

**The National Coalition to Protect Family Leave
Statement for the Record**

**Children and Families Subcommittee
Senate Health, Education, Labor and Pensions Committee
*Writing the Next Chapter of the Family and Medical Leave Act –
Building on a Fifteen Year History of Support for Workers*
Wednesday, February 13, 2008**

The National Coalition to Protect Family Leave (“Coalition” or “NCPFL”) is a broad-based, non-partisan group of organizations, companies and associations dedicated to protecting the integrity of the Family and Medical Leave Act (“FMLA” or “the Act”). The Coalition supports both the spirit and intent of the FMLA and commends the Subcommittee for holding this hearing commemorating the 15th anniversary of this important statute. The Coalition appreciates the opportunity to submit this statement for the record.

Since its enactment in 1993, the FMLA has guaranteed invaluable work and family flexibility for millions of Americans. Members of the Coalition recognize the challenges employees face in balancing work and family demands and their desire to feel secure in their jobs, particularly in the event they need to be absent for family or medical issues. We also understand the concerns of employers when administering certain portions of the FMLA on a daily basis. The Coalition believes that Congress intended the Act to strike a balance between the needs of employees for leave for family and serious medical reasons, and the interests of employers to know when employees will be at their job. This hearing provides an ideal opportunity to examine the FMLA 15 years later to determine whether the law continues to meet the needs of both employees and employers.

I. FMLA Challenges

The Coalition recognizes the significant contributions the FMLA has made to the American workplace and the millions of Americans who have benefited from this historic piece of legislation. The family leave provisions of the FMLA have been particularly successful, and employers have encountered very few challenges implementing the leave provisions as they apply to the birth or adoption of a child or the extended care of a sick parent or child. Further, the medical provisions of the FMLA generally work well in cases of planned surgery and long-term scheduled medical events as well as scheduled intermittent leave for recurring conditions. The common factor in each of the above mentioned examples is that in each instance, the need for leave was either foreseeable or scheduled in advance. While the Coalition realizes that not every need for leave is foreseeable or predictable, the ability of an employer to know ahead of time that an employee will be absent from work and to be able to plan for the employee’s absence, is crucial to the successful administration for the FMLA.

Notwithstanding the FMLA's successes, employers have experienced challenges with the Act, in particular the use of intermittent leave for chronic conditions. While Congress wisely foresaw the need for intermittent leave by employees to receive physical therapy, dialysis, or chemotherapy treatments when it passed the FMLA, the workplace impact of unscheduled, sporadic, leave in small increments of time was not fully appreciated. As a result, the day-to-day administration of the Act has confused both employers and employees alike resulting in employers not being sure what leave they should grant, employees taking leave that is not consistent with the intent of Congress, and ultimately extensive litigation to resolve these disagreements.

Employers have also struggled with the definition of what constitutes a serious health condition as well as with the implications of unscheduled intermittent leave. The intermittent leave regulations, coupled with the vague, and seemingly open ended, serious health conditions regulations, allow employees to characterize chronic, non-serious health conditions as FMLA leave.

In 2007, the Coalition released a survey conducted by the Society for Human Resource Management (SHRM) that found more than half (51%) of human resource (HR) professionals have faced "significant challenges" in implementing the medical leave provisions of the FMLA. In addition, nearly two-thirds of HR professionals have experienced problems in determining when to grant "chronic leave" under the Act, leading to employee morale issues for those employees who have to cover for an employee on leave, and loss of productivity.¹ The challenges of chronic leave threaten the integrity of this important law for those employees who truly have serious health conditions. For these reasons, the Coalition has actively supported public policies and regulatory changes that will strengthen the FMLA to ensure its availability to those employees Congress intended to cover.

Much of the confusion surrounding the medical portion of the FMLA has been the inconsistent U.S. Department of Labor ("DOL" or "the Department") opinion letters and Federal court decisions that have undermined the original intent of the Act. Consequently, the Coalition has repeatedly urged DOL and Congress to strengthen the FMLA regulations by clarifying the medical leave interpretations and other FMLA administrative complexities which are causing problems in the workplace.

II. DOL's Proposed FMLA Regulation

On February 11, 2008, the DOL published its long-awaited proposed rules to address many of the sections of the FMLA that are confusing for both employees and employers. As the Coalition continues to review the details of this proposed rule, it is clear that the DOL's suggested modifications are modest in scope, well supported by an extensive record, and will protect the benefits afforded to employees under the Act while improving FMLA administration in the workplace. In no way will the proposed changes jeopardize, or undermine the ability of an employee to take the leave intended by Congress when it passed the FMLA in 1993.

