



TESTIMONY OF

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MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

ON BEHALF OF

THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

AND

THE FMLA TECHNICAL CORRECTIONS COALITION

ON

REGULATORY REFORM AND PAPERWORK INFLATION

BEFORE

THE GOVERNMENT REFORM COMMITTEE

**SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY
AFFAIRS**

U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman and Members of the Subcommittee:

Good morning. I am Nancy McKeague, Senior Vice President of the Michigan Health and Hospital Association (MHA). Located in Lansing, Michigan, the MHA represents Michigan's nonprofit community hospitals and health systems in the legislative and regulatory process. Our mission is to advocate for Michigan's hospitals and the patients they serve. I am also here today representing the Society for Human Resource Management (SHRM), and the SHRM-founded Family and Medical Leave Act (FMLA) Technical Corrections Coalition. SHRM and the Coalition commend the members of the Subcommittee for their interest in the important issues of regulatory reform and paperwork inflation.

The membership of MHA includes all 145 nonprofit acute care community hospitals in Michigan, along with 18 health systems and affiliated clinics, nursing homes and other facilities. Michigan is the last state in the nation where all of the acute care hospitals are nonprofit, a heritage of which we are most proud. In fiscal year 2002 our hospitals provided nearly \$994 million in uncompensated health care, and more than \$220 million in reduced-fee or free programs and services. In addition to the nearly 200,000 people we employ directly, we are privileged to have 37,000 hospital volunteers. More information about the MHA can be found at www.mha.org.

SHRM is the world's largest association devoted to human resource management. Representing more than 190,000 individual members, the Society serves the needs of HR professionals by providing the most essential and comprehensive set of resources available. As an influential voice, SHRM is committed to advancing the human resource profession to ensure that HR is an essential and effective partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 120 countries. Visit SHRM Online at www.shrm.org.

The FMLA recordkeeping and notification requirements have historically been of great concern to SHRM members, since they are charged with implementing the FMLA in large and small companies across the nation. SHRM has long recognized its special responsibility to encourage compliance with the FMLA. SHRM welcomes opportunities to educate members of Congress on the FMLA since our members have experienced numerous difficulties in their good faith efforts to comply with its record keeping and notification requirements.

In 1997, SHRM founded the FMLA Technical Corrections Coalition (www.fixfmla.org) which is a diverse, broad-based nonpartisan group of leading companies of all sizes and associations. Members of the Coalition are fully committed to complying with both the spirit and the letter of the FMLA and strongly believe that employers should provide policies and programs to accommodate the individual work-life needs of their employees. At the same time, the Coalition believes that the FMLA regulations should be improved by streamlining compliance and

eliminating administrative problems in order to better protect the employees Congress aimed to assist when the FMLA was enacted.

I. The FMLA: Ripe for Regulatory Review

A. Background on FMLA Interpretation Problems

Certainly, the FMLA has made an important contribution by providing a supportive environment for employees and their families in a time of need. The spirit of the law, however, is not well served when the complexities of the statute leave employers guessing how to best comply with it as well as leave employees guessing what leave is protected under ever-changing legal interpretations.

Through SHRM, HR professionals desire to work closely with regulators and others to clarify the original intent of the law so that it more effectively protects the employees Congress intended to assist. MHA hospitals are often the largest employer in the communities where they are located and, as a result, are able to set an example for other employers. At the same time, MHA hospitals have a unique perspective on, and understanding of, the special challenges of medical leave – both for employers and patients. I am also aware of the enormous FMLA compliance challenges confronting smaller employers.

