine health matters, e.g., routine dental work, *ordinarily* are not considered serious health conditions, *unless complications arise.*<sup>26</sup> Overall, the definition focuses on the common features that often would be found in all serious health conditions. But no definition, if it is to be effective, can impose precise categories for every health condition. The practical reality is that

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<sup>21</sup> 29 U.S.C. §§ 2611(11), 2612(a)(1)(C), (D).

<sup>22</sup> 29 C.F.R. § 825.114.

<sup>23</sup> Regulatory Preamble, 60 Fed. Reg. at 2195 (emphasis added).

<sup>24</sup> 29 C.F.R. § 825.114(a); *see also* 29 U.S.C. § 2611(11).

<sup>25</sup> *Id.* § 825(a)(2)(i).

<sup>26</sup> *Id.* § 825.114(c) (emphasis added).

serious health conditions will differ from person to person. Thus, the regulations must necessarily have the flexibility to be applied to different individual circumstances.

- There is little objective data indicating that the limitations in the regulations excluding more routine health matters from the serious health condition definition are no longer workable. Section 825.114(c) of the regulations includes a list of conditions that *ordinarily* would not be considered serious health conditions, such as the common cold, the flu, ear aches, or an upset stomach. But the regulation on its face also makes clear that complications can arise to make what is usually a routine health matter much more serious.<sup>27</sup> In doing so, the regulation is consistent with the FMLA’s intent – to cover serious health conditions and exclude from coverage routine or minor health concerns, but also to allow sufficient flexibility to cover the unique and rare situations where a particular condition unexpectedly becomes a very serious health problem. Even in these unusual situations, to qualify for FMLA leave, any health condition still must satisfy the objective criteria in § 825.114(a) that define a serious health condition. We believe it is essential for DOL to undertake objective research through surveys and other tools, rather than rely on anecdotal information, before considering any changes to these regulations.
  
- Imposing categorical changes to the definition of a serious health condition, such as increasing the required number of days of incapacity, could have a devastating impact on employees in need of leave. Unilaterally excluding certain short-term conditions, such as appendectomy, for which treatment and recovery are “very brief,” could risk damaging an employee’s health. Further, workers with chronic and serious health problems such as asthma and diabetes, for example, could be prevented from taking FMLA leave for their brief but incapacitating episodes. We believe these results would undermine the very purposes of the FMLA.

### 3. Definition of a “Day”

The RFI poses two questions about how to count days and holidays when an employee seeks or takes FMLA leave.

#### A. The Counting of Scheduled Holidays While an Employee is on Leave.

The RFI asks whether scheduled holidays should count against an employee’s FMLA leave when the employee is out on leave for that full week.<sup>28</sup> Under the current regulations, such holidays are counted as part of an employee’s FMLA leave.<sup>29</sup> We believe such a policy is inconsistent with how holidays are typically treated in other leave contexts. If an employee is out on FMLA leave and a scheduled holiday occurs, we believe the employee should be able to

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<sup>27</sup> 29 C.F.R. § 825.114(c); *see also* Dep’t of Labor Op. Ltr. FMLA-86 (Dec. 12, 1996).

<sup>28</sup> RFI, 71 Fed. Reg. at 69,509.

<sup>29</sup> 29 C.F.R. § 825.200(f).

use holiday leave just like other employees rather than losing a day of FMLA leave. Thus, we would urge DOL to modify the regulations accordingly.<sup>30</sup>

**B. The Counting of Days for Purposes of Satisfying the Three-Day Requirement to Establish a Serious Health Condition.**

The RFI asks whether the FMLA requirement that a serious health condition last for “more than three consecutive calendar days” should be interpreted as meaning three days plus any part of the fourth day, or four days.<sup>31</sup> We believe the question posed in the RFI is best answered by the fairest reading of the regulation itself. The FMLA legislative history and the preamble to the FMLA regulations make clear that the three-day minimum for a serious health condition received extensive consideration and discussion.<sup>32</sup> The regulation describes a serious health condition as one lasting “more than three consecutive calendar days.”<sup>33</sup> This language on its face can best be read as requiring only that a serious health condition last, at a minimum, any duration more than three consecutive days. Thus, a condition requiring more than three days from work, even a partial day, would be covered by this language. If the three-day minimum requirement was intended to operate as a four-day minimum, presumably there would be some language to that effect in the regulations. But there is nothing in the regulations that suggests a four-day minimum was intended, nor should such a rule be incorporated into the regulations now.

**4. Substitution of Paid Leave**

While the FMLA has been an enormous gain for millions of workers, many employees have been unable to make use of its benefits because the leave authorized under the law is unpaid. Thus, we believe the provisions in the law allowing employees and employers to substitute paid leave benefits for FMLA leave in some circumstances are particularly important. The RFI poses a series of questions about the substitution of paid leave.

**A. Impact of Policy Allowing Employee Substitution of Paid Vacation and Personal Leave for Unpaid FMLA Leave.**

The RFI asks about the impact of § 825.207 of the FMLA regulations, which prohibits employers from interfering with employees seeking to substitute paid vacation or personal leave for unpaid FMLA leave.<sup>34</sup> We have no data available to analyze the precise impact of the regulation, nor are we aware of research on this question that is publicly available. As a general matter, we believe this regulation is an important mechanism for providing income to employees when they take leave, and thus it should be preserved. Moreover, it maximizes employee flexibility by enabling employees to use leave they have accrued in the manner that is most

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<sup>30</sup> To the extent an employer provides paid, rather than unpaid, holiday leave, the employee on FMLA leave could be paid for that holiday upon returning to work.

<sup>31</sup> RFI, 71 Fed. Reg. at 69,509.

<sup>32</sup> See S. Rep. No. 103-3, at 28-29 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 30-31; Regulatory Preamble, 60 Fed. Reg. at 2191-96.

<sup>33</sup> 29 C.F.R. § 825.114(a)(2)(i).

<sup>34</sup> RFI, 71 Fed. Reg. at 69,509.

helpful to their unique circumstances. To place limits on when such leave can be used would undermine the very purposes of the FMLA.