The Department's proposal is the result of a lengthy and comprehensive review of the FMLA regulations that included numerous stakeholder meetings, more than 15,000 public comments from employers, employees, and health care providers, numerous congressional hearings, and much litigation. Unfortunately, the proposed rule does not appear to adequately

¹ Society for Human Resource Management, SHRM Survey Brief: FMLA (2007)

address the challenges employers have experienced in determining the definition of a serious health condition under the current regulations – which will mean that this issue will require attention at a future date. Despite this omission, the Coalition believes the DOL’s proposal represents a good first step – and we support this reasonable approach for the following reasons:

- First, the Coalition supports the DOL’s proposed changes to the medical certification process so that “vague, ambiguous and non-responsive” answers may be clarified. As this process is the foundation of the medical leave determination, it is imperative that as much information as possible, consistent with requirements for maintaining privacy, be collected. The more an employer understands about an employee’s condition, the better they can accommodate that employee’s needs. Providing a medical provider with a list of necessary job functions and asking him or her to certify the employee is fit for duty will ensure the health and safety of the employee as well as his or her colleagues. In addition, granting an employer the ability to ask clarifying questions of the health care provider consistent with the Health Insurance Portability and Accountability Act, the Americans with Disabilities Act and other Federal statutes, will ensure prompter FMLA leave request reviews and decrease costs for both employers and employees. We also join with many health care providers and associations of health care providers who have expressed concerns about the current WH-380 medical certification form and commend the Department for proposing a new form that will be easier for health care providers to use and will likewise assist employers in making proper determinations about the granting of FMLA leave.
- Second, the proposed rule provides a practical approach to requirements for the employee to provide notice of when they will be using FMLA leave and ends the ability of an employee to report his or her failure to show up for work for up to two days with no notice as FMLA leave (absent a severe emergency situation). By requiring a qualified employee to make a “reasonable effort” to contact his or her employer before an assigned shift, employers can more adequately staff and operate their businesses. Additionally, the Coalition believes that this proposed change will alleviate much of the workplace friction by providing employees and employers alike with clearer guidance as to how and when unscheduled intermittent leave may be requested. This provision will also benefit those employees who are at the job and would otherwise have had to cover for an employee who was taking leave that would not have been scheduled, or may not be appropriate.
- Finally, the NCPFL believes the proposed rule could have done more to address the issue of defining serious health conditions by clarifying the “objective test” of more than three days incapacity plus treatment and by increasing the minimum increment of intermittent leave allowed to half or full days. Either or both of these changes would likely have reduced the use of medical leave that is inconsistent with the act, and would have helped employers determine whether an FMLA leave request is legitimate. Increasing the increments of intermittent leave would have reduced the time spent calculating FMLA time used and accrued, and also served as a disincentive to employees using intermittent leave to cover for tardiness.

These concerns do not override our strong support for these proposed changes. The NCPFL hopes that Congress will allow DOL to proceed with the regulatory changes to the FMLA which will restore the balance Congress intended between employers’ needs for a productive workforce and workers’ needs for time to attend to important family and medical issues.

III. FMLA Expansion

As mentioned earlier, the NCPFL supports both the spirit and intent of the Family and Medical Leave Act and recognizes the many Americans who have benefited from this important law. In order to preserve the integrity of the law's leave protections for family and medical reasons, the medical leave provisions of the Act and the corresponding regulations must be clarified to ensure that the Act benefits those employees who need it most. While we understand that some members of Congress are interested in providing additional work flexibility to employees and their families, or providing these benefits to more employees and their families, the Coalition believes that the FMLA regulations need to be improved before expansion of the Act or other leave mandates are considered. Expanding a law that is not working properly will only exacerbate the problems currently experienced by both employers and employees. Similarly, we are opposed to amending the FMLA to make leave paid. We believe this will create a strong incentive for employees to look for opportunities to take leave that is not consistent with the balance of interests established in the Act.

IV. Conclusion

Regulatory changes to the Family and Medical Leave Act proposed by the Department of Labor will strengthen a law that is critically important to employees and their families. At the same time, more work needs to be done to clarify other areas of the FMLA's implementing regulations. The Coalition appreciates the spotlight Congress has placed on this important policy that has benefitted so many. We look forward to working with you, and members of this Committee, to ensure the needs of our ever-changing workforce and their employers are met by the FMLA.