The FMLA is a prime example of a very well intended law, which has resulted in unnecessary confusion and litigation because of problematic regulatory interpretations and inconsistent guidance. The FMLA interpretations are vague and contradictory. The Department of Labor's (DOL) final FMLA implementation regulations became effective for private sector employers on April 6, 1995. The FMLA was enacted to allow eligible employees up to twelve (12) weeks of unpaid leave for birth or adoption, or foster care (family leave) or for the "serious health condition" of the employee, the employee's child, or the employee's spouse ("medical" leave). The "family" leave part of the FMLA has typically not been difficult to implement and administer in the workplace. However, because of vague and expansive interpretations as well as contradictory court rulings, the "medical" leave component of the FMLA has become increasingly complex to administer. The expansive regulatory definition and varying interpretations of what constitutes a "serious health condition" make administering leave far too complicated and subject to misinterpretation and inconsistent applications.

The cumulative impact of the ever-changing regulatory definitions at MHA hospitals is that it diverts critical resources away from patient care and increases health care costs due to administrative burdens. I would like to draw your attention to **Chart A: "FMLA Flowchart"** (attached) which illustrates the complexity of the FMLA compliance process. FMLA compliance problems have interjected significant legal uncertainties into organizations' decision-making processes. For example, the inability to address attendance in the context of the FMLA legal morass has had a chilling effect on the expansion of paid leave policies. It would be

wonderful if all private sector employers voluntarily expand paid leave policies for their workers. However, in order to facilitate the expansion of paid leave policies, the current problems with the FMLA's regulations and interpretations must be addressed first, because they serve as a disincentive for companies to offer or expand paid leave benefits.

B. The FMLA Has Received More Nominations for Improvement than any Other Federal Regulation

In 2002, the Office of Management and Budget (OMB) asked the public to nominate federal regulations that should be improved. Of all government regulations, the FMLA regulations (29 *CFR part 825, 1/6/95*) received the highest number of nominations for improvement. In fact, more than a thousand comments were received urging OMB to implement FMLA corrections so the regulations could be applied more effectively. Both SHRM and the FMLA Technical Corrections Coalition submitted extensive comments nominating the FMLA regulatory review and revision.

Again, this year, in response to the OMB's specific request for "public nominations of promising regulatory reforms," SHRM and the FMLA Technical Corrections Coalition reaffirmed the need for FMLA reform. **We now hope that technical corrections will be made to the FMLA to address compliance and recordkeeping problems so that the law can be enforced more consistently and more effectively and so that it will better protect the employees Congress intended to assist when the FMLA was enacted.**

C. An FMLA Litigation Explosion has Resulted from Misinterpretations

In a survey by Spencer Fane Britt & Browne LLP, 68 federal lawsuits **challenging the validity** of the DOL's FMLA regulations have been filed since the FMLA was enacted.¹ The Federal courts are holding that various DOL regulations are invalid. The United States Supreme Court struck down a portion of the existing DOL regulations in the first FMLA case before it. (*Ragsdale v. Wolverine Worldwide, Inc.*, No. 00-6029, Mar. 19, 2002). Although the Court focused on one particular section of the DOL regulation, there are a number of other sections that impose "across the board" penalties that will not meet the Court's standard. Consequently, other FMLA regulations that include penalty provisions are now in question, will probably not withstand judicial scrutiny, and will likely be held invalid by the courts unless the DOL amends the regulations.

In light of the historic *Ragsdale v. Wolverine Worldwide, Inc.* decision and the fact that many other sections of the FMLA regulations are similarly inconsistent with Congressional intent, an increasing number of lawsuits challenging FMLA regulations are expected. Without

¹ Spencer Fane Britt & Browne LLP, August 2004 *Survey of Court Decisions Reported by Westlaw® Involving Challenges to the Validity of the FMLA Regulations.*

modification, continued adherence to these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions and the courts) additional time, effort, and resources. This would be avoidable if the regulations could be corrected to properly reflect original Congressional intent.

D. Problems are Reflected in National Surveys

The SHRM® 2003 FMLA Survey found that organizations clearly want to follow and support the spirit and intent of the FMLA, and in many cases offer protections beyond the law², but appear to find obstacles in expanding leave options. As a result, human resources professionals are calling for more clarification and education on such issues as overall compliance, managing intermittent use of leave, determining serious health condition coverage, and communicating with care providers and physicians. A review and modification of FMLA recordkeeping and notification requirements is necessary.