B. Impact of Paid Leave Policies on the Nature and Type of FMLA Used.

The RFI asks whether the existence of paid leave policies affects FMLA leave usage.<sup>35</sup> Again, there is limited data to provide a definitive answer to this question and more in-depth research is needed. The 2000 Westat Study found that 66% of FMLA leave-takers received some form of compensation during their longest leave.<sup>36</sup> That same study found that of the 3.5 million workers who needed FMLA leave but did not take it, 78% did not take the leave because they could not afford to take unpaid leave.<sup>37</sup> Taken together, these findings suggest that having access to some form of paid leave is critical to enabling employees to make full use of the leave provided under the FMLA.

C. Availability of paid leave to cover short absences for FMLA covered conditions.

The RFI includes a question that asks whether employers allow employees to use paid leave, such as sick leave, to cover short absences from work for FMLA-covered conditions.<sup>38</sup> We do not have access to employer data, thus we are unable to provide a definitive response to the question. There is, however, data available on the broader question of employee access to paid sick leave that helps provide some answers. Almost half, 47%, of all private sector workers and fifty-nine million total workers have no paid sick days.<sup>39</sup> That percentage is even higher for low-income workers – one study found that 76% of low-wage workers have no paid sick leave.<sup>40</sup> Thus, at a minimum, it is clear that these private sector employees do not have access to paid sick leave to cover short, FMLA-related absences from work. More research is needed to determine whether there are other paid leave options available to employees for short-term absences.

## 5. Attendance Policies

The current FMLA regulations prohibit employers from counting FMLA leave against an employee in determining eligibility for certain bonuses and awards, such as perfect attendance awards.<sup>41</sup> These regulations appropriately recognize that workers should not be penalized for exercising their FMLA rights. The RFI asks whether the FMLA has impacted the ability of

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<sup>35</sup> *Id.*

<sup>36</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* § 4.2.2, Table 4.4 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>.

<sup>37</sup> *Id.* §§ 2.2.1, 2.2.4, Tables 2.14, 2.17 (finding that 3.5 million workers needed family or medical leave but did not take it in the eighteen months prior to the 2000 Study).

<sup>38</sup> RFI, 71 Fed. Reg. at 69,509.

<sup>39</sup> National Partnership for Women & Families, *Get Well Soon: Americans Can't Afford to Be Sick* 1 (2004), <http://www.nationalpartnership.org/site/DocServer/GetWellSoonReport.pdf?docID=342>.

<sup>40</sup> Institute for Women's Policy Research, Pub. No. C349, *The Widening Gap: A New Book on the Struggle to Balance Work and Caregiving* 3, Figure 4 (2001) (citing JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 115 Figure 6.1 (2000)), <http://www.iwpr.org/pdf/heyman.pdf>.

<sup>41</sup> 29 C.F.R. §§ 825.215(c)(2), 825.220(c).

employers to use perfect attendance awards, and whether there are ways to preserve the effectiveness of such awards.<sup>42</sup>

We believe that the current regulations properly forbid employers from denying certain awards or bonuses to employees who take FMLA leave:

- Permitting employers to exclude employees who take FMLA leave from eligibility for certain awards would discourage employees from taking leave – precisely the opposite of what Congress intended in passing the FMLA. The FMLA does nothing to prohibit the use of attendance awards. Rather, it simply bars the employer from counting time spent on FMLA leave against an employee when making decisions about such awards. An employer certainly retains the option of issuing such awards, but an employee who satisfies the award requirements cannot be excluded from the award solely for taking FMLA leave.
- We also encourage employers, consistent with applicable collective bargaining agreements, to explore other types of awards to reward exemplary employee performance, such as awards for meeting certain production goals or performance objectives. These types of awards have the benefit of focusing on the quality of an employee’s job performance rather than attendance goals, and thus may be a more accurate measure of an employee’s skills and effectiveness.

## **6. Different Types of Leaves**

We strongly support the flexibility incorporated into the FMLA regulations, consistent with the FMLA statute, enabling employees to fashion leave requests that fit their individual circumstances. One key way that the FMLA helps employees balance their work and family responsibilities is that it allows employees to take leave under many different leave arrangements. An employee might require leave in small time increments to receive certain medical treatments, while another employee may need a large block of time for leave to recover from a serious illness. It is this flexibility that is integral to the FMLA’s effectiveness and overall success. Thus, we believe it is crucial to preserve the availability of different leave options so that all eligible employees can utilize family or medical leave in a way that is consistent with the law and meets the needs of themselves and their families.

The RFI poses a series of questions about different types of leave and leave administration issues. The bulk of the questions focus on employer and employee experiences managing different types of leave arrangements, and alleged problems associated with different types of leave. For many of the questions, more objective research is needed. We believe it is crucial for DOL to pursue such research, rather than rely on information gathered during an unscientific RFI process, before proposing changes to the regulations. There are also several questions we are not

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<sup>42</sup> RFI, 71 Fed. Reg. at 69,509.

in a position to answer because they are aimed at employers, and we do not have access to the relevant information.<sup>43</sup>

#### A. Scheduled v. Unscheduled Leave

The RFI asks about different problems associated with scheduled and unscheduled leave. While we do not have access to extensive data on this issue, the FMLA clearly contemplates that there will be situations where leave is scheduled, and unforeseeable situations where leave is unscheduled.<sup>44</sup> Not surprisingly, situations involving unscheduled leave may present unique challenges for both employees and employers, precisely because it is unexpected. But the law provides for the use of unscheduled leave because it is impossible to plan or script every situation where family or medical leave is needed. Emergencies and unforeseeable situations inevitably will arise. To limit the ability of employees to use FMLA leave in these “unscheduled” situations would be inconsistent with the very purpose of the FMLA. The regulations, however, do establish a two-day timeframe for employees to inform their employer about unscheduled leave to help ensure prompt notification of employers in these unforeseeable situations.<sup>45</sup> We believe that this framework provides an appropriate way to accommodate the unforeseeable nature of certain emergencies while also addressing the needs of employers.

#### B. Intermittent Leave

The RFI asks for comments on the comparative benefits and problems associated with intermittent leave versus leave taken for one continuous block of time. We strongly support the existing regulations that permit the use of intermittent leave.