Unfortunately, the greatest cost of the FMLA interpretive problems is to employees themselves. Two DOL studies, as well as the SHRM® 2000 and 2003® FMLA Surveys, have confirmed that the most prevalent method used to cover work when employees are out on FMLA leave is to assign the work temporarily to other onsite employees. With the FMLA interpretations requiring little or no notice, employers have had to require unscheduled overtime in order to cover absent employees, which is frequently unwelcome. According to the 2004 Commerce Clearing House Unscheduled Absences Survey, unscheduled absences are now at a five-year high (2.4 percent in 2004, up from 1.9 percent in 2003)⁴. Work coverage for questionable unscheduled absences has been especially challenging in the health care industries and is particularly difficult for smaller employers.

Compliance challenges with the FMLA are not a new phenomenon. Even a survey conducted by the prior Administration's DOL confirmed FMLA implementation problems. The DOL report found that the share of covered establishments reporting that it was somewhat easy or very easy to comply with the FMLA declined 21.5% from 1995 to 2000.⁵

²The SHRM® 2003 FMLA Survey found that 59% of HR professionals surveyed report that their organization offers job protected leave beyond the FMLA and 63% of HR professionals surveyed report that they make exceptions to the FMLA requirements to offer more flexibility to employees.

⁴ 2004 Commerce Clearing House Unscheduled Absences Survey, Chicago, IL, November 2004.

⁵ Balancing the Needs of Families and Employers Family and Medical Leave Surveys, U.S. Department of Labor, 2000 Update, released January 2001.

II. Specific FMLA Interpretation and Compliance Problems

A. Serious Health Condition Interpretations and Non-Regulatory Guidance Have Been Problematic

In enacting the FMLA, Congress stated that the term “serious health condition” is not intended to cover short-term conditions for which treatment and recovery are very brief, recognizing that “it is expected that such conditions will fall within the most modest sick leave policies.”⁶ The DOL regulations as originally developed by President Clinton’s administration do not follow Congress’ intent. Instead the regulation for “serious health condition” is expansive and defines the term as “including, among other things, any absence of more than three (3) days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor visit, or a prescription, or a referral to a physical therapist).” Essentially, the broad definition mandates FMLA leave in situations where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve. That was not the intended purpose of Congress when the FMLA became law. The regulations also define as a “serious health condition” any absence for a chronic health problem, such as arthritis, asthma, or diabetes, even if the employee does not see a doctor for that absence and is absent for fewer than three days.

Most of the medical leave taken under the FMLA has been for employees’ own illnesses, most of which were previously covered under sick leave and/or paid time off policies. Clearly, this goes against Congress’ intent, but the DOL regulations as originally developed offer little help to determine whether these types of illnesses are covered by the FMLA. It does not help that the DOL’s opinion letters issued by President Clinton’s administration have been inconsistent and somewhat vague, leaving employers and workers guessing what the DOL and the courts will deem to be “serious.” The following excerpts from DOL opinion letters highlight the difficulty human resource professional’s face in complying with the Act:

- April 7, 1995 DOL opinion letter No. 57 states that “The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).”
- December 12, 1996 DOL opinion letter No. 86 states that letter No. 57 “expresses an incorrect view,” that, in fact, with respect to “the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.,” if any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar

⁶ H.R. REP. NO. 103-8, at p. 40 (1993).

days that also involves qualifying treatment (continuing treatment by a health care provider), “then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying ‘serious health condition’ for purposes of FMLA.”

Inclusion of all these various absences in the definition of “serious health condition” has inadvertently changed the FMLA statute into a national sick leave policy—something that Congress specifically sought to avoid.⁷ Confusion over the definition of “serious health condition” has a ripple effect on many other aspects of the FMLA’s medical leave administration, for example, the use of intermittent leave and certification and verification issues.