- One clear intent of the FMLA was to enable workers to take leave to accommodate medical conditions or family situations that might require regular treatment or attention for a short duration of time. For example, after having their lymph nodes removed, cancer patients often suffer from lymph edema, a condition that can require a series of short sessions of physical therapy. The regulations were crafted specifically to enable workers to take leave in the small time increments already used by their employer.<sup>46</sup>
- Intermittent leave was designed to help employers by ensuring that workers are not absent any longer than necessary. While some employers now argue for half-day increments of intermittent leave, enforcing a four-hour leave requirement would mean forcing employees to miss more work than necessary, which is contrary to the statute and harmful to both employees and employers. The FMLA specifically states that “[t]he taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under [29 U.S.C. § 2612(a)] beyond the amount of leave actually taken.”<sup>47</sup> Being

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<sup>43</sup> See, e.g., *id.* (posing questions for employers – “Do employers track late arrivals and early departures for FMLA-covered conditions? Is there any evidence of employers closing or relocating facilities as a result of employees leave patterns?”).

<sup>44</sup> See 29 U.S.C. § 2612(b), (e).

<sup>45</sup> See 29 C.F.R. § 825.303(a).

<sup>46</sup> See Regulatory Preamble, 60 Fed. Reg. at 2202.

<sup>47</sup> 29 U.S.C. § 2612(b)(1); see also Regulatory Preamble, 60 Fed. Reg. at 2202.

forced to take more leave than necessary could deter some employees from taking the leave that they do need. Moreover, requiring employees to take more unpaid leave than needed has financial implications – it reduces their pay even further at a time when resources are likely needed the most.

- The 2000 Westat Study found that 81% of covered establishments reported that intermittent leave had no impact on business productivity, and 94% reported that intermittent leave had no impact on business profitability.<sup>48</sup>

### C. Differences in Occupations

The RFI asks for information on differences in leave usage by occupation, employee classification, or other factors. There is limited data available from which to draw definitive conclusions. It is clear, however, that the FMLA has been a critical source of support for workers across all occupations and industries.

### D. Employee Coverage During FMLA Leave

The RFI poses a series of questions about how employers cover the work of employees while they are on leave, and whether this coverage is affected by the length and timing of the leave.<sup>49</sup> We do not have access to the data needed to provide a comprehensive answer to this question. Based on the results of the 2000 Westat Study, 98% of employers have covered the work of employees on FMLA leave by assigning work temporarily to other employees.<sup>50</sup> An additional 41% of establishments also reported hiring a temporary replacement to assist in covering the work of leave-takers.<sup>51</sup> Approximately 15% responded that they have put work on hold until the employee returns from leave, and 9% have had the employee perform some work while on leave.<sup>52</sup> Of the establishments that reported more than one method used to cover the work of employees on FMLA leave, 74.5% cited assigning work temporarily to other workers as the most commonly used method.<sup>53</sup>

### E. Improper Denials of FMLA Leave and Misuse of FMLA Leave

The RFI asks for evidence regarding longstanding questions about employees misusing FMLA leave, and employers improperly denying requests for FMLA leave. While anecdotes are often offered in support of these claims, there is little objective data available to examine these questions more closely. Clearly, it is in the interest of both employers and employees to ensure that the law is implemented in a fair and accurate manner. Perceptions of FMLA abuse or efforts to evade or weaken FMLA protections only serve to create and exacerbate tensions in the

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<sup>48</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* § 6.2.3, Table A2-6.13 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>.

<sup>49</sup> RFI, 71 Fed. Reg. at 69,509.

<sup>50</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* § 6.1.2, Tables 6.3, A2-6.5 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

workplace. Thus, both employers and employees can benefit from taking steps to adhere to the law's requirements and curb FMLA mismanagement and misconduct.

The FMLA does permit employees to file complaints about alleged FMLA violations by employers.<sup>54</sup> The law also prohibits employers from retaliating against employees for requesting or taking leave.<sup>55</sup> With regard to employee misuse, there are provisions that allow employers to require medical certification and re-certification, or seek second opinions, to verify the need for leave.<sup>56</sup> We believe that more scientific research is needed to better understand and document the FMLA experiences of both employees and employers. Such research is essential before moving forward with any changes to the regulations.

## 7. Light Duty

The RFI asks whether the time spent by an employee in a "light duty" assignment should count against the employee's FMLA leave entitlement or right to reinstatement. The question posed by the RFI raises two distinct issues that have emerged in the context of light duty: (1) an employee's right to job restoration and (2) an employee's right to twelve weeks of FMLA leave, both of which are protected in separate sections of the FMLA statute.<sup>57</sup> "Light duty" assignments are jobs taken by employees in lieu of their ordinary jobs that typically have modified duties or responsibilities. Employees who are unable to work in their regular job because of a serious health condition (or a disability) might decide to accept a "light duty" assignment in the interim to earn income rather than take unpaid FMLA leave. The RFI references two unpublished district court opinions ruling that time spent in a light duty position should be counted towards an employee's FMLA leave entitlement.<sup>58</sup> These opinions directly contradict the conclusions of the Department of Labor described in a DOL Opinion Letter issued in March 1995.<sup>59</sup> We strongly believe that time spent by an employee working, even in a light duty position, should not be used to reduce that employee's FMLA leave – to do so would be contrary to the express language and purposes of the FMLA.

### A. Reinstatement Rights

We support the existing FMLA regulations regarding time spent in a light duty position and an employee's right to reinstatement to her/his prior position, and believe those regulations should

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<sup>54</sup> 29 U.S.C. § 2617(b)(1); 29 C.F.R. §§ 825.400(a)(1), 825.401.

<sup>55</sup> 29 U.S.C. § 2615(a)(2), (b); 29 C.F.R. § 825.220(a), (c), (e).

<sup>56</sup> 29 U.S.C. § 2613; 29 C.F.R. §§ 825.305, 825.307, 825.308; *see also* S. Rep. No. 103-3, at 25-26 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 27-28 (noting that 29 U.S.C. § 2613's provision for certification of a serious health condition "is designed as a check against employee abuse of leave under 102(a)(1)(C) and (D)").

<sup>57</sup> 29 U.S.C. § 2612(a)(1) (guaranteeing twelve weeks of leave); *id.* § 2614(a)(1) (guaranteeing a right to job restoration).

<sup>58</sup> *Artis v. Palos Cmty. Hosp.*, No. 02-C-8855, 2004 WL 2125414 (N.D. Ill. Sept. 22, 2004); *Roberts v. Owens-Illinois, Inc.*, No. 2:02-CV-207, 2004 WL 1087355 (S.D. Ind. May 14, 2004).

<sup>59</sup> Dep't of Labor Op. Ltr. FMLA-55 (Mar. 10, 1995) (explaining that "[i]f an employee on FMLA leave voluntarily accepts a light duty assignment, the final regulations have been amended at 29 CFR 825.220(d) to provide that such an employee retains rights under FMLA to job restoration to the *same or an equivalent* position held prior to the start of the leave for a cumulative period of up to 12 workweeks," but that "[t]he period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave").

remain undisturbed. Under the regulations, an employee taking FMLA leave has the right to be restored to her/his prior job for up to twelve weeks.<sup>60</sup> The regulations also state that time spent by an employee in a light duty position should be counted, along with their time taking FMLA leave, to determine when the twelve-week limit has been reached.<sup>61</sup> This formulation balances the interests of both employees and employers by preserving employees' reinstatement rights for twelve weeks, and ensuring that employers do not have to hold open positions for an unreasonable length of time.

### B. Right to FMLA Leave

We oppose any changes to the FMLA regulations governing "light duty" assignments that would reduce the amount of FMLA leave available to employees. The FMLA makes clear that the law grants eligible employees twelve weeks of family or medical leave in a twelve-month period.<sup>62</sup> Further, an employee's right to family or medical leave cannot be waived. Thus an employer cannot condition certain employment benefits or outcomes on an employee's willingness to give up FMLA leave.<sup>63</sup> While an employee could decide voluntarily to take a light duty position rather than take leave, it is important to recognize that light duty and leave are not interchangeable. Light duty constitutes work, albeit in a different job from an employee's regular position. In contrast, leave constitutes time off from work, and under the FMLA it is time off for specific family or medical reasons. Permitting time spent working, even in a light duty position, to reduce the amount of FMLA leave an employee can receive would be inconsistent with the express purposes of the FMLA.

## 8. Essential Functions

The FMLA regulations firmly establish that an employee who is unable to work at all or unable to perform any one of the essential functions of the employee's job is entitled to FMLA job-protected leave.<sup>64</sup> The regulations also make clear that, under such circumstances, an employee cannot be forced to accept a job that has been modified or restructured to accommodate the employee's condition. Trying to force an employee to work instead of taking leave is considered a violation of the employee's entitlement to leave as established by the FMLA.<sup>65</sup> The regulations do permit, however, an employee to decide voluntarily to accept a modified position in lieu of taking leave, if offered by an employer.<sup>66</sup>

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<sup>60</sup> 29 U.S.C. §§ 2612(a)(1), 2614(a)(1).

<sup>61</sup> 29 C.F.R. § 825.220(d); *see also* Dep't of Labor Op. Ltr. FMLA-55 (Mar. 10, 1995).

<sup>62</sup> 29 U.S.C. § 2612(a)(1); *see also* Dep't of Labor Op. Ltr. FMLA-55 (Mar. 10, 1995).

<sup>63</sup> 29 C.F.R. § 825.220(d).

<sup>64</sup> 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.115.

<sup>65</sup> Regulatory Preamble, 60 Fed. Reg. at 2196 (explaining that "[u]nder [the] statutory terms, if an employee qualifies under FMLA for job-protected leave, the employee may not be forced, before the employee's FMLA job-protected leave entitlement has expired, to return to work in a 'light duty' (i.e., an unequal, modified, or restructured) position, instead of continuing FMLA leave until the entitlement has been exhausted" because "[t]o do so would violate an employee's job-protected rights to be restored to the same or an equivalent position" and, in any event, "the circumstances in which an employer is permitted to place an employee in an alternative position are explicitly addressed in the Act [29 U.S.C. § 2612 (b)(2)]").

<sup>66</sup> 29 C.F.R. § 825.220(d); *see also* Regulatory Preamble, 60 Fed. Reg. at 2196.

The RFI asks about the implications of allowing an employer to modify an employee's existing job to address the limitations caused by the employee's serious health condition, while maintaining the employee's same job, pay, and benefits.<sup>67</sup> It is unclear exactly what issues the RFI is seeking to explore with this question. But, we offer the following observations on how we believe the regulations are intended to – and should – work:

- One bedrock principle of the FMLA is the right of an eligible employee to take a specified amount of leave for family or medical reasons and then return to the same or equivalent job. To the extent the RFI is considering a change in the regulations to *require* an employee to accept an employer's offer to make modifications to the employee's existing job to accommodate a serious health condition, we believe such a change would be inconsistent with the express language and intent of the FMLA. We also would oppose any effort to penalize an employee who declined to accept such a position, except as currently permitted by law. The law entitles eligible employees to take up to twelve weeks of family or medical leave, and nothing in the statute, regulations, or legislative history suggests that an employee should lose the right to determine whether or not to take leave if an employer modifies the employee's job duties.
- The FMLA regulations do not prohibit an employer from offering to modify an employee's existing job to address that employee's serious health condition. But the employee is not required to accept that offer, nor can the employer condition special job benefits on the employee's willingness to accept the offer. An eligible employee can choose, instead, to utilize FMLA leave for up to twelve weeks and then return to the same or equivalent job without penalty.
- If the employee's serious health condition also constitutes a disability as defined by the Americans with Disabilities Act ("ADA"),<sup>68</sup> then the employer is required *under the ADA* to provide that employee a reasonable accommodation.<sup>69</sup> Such an accommodation might include providing certain equipment or making facilities accessible or other reasonable adjustments on the job to assist the employee with successfully performing the job at issue. But the concept of a reasonable accommodation under the ADA is wholly distinct from the protections conferred by the FMLA. The purpose of a reasonable accommodation for qualified individuals with a disability is to help ensure that workers with disabilities have an opportunity to become full and equal participants in the workforce. The purpose of the FMLA is to enable eligible workers to take temporary family or medical leave without fear of losing a job.