When read with the other interpretations, the very expansive definition of “serious health condition” suggests that any time an employee has missed work for three (3) days and reports feeling ill, the employer (e.g., the manager) must inquire as to whether the employee’s condition is one that would make them eligible for FMLA. As a result, employers must attempt to determine whether an employee who does not come to work for three (3) or more days is entitled to FMLA protection. More often than not, even minor ailments entitle an employee to FMLA coverage.

B. Intermittent Leave Tracking is Very Difficult

The issue of intermittent leave continues to be extremely difficult for human resources professionals. In fact, intermittent leave is identified most often by SHRM members as an extremely significant problem to administer. The SHRM® 2003 FMLA Survey found that human resource professionals believe that the DOL regulation is unreasonable and that a slight modification (e.g., allowing for no less than ½ day increments) would help them more effectively administer the Act.

Example:

In the healthcare industry, managing intermittent leave is particularly difficult. Given the expansive definition of “serious health condition” and the broad entitlement to intermittent leave, employers are put in a very difficult position when employees use intermittent leave. One hospital in Macomb County, Michigan said, “The costs associated with these absences are phenomenal. In health care, most all positions have to be replaced when a worker is absent.

⁷The Family and Medical Leave Act of 1993, Public Law 103-3, Sec. 403 states: “ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES. Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.”

Those replacement hours are typically paid at time and one-half or double time. It also creates morale issues among staff.”

Ailments such as migraine headaches, allergies, asthma, and back pain have all recently been the subject of intermittent certification in MHA hospitals. In these situations, employees must be allowed up to 480 hours off of work to tend to these conditions. More often than not, the leave time comes without any advance notice. It may come moments before a shift begins, during a shift or at the end of the day. The regulations prohibit employers from requiring an employee to provide a note once the employer has received an initial certification for an ongoing condition. For example, a certification for intermittent leave for migraine headaches may say, “employee may be absent intermittently, 3-4 times per month.” As a result, employers must arrange to cover the employee’s patient care responsibilities without advance notice in an effort not to adversely impact patients or the remaining valued employees. Additionally, none of the intermittent absences subject the employee to any coaching or counseling on absenteeism until after the expiration of the 480 hours, or 60 days. Even then, the employer’s policy on unscheduled absenteeism would not be implicated until the unprotected absences have already reached an intolerable level.

Another hospital in West Michigan said, “The biggest problem with the FMLA by far is employee abuse of intermittent leave. Most people think of the FMLA as providing for blocks of leave after the birth of a child or to recuperate from a major illness or surgery. The FMLA does provide for this type of leave, but it also allows an employee to take leave in small increments or at unpredictable times. The most problematic is leave for “chronic conditions.” Under the current regulatory scheme, an employee may obtain a physician’s certification stating that the employee has a chronic, recurring condition – such as migraines or asthma – that may episodically flare up, and that the employee will need intermittent leave as a result. With that certification, the employer must provide the employee with intermittent leave whenever the condition flares up ... the employer is not allowed to require an employee to verify that the absences were indeed caused by the chronic condition.”

An example from mid-Michigan: “We currently have two employees who are approved for intermittent FMLA leave due to their own chronic health conditions. Both are either absent or tardy for 85% of their scheduled shifts. We have attempted to adjust their work schedules with a later start time, however the problem persists. It is very difficult for the department to cope with this rate. They need the employees to be working, **and the coworkers of these individuals feel they are taking advantage of the system.** We are preparing to request second opinion independent medical evaluations. It was well known that one employee attended a concert last Thursday night. The same employee then called in under intermittent FMLA leave for Friday's shift. We can request recertification, however for intermittent leave, the regulations state that an employee does not have to be treated by a physician for each FMLA-related absence.”