## 9. Waiver of Rights

The FMLA prohibits both employees from waiving their FMLA rights, and employers from requiring a waiver of FMLA rights.<sup>70</sup> Specifically, § 825.220(d) of the FMLA regulations states

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<sup>67</sup> RFI, 71 Fed. Reg. at 69,509.

<sup>68</sup> 42 U.S.C. § 12111(8) (2006).

<sup>69</sup> *Id.* § 12112(b)(5).

<sup>70</sup> 29 C.F.R. § 825.220(d);

that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” One court has concluded that this regulation bars *both* prospective waivers and retrospective waivers (i.e., settlements) and held that this regulation was reasonable.<sup>71</sup> But DOL has questioned this interpretation and, in the RFI, seeks comments on “whether a limitation should be placed on the ability of employees to settle their past FMLA claims.”<sup>72</sup> We strongly believe it is crucial to preserve the ability of employees to fully vindicate their FMLA rights. The RFI process, in our view, does not provide the best structure for analyzing the different legal issues raised by the FMLA’s waiver provision, regulations, and recent case law. Instead, we suggest that this issue is best suited for a separate discussion with all stakeholders to explore ways to appropriately resolve complaints and ensure that employees retain their FMLA rights.

## 10. Communication Between Employers and Employees

The RFI poses several questions focusing on communications between employers and employees.

### A. Employee Awareness of FMLA Rights

We remain concerned about the high percentage of employees who are not familiar with the FMLA and the protections the law provides. According to the 2000 Westat Study, at least 62% of employees at FMLA-covered employers reported either that the FMLA did not apply to them or that they did not know if the FMLA applied to them.<sup>73</sup> The study also found that 16% of employers covered by the FMLA did not know they were covered, or mistakenly reported that they were not covered.<sup>74</sup> A different study found that more than half of employers – 56% – did not notify employees as they became eligible for FMLA leave.<sup>75</sup> We believe it is essential for DOL to undertake renewed efforts to educate employees about their FMLA rights and employers about their FMLA obligations. Such efforts could include:

- a public education campaign about the FMLA and its protections aimed at both employees and employers,
- development of up-to-date, user-friendly materials about FMLA rights that can be posted and widely disseminated,
- use of on-line tools, such as webinars, on-line quizzes, or an e-mail campaign, to provide interactive opportunities to learn about the FMLA, and
- outreach to a variety of stakeholders to disseminate educational materials about the FMLA.

### B. Methods Used to Notify Employees About How Leave is Designated

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<sup>71</sup> *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 369 (4th Cir. 2005), *en banc reh’g granted*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006).

<sup>72</sup> RFI, 71 Fed. Reg. at 69,509-10.

<sup>73</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* § 3.4.1, Figure 3.2 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>.

<sup>74</sup> *Id.* § 3.4.2, Figure 3.3.

<sup>75</sup> WorldatWork, *FMLA Perspectives and Practices* 11 (2005).

The RFI includes a question that asks about the methods used by employers to notify their employees about their FMLA rights. Unfortunately, we do not have access to the employer information that could provide an answer this question. The fact that many employees are unaware of the FMLA, however, suggests that much more work is needed to ensure that employees get accurate, timely information about their leave options, how their leave is being designated, and their FMLA rights. We urge DOL to undertake research to determine the frequency and types of problems employees face when they seek information about the FMLA from their employers, and evaluate how well employers are doing in providing FMLA information to their employees.

### C. Changes to Conform to *Ragsdale*

The RFI requests recommendations on what regulatory changes are needed to respond to the Supreme Court's decision in *Ragsdale v. Wolverine World Wide*.<sup>76</sup> In *Ragsdale*, the Supreme Court declared invalid an existing FMLA regulation that prohibited employers from counting an employee's leave as FMLA leave if the employer failed initially to designate the leave as FMLA-qualifying and notify the employee of the designation. In reaching its decision, the Court discussed two issues: (1) the threshold requirement that employers *designate* leave as FMLA-qualifying, and give *notice* of the designation to the employee,<sup>77</sup> and (2) the proper enforcement mechanism for employer violations of the requirement to designate and give notice about leave. With regard to the requirement to designate and give notice of leave to an employee, the Court left the requirement intact without change.<sup>78</sup> But the Court struck down the enforcement mechanism incorporated into the regulations, arguing that it operated as a categorical penalty against employers. The Court in *Ragsdale* did not prohibit DOL from imposing *any* penalties on employers for failing to properly designate and notify employees about leave. Rather, the Court invalidated the specific penalty in the existing regulation because it, according to the Court, was imposed in an automatic fashion.

Keeping in mind both the Court's direction in *Ragsdale* and the overall purposes of the FMLA's designation and notice requirement, we believe any changes to the regulations in response to *Ragsdale* should do the following:

- Emphasize that the Court did not alter the obligation of employers to both designate leave promptly and notify employees of how that leave has been designated. Thus, employers must continue to adhere to these designation and notice requirements or risk penalties.
- Reaffirm and modify current recordkeeping requirements that require employers to keep accurate and complete records of how leave has been designated, and when the employee was notified of the designation.

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<sup>76</sup> 535 U.S. 81 (2002).

<sup>77</sup> 29 CFR §§ 825.208(a), 825.301(b)(1).

<sup>78</sup> In its opinion, the Court explicitly declined to address this designation/notice provision and instead "assum[ed] that [it was] . . . valid." *Ragsdale*, 535 U.S. at 88. The Court later repeats this point, stating that it was "not "decid[ing] whether the notice and designation requirements [we]re themselves valid. . . ." *Id.* at 96.

- Prohibit employers from making any retroactive changes to how leave has been designated without notification and consultation with the employee, and require maintenance of records documenting such notification and consultation.
- Establish new penalties for employer non-compliance that are not automatic, but can be imposed following a complaint by the affected employee and an independent determination of the harm caused by the employer's violation.

#### D. Failure to Notify about Unforeseeable Leave

The RFI includes a question that asks for information about the prevalence and causes of employees failing to notify employers promptly about unforeseeable FMLA leave.<sup>79</sup> We believe more objective research is needed to examine not only how quickly employees notify their employers, but also the reasons for unforeseeable leave and the frequency with which it occurs. By definition, unforeseeable leave is unplanned and unanticipated. Thus, it is clear that short notice to employers about such leave is likely to be the rule rather than the exception. When unforeseeable situations occur, the regulations establish a two-day window for employees to inform their employer promptly about the need for leave.<sup>80</sup> Clearly, employees should notify their employers about their need for leave as quickly as is reasonably possible, but it also is important to ensure that employees are not penalized unfairly when confronted with unexpected emergencies. We believe the regulations strike an appropriate balance to allow employees to take leave in emergency situations, and also to provide employers with information about the need for leave in a prompt manner.

## 11. Medical Certification

We oppose any changes to the regulations regarding leave determinations and medical certifications that would impose additional unnecessary obstacles for workers seeking FMLA leave. The existing regulations appropriately balance a worker's interest in a manageable certification process that does not impose unreasonable burdens, with the employer's interest in the accurate certification of medical conditions. Additionally, the regulations recognize that employers' judgment regarding the health condition of an employee or an employee's family member should not be substituted for the professional medical opinion of that individual's health care provider. We oppose any changes to the certification requirements that would impose additional, unnecessary burdens on workers who need to take FMLA leave. We also oppose any regulatory changes that would allow employers to contact directly the health care providers of employees or their families, which would violate unnecessarily workers' and their families' rights to keep medical information confidential.

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<sup>79</sup> RFI, 71 Fed. Reg. at 69,510. The introduction to the question posed in the RFI specifically mentions concerns about the use of unforeseeable FMLA leave. Although the actual question that follows does not include a specific reference to unforeseeable leave, we assume that the question is intended to focus on unforeseeable leave.

<sup>80</sup> 29 C.F.R. § 825.303(a).

A. Limitation on Contact with the Employee's or Family Member's Health Care Provider.

Current FMLA regulations allow an employer to contact the health care provider of the employee or the employee's family member to clarify or authenticate a medical certification only through the employer's health care provider.<sup>81</sup> The RFI asks whether this limitation on the employer's contact with the health care provider imposes unwarranted expenses on employers – for example, by requiring them to hire a health care professional for purposes of this contact – or excessive delay in the certification process.<sup>82</sup> The RFI seeks comments regarding the costs and benefits of this limitation.<sup>83</sup> The RFI also asks how the FMLA should be reconciled with the ADA, which regulates medical inquiries regarding the exercise of rights under the ADA and does not limit employer contact with the employee's health care provider.<sup>84</sup>

We believe that the current regulations properly balance the needs of employers in ensuring the authenticity of medical conditions and the needs of employees and their families in protecting the privacy of their medical information, and thus should not be altered:

- DOL has already considered comments regarding concerns about an employer's ability to obtain medical information from a health care provider. The interim FMLA regulations entirely prohibited an employer from contacting the health care provider of the employee or the employee's family member.<sup>85</sup> In response to a number of comments, DOL recognized that this total ban on contact between an employer's health care provider and the health care provider of the employee or the employee's family member would not be in the best interests of employers or employees because allowing an employer's health care provider to ask a few clarifying questions of the employee's or the family member's health care provider could avoid the need for a second or third medical opinion.<sup>86</sup> On this basis, DOL amended the regulations to allow an employer's health care provider to contact an employee's or a family member's health care provider to clarify or authenticate the information in the medical certification.<sup>87</sup> In arriving at this compromise position, DOL limited this contact to an employer's health care provider to protect the privacy interests of employees and their families and ensure that their medical information was only being shared between medical professionals.<sup>88</sup>

These privacy considerations continue to favor retaining the current limitation on an employer's contact with the health care provider of the employee or the employee's family member. The costs that this limitation might impose on an employer are not unwarranted given the determination that only a health care provider would both practically and ethically be in the position to ask clarifying questions of an employee's or a family member's health care provider. According to the 2000 Westat Study, over half (57%) of covered establishments experienced no increase in administrative costs due to

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<sup>81</sup> See 29 C.F.R. § 825.307.

<sup>82</sup> RFI, 71 Fed. Reg. 69,510.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Regulatory Preamble, 60 Fed. Reg. at 2224.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

the FMLA.<sup>89</sup> The benefits of protecting employees' and their families' privacy regarding sensitive medical information far outweigh any minimal cost or delay resulting from requiring an employer to contact the employee's or family member's health care provider with its own health care provider.

- The rules governing medical information under both the ADA and the FMLA recognize the great importance of the privacy of medical information. The statutes merely choose slightly different avenues to protect this interest, ultimately achieving the same result. While the FMLA restricts an employer's contact with an employee's or family member's health care provider,<sup>90</sup> the ADA imposes confidentiality and use restrictions on medical exams, which, in any event, are only permitted when they are "job-related and consistent with business necessity."<sup>91</sup> The ADA requires that information from medical exams be available to others only in extremely limited circumstances.<sup>92</sup> Under the ADA, supervisors and managers can learn of work restrictions and necessary accommodations, but are not allowed access to the medical files themselves.<sup>93</sup> Both statutes acknowledge the significance of employees' privacy in their medical information and simply opt for different restrictions on access to medical information to safeguard employees' privacy. The privacy concerns regarding employers' access to medical information are heightened in the context of the FMLA because the FMLA governs employers' access not only to the medical information of employees, but also to the medical information of employees' family members. This provides justification for additional caution in ensuring the privacy of medical information under the FMLA.

#### B. Timeframe to Respond to an FMLA Leave Request.

The FMLA regulations require an employer to inform an employee that her request for FMLA leave has been approved or denied within two days of when the request was made.<sup>94</sup> The RFI requests views on whether this two-day timeframe is sufficient for employers to review the relevant information and make a determination.<sup>95</sup>

The data on the amount of time necessary for employers to respond to FMLA leave requests evidences that two days is sufficient to allow employers to review and respond to employees' leave requests. Most organizations spend only between thirty and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion.<sup>96</sup> Therefore, no change to the current two-day response requirement is warranted.

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<sup>89</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* Table § 6.2.4, Table A2-6.14 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>.

<sup>90</sup> 29 C.F.R. § 825.307.

<sup>91</sup> 42 U.S.C. § 12112(d)(4)(A).

<sup>92</sup> *Id.* § 12112(d)(3)(b).