Intermittent leave is an important component of the FMLA; however, the expansive definition of serious health condition has changed the nature of most types of intermittent leave. Treatments such as chemotherapy, radiation, and kidney dialysis were the types of conditions contemplated by Congress, but are among the more infrequent uses of FMLA intermittent leave. It is much more common to have multiple employees in a single department or work unit certified for intermittent leave for conditions such as migraine headaches, back aches, allergies, etc. which Congress assumed would be covered under an employer's sick leave plan rather than the FMLA. The natures of these conditions make advance planning for staffing virtually impossible.

C. Medical Certification Needs to Be Clarified

The Certification of Health Care Provider form (WH-380) may be used to certify a serious health condition under the FMLA. However, due to the limits imposed by the FMLA regulations, the employer's health care provider cannot contact the employee's health care provider unless the employee grants the employer permission. Nor can the employer's health care provider obtain the usual documentary support for a disability determination. These limitations either lead the employer to deny FMLA coverage due to lack of sufficient certification or to grant FMLA coverage despite the lack of sufficient factual support just to avoid a dispute.

The SHRM® 2003 FMLA Survey found that:

- Over half of respondents said they have had to grant FMLA requests that were not legitimate due to the FMLA regulations and the interpretations of those regulations.
- Approximately one-third (35%) of respondents were aware of employee complaints in the last 12 months from co-workers because of another worker's questionable use of FMLA leave.

This rule also applies to the certification, or fitness for duty report, that the employer is entitled to upon the employee's return. The regulations state that "a health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired. The employer may not delay the employee's return to work while contact with the health care provider is being made."⁸ For hospital employers whose employees are in safety sensitive positions, these restrictions on contacting the physician are not just burdensome, but can create unnecessary risk to patients and co-workers.

⁸ 29 CFR 825.310

Examples:

A hospital in Oakland County, Michigan has reported that:

“The biggest issue we have here with the FMLA specifically pertains to medical documentation. We are still not clear as to when it’s okay to ask for medical information. We are also unclear as to our rights when we receive incomplete medical documentation from the treating physician. We consistently see missing beginning and end dates to the leaves. We also see physicians approve leaves for an employee’s lifetime. We see circumstances where the treating physician makes a diagnosis out of his or her scope of practice.”

Another large health system operating on a multi-state basis reports 2-3 calls daily for legal assistance relating to FMLA questions:

“The calls come from every state in which we have hospitals or other facilities. There is no state-specific pattern to the calls. In others words, the calls do not come disproportionately from our Michigan hospitals. We also have problems arising from 29 CFR 285.111(2) defining health care provider by including quite a list of “any other persons” determined to be capable of providing health care services.”

“In one recent situation we had an employee who returned with a fitness for duty evaluation from her physician following back surgery. The note indicated that she was fit to “return to full duty.” This employee was a nurse in the Critical Care unit and had various lifting, pushing and pulling requirements that we questioned. The employee refused to allow us to talk with her physician. Under the FMLA regulations, this employee needed to be returned to her position without delay. Subsequent observations of this employee indicated that she was unable to perform her job duties and she was subsequently removed from patient care pending an evaluation.”

Problems faced in determining the validity of an employee’s FMLA certification need to be addressed by clarifying that sufficient certification under the FMLA must allow employers to verify FMLA leave and an employee’s fitness to return in the same way they verify other employee absences for illness, while at the same time protecting employee privacy in the process. This will allow employers and health care providers to communicate so that health care providers understand the requirements of the employee’s job, which will better enable them to determine whether the employee is fit to return to service. This clarification would simply give the employer more information upon which to determine whether or not a leave request qualifies under the FMLA.

D. Lack of Advance Notice is an Issue

As discussed previously, FMLA medical leave does not need to be taken continually, but may be taken in small increments (minutes) and without advance notice. According to the SHRM® 2003 FMLA Survey, less than half of employees (48%) schedule the leave in advance. Once an employee receives a certification for an ongoing condition, leave can be taken on numerous occasions intermittently for the same condition and without advance notice. The practical application of this aspect of the FMLA has presented staffing challenges in the workforce and raised employee morale issues, especially in instances when repeated instances of leaves are questionable.