<sup>93</sup> *Id.*

<sup>94</sup> 29 C.F.R. § 825.301(c).

<sup>95</sup> RFI, 71 Fed. Reg. at 69,510.

<sup>96</sup> WorldatWork, *FMLA Perspectives and Practices* 2, 6-7 (2005).

### C. Frequency of Medical Recertifications.

Under the current FMLA regulations, an employer may typically request a medical recertification no more frequently than every thirty days and may only request a recertification in connection with the absence of an employee.<sup>97</sup> The employer may be permitted to request a recertification more frequently when an employee requests an extension of leave, when there have been significant changes in the circumstances described by the previous certification, and when the employer receives information that casts doubt on the employee's stated reason for leave.<sup>98</sup> The RFI asks whether thirty days is an appropriate general timeframe for allowing medical recertifications.<sup>99</sup>

In arriving at the general thirty-day minimum for requiring medical certifications, DOL considered comments suggesting minimum periods of recertification from fifteen days to one year and determined that thirty days was a reasonable minimum period for recertification.<sup>100</sup> There is no reason that the initial balance struck by the regulation should be altered. Allowing more frequent recertifications would be unduly burdensome on employees who are exercising their right to leave under the FMLA. DOL carved out exceptions to the thirty-day minimum when there are changed circumstances and when the employer acquires information that undermines the employee's stated reason for leave. These exceptions are sufficient to protect employers from potential employee abuse.

### D. Second Opinions for Recertifications.

The FMLA regulations currently allow employers to request a second medical opinion only for the initial certification.<sup>101</sup> The RFI seeks input on the costs and benefits of allowing employers to request second opinions for recertifications, and specifically asks whether this change in the rules on recertifications would impose any hardships.<sup>102</sup>

The regulations do not allow employers to request second opinions for medical recertifications because the statute itself only provides for second opinions in the context of initial certifications.<sup>103</sup> In addition to the express statutory limitation of second opinions to initial certifications, allowing employers to request second opinions on recertifications would unfairly

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<sup>97</sup> See 29 C.F.R. § 825.308. Under certain circumstances, the employer is required to wait *more* than thirty days to request a medical recertification from an employee. *Id.* § 825.308(b).

<sup>98</sup> *Id.*

<sup>99</sup> RFI, 71 Fed. Reg. at 69,510.

<sup>100</sup> Regulatory Preamble, 60 Fed. Reg. at 2225. In fact, DOL also determined that allowing an employer to request a medical recertification every thirty days would be unreasonable under certain circumstances. *Id.*; 29 C.F.R. § 825.308(b).

<sup>101</sup> See *id.* § 825.308(e).

<sup>102</sup> RFI, 71 Fed. Reg. at 69,510.

<sup>103</sup> See 29 U.S.C. § 2613(c) (stating that “[i]n any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1) [29 U.S.C. § 2612(a)(1)(C) or (D)], the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave” (emphasis added)); *id.* § 2613(e) (allowing recertifications on a “reasonable basis”); Regulatory Preamble, 60 Fed. Reg. at 2225 (explaining that “[b]ecause the statute does not provide for second or third opinions for recertifications, no such opinions may be required”).

burden employees for taking leave to which they are entitled. Imposing this unnecessary burden on employees during a time of great need constitutes a hardship unjustified by the statute.

#### E. Fitness for Duty Statements.

The current FMLA regulations do not permit an employer to request a fitness for duty statement from workers who take leave intermittently.<sup>104</sup> The RFI requests comments on the benefits and burdens of allowing employers to request fitness for duty certifications from workers who are absent intermittently.<sup>105</sup>

There is no reason to disturb the current rule barring employers from requesting fitness for duty statements from workers who take intermittent leave. Any benefit to the employer of obtaining fitness for duty statements from intermittent leave-takers is far outstripped by the unwarranted burden that such a change in the regulations would impose on employees. Intermittent leave was designed to accommodate employer interests by allowing employers staffing flexibility and by keeping the employer from being “directly involved in an employee’s rehabilitation.”<sup>106</sup> The intermittent leave option helps to take some of the financial strain off employees by enabling them to continue earning a paycheck while addressing serious health or family needs,<sup>107</sup> and allows employees to preserve as much of the twelve weeks of leave as possible.<sup>108</sup> The regulation disallowing employers from requesting fitness for duty statements from intermittent leave-takers promotes these important interests and avoids discouraging employees from taking intermittent leave due to overly burdensome administrative requirements.

## 12. Employee Turnover and Retention

By enabling workers to take up to twelve weeks of family or medical leave without fear of losing their job, the FMLA helps ensure that workers can meet their family responsibilities without putting their employment future and financial security at risk. The law promotes greater workforce continuity and stability by helping employees retain their jobs when an emergency strikes. We believe the FMLA is essential to achieving greater employee retention and reducing employee turnover. Thus it is crucial to preserve the FMLA’s protections in their entirety.

#### A. Effects on Employee Morale.

The RFI asks how the availability of FMLA leave affects employee morale and productivity.<sup>109</sup> We believe there is valuable and persuasive evidence of the FMLA’s positive effects. The 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or

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<sup>104</sup> See 29 C.F.R. § 310(g).

<sup>105</sup> RFI, 71 Fed. Reg. at 69,510.

<sup>106</sup> *Hatchett v. Philander Smith College*, 251 F.3d 670, 676-77 (8th Cir. 2001).

<sup>107</sup> 29 U.S.C. § 2601(b)(1) (2006); S. Rep. No. 103-3, at 5, 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7, 9.

<sup>108</sup> 29 U.S.C. § 2612(b)(1); Regulatory Preamble, 60 Fed. Reg. at 2202.

<sup>109</sup> RFI, 71 Fed. Reg. at 69,510.

neutral effect on employee morale.<sup>110</sup> The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive.<sup>111</sup>

### B. Impact on Employee Retention

The RFI also inquires about evidence that FMLA leave increases employee retention and reduces employee turnover. An overwhelming percentage of employees taking FMLA leave – 98% – return to work after taking leave.<sup>112</sup> Research on new mothers found that the FMLA increased the likelihood that new mothers would return to their employer after the birth of their child.<sup>113</sup> Of the employers who experienced cost savings due to the FMLA, more than three-quarters attributed their savings to decreased turnover.<sup>114</sup> Additionally, 84% of covered employers reported that the FMLA had no effect or a positive effect on business productivity, and nearly as many (83%) reported that the FMLA had no effect or a positive effect on employee productivity.<sup>115</sup> We believe these findings provide compelling evidence of the FMLA’s important role in helping employers retain employees and maintain a stable workforce.

These findings are particularly important in light of the expense associated with employee turnover. When employees leave a job, employers accrue turnover-related costs. These costs include, but are not limited to: costs of advertising for replacement workers, as well as interviewing, orientation, training, and processing; and costs associated with losing employees’ knowledge of both the firm and its customers, as well as costs of decreased morale and efficiency.<sup>116</sup> According to the Employment Policy Foundation, the average cost of employee turnover in the private sector is 25% of an employee’s total compensation.<sup>117</sup>

## Conclusion

For millions of workers, the FMLA has been an unprecedented success. The law has been instrumental in enabling workers across the country, in every occupation and industry, to take leave to care for family members or themselves without putting their jobs or their family stability

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<sup>110</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* Table § 6.2.3, Table 6.5 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>. Of these employers, 24% reported a positive effect on morale, and 65% reported no noticeable effect on morale. *Id.*

<sup>111</sup> *Id.* § 4.7, Table 4.23.

<sup>112</sup> *Id.* § 3.5.3, Table 3.9.

<sup>113</sup> Sandra L. Hofferth & Sally C. Curtin, *Parental Leave Statutes and Maternal Return to Work After Childbirth in the United States*, 33 WORK AND OCCUPATIONS No. 1, 73 (2006); Sandra L. Hofferth and Sally C. Curtin, OECD Social, Employment and Migration Working Papers No. 7, *The Impact of Parental Leave on Maternal Return to Work After Childbirth in the United States* (2003), <http://www.oecd.org/dataoecd/26/45/2955849.pdf>.

<sup>114</sup> Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* § 6.2.4, Table A2-6.19 (2001), <http://www.dol.gov/esa/whd/fmla/fmla/toc.htm>.

<sup>115</sup> *Id.* § 6.2.3, Table 6.5.

<sup>116</sup> Randy Albelda & Alan Clayton-Matthews, *The Future of Work Paper No. 2, Sharing the Costs, Reaping the Benefits: Paid Family and Medical Leave in Massachusetts* 5 (2006), <http://www.cpcs.umb.edu/lrc/documents/LRCreport5-06Final.pdf>.

<sup>117</sup> Employment Policy Foundation, *Turnover Costs* 1 (2004), <http://www.super-solutions.com/pdfs/EmployeeTurnoverExpensive2004.pdf>.

at risk. It is crucial to preserve these gains. Strong FMLA enforcement, support for existing FMLA regulations, and comprehensive FMLA research must be key priorities for DOL. We urge DOL to use this RFI process to affirm its unwavering commitment to uphold and enforce the FMLA with vigor, consistency, and persistence. We strongly oppose efforts to rollback or undo the FMLA's hard-won protections, and urge DOL to reject such recommendations. Thank you for the opportunity to comment on the RFI and the important role of the FMLA.

National Partnership for Women & Families

9to5 Bay Area

9to5 Colorado

9to5 Poverty Network Initiative (PNI) - Wisconsin

9to5, National Association of Working Women

ACORN

All Families Deserve a Chance (AFDC) Coalition - Colorado

American Association of People with Disabilities

American Association of University Professors

American Diabetes Association

American Federation of Labor and Congress of Industrial Organizations

American Federation of State, County and Municipal Employees (AFSCME)

American Friends Service Committee - Colorado

American Postal Worker's Union

Atlanta 9to5

Atlanta Women's Foundation

Atlanta/North GA Central Labor Council

Business and Professional Women USA

California Employment Lawyers Association

Center for Law and Social Policy

Change to Win

Coalition of Labor Union Women

Coalition on Human Needs

College and University Work/Family Association (CUWFA)

Colorado ACORN

Colorado AFL-CIO

Colorado Coalition for the Homeless

Colorado Fiscal Policy Institute

Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)

Colorado Progressive Action

Colorado Progressive Coalition

Colorado Women's Agenda

Communications Workers of America, AFL-CIO

DC Employment Justice Center

Denver Area Labor Federation

Denver Women's Commission

Equal Rights Advocates

Families USA

Family Voices-NJ

Front Range Economic Strategy Center - Colorado  
Georgia ACORN  
Georgia Stand Up  
Human Rights Campaign  
International Brotherhood of Teamsters  
International Gender Organization  
Iowa Commission on the Status of Women  
Laborers' International Union of North America  
Labor Project for Working Families  
Latina Initiative - Colorado  
League of Women Voters of Colorado  
Legal Momentum, Advancing Women's Rights  
Los Angeles 9to5  
Maine Women's Lobby  
Massachusetts Paid Family Leave Coalition  
NARAL Pro-Choice America  
National Association of Mothers' Centers (NAMC), and its MOTHERS Initiative  
National Coalition for Cancer Survivorship  
National Education Association  
National Employment Law Project  
National Employment Lawyers Association  
National Family Caregivers Association  
National Organization for Women  
National Women's Law Center  
NJ Statewide Parent to Parent  
Older Women's League  
Padres Unidos - Colorado  
Parents Educating Parents, Inc. (Douglasville, GA)  
ParentsWork  
PathWaysPA  
Project Wise – Colorado  
Public Justice Center, Baltimore, MD  
Service Employees International Union (SEIU)  
Statewide Parent Advocacy Network of NJ  
The Arc of the United States  
The Georgia Job/Family Collaborative  
The Legal Aid Society-Employment Law Center in San Francisco  
Transportations Communications International Union  
United Automobile Workers (UAW)  
United Cerebral Palsy  
United Food and Commercial Workers International Union  
University of Minnesota Humphrey Institute Center on Women and Policy  
USW International Union  
White House Project - Colorado  
Wider Opportunities for Women  
Women Employed

Women Work! The National Network for Women's Employment  
Women's Lobby of Colorado  
Women's Law Project  
Women's Policy Group (Georgia)  
Women's Research & Education Institute (WREI)  
WOMEN'S WAY