Example:

A hospital in the Detroit area reports that:

Employers are not able to require advance notice of an employee's need for FMLA leave. Current FMLA regulations require an employee to give notice of the need for FMLA leave 'as soon as is practicable', which usually means within a day or two of learning of the need for leave. However, employees who are chronically tardy may wait one or two days to notify the employer that the tardiness resulted from an FMLA-covered reason. This is untenable for employers, who need to promptly monitor attendance and discipline. Also, in most cases, there is no reasonable excuse for the employee's delay in providing notice.

One recent example involved a health care employee with a significant history of absenteeism. This employee was told that she could not have any unexcused absences for the next 90 days. This employee knew that absences due to her asthma, which had previously been certified as intermittent leave, and absences due to her workers' compensation injury would not be counted against her. On the 89th day, the employee called up and said she wouldn't be at work because her back hurt and she would be going to the doctor. After confirming that the absence was not due to her asthma or workers' compensation leave, the employer counseled this employee. The employee saw her physician who gave her anti-inflammatory medication and told her to alternate between ice and heat when her back hurt. As a result, the employee was eligible for FMLA and the employer's counseling had violated the FMLA.

III. Specific Recommendations

SHRM, MHA, and the FMLA Technical Corrections Coalition unconditionally support the spirit of the FMLA. However all believe that at a minimum, the following areas should be addressed to provide for clearer and stronger enforcement of the Act and to allow employers and human resource professionals to more effectively implement the law:

Serious Health Condition Misinterpretations:

Restore the regulatory definition of “serious health condition” to reflect serious conditions as intended by Congress in the Act’s legislative history and withdraw or replace the December 12, 1996 DOL opinion letter No. 86 with more appropriate guidance.

Intermittent Leave:

Minimize unnecessary tracking and administrative burdens while maintaining the original intent of the law, by permitting employers to require employees to take “intermittent” leave (FMLA leave taken in separate blocks of time due to a single qualifying reason) in four hour increments.

Certification:

Allow employers to verify FMLA leave in the same way that other employee absences for illness are verified. Employers should be permitted to communicate with health care providers to ensure that they understand the requirements of the employee’s job and the employer’s willingness to make alternative work (such as “light duty”) available to the employee.

Request for Leave/Notification Requirements:

It would be helpful to shift the burden to the employee to request that leave be designated as FMLA leave. This would address concerns about employers having to pry into the employee’s and the employee’s family’s private matters. Additionally it would help eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations. Certainly the current two (2) day notification period for designation of leave as FMLA leave should be expanded.

SHRM, MHA, and the FMLA Technical Corrections Coalition hope that these administrative processes can be clarified in the context of overall FMLA technical corrections so that the FMLA works as intended. SHRM and the Coalition strongly support legislation that has been introduced in Congress (S. 320 and H.R. 35) that would require FMLA implementing regulations to be reissued in accordance with the original Congressional instructions provided in the legislative history. However, the DOL could simply correct the regulatory misinterpretations, thus avoiding the need for corrective federal legislation.

Additional information and examples are contained in the May 2002 comments submitted to OMB by SHRM and the FMLA Technical Corrections Coalition.

IV. Conclusion

The FMLA's implementing regulations and interpretations have left employers and human resources professionals struggling with the management of intermittent leave, communications with physicians and often difficult determinations as to whether a "serious health condition" exists within the meaning of the FMLA.

Difficulties associated with FMLA's medical leave have led to unnecessary compliance problems and an inconsistent application of the law. The FMLA is a good law that has become inadvertently too complex. The regulatory complexities are diverting important human resources and increasing the costs of providing health care and offering other services.

I hope that this review of the need for FMLA technical corrections is helpful. I would be happy to answer any questions the Subcommittee may have.