

EXECUTIVE SUMMARY

Full text of these comments can be found at <http://www.protectfamilyleave.org>

The National Coalition to Protect Family Leave is a broad-based, nonpartisan group of employer organizations, companies, and associations. The Coalition supports both the spirit and intent of the FMLA, and we believe the Act can be strengthened by modifying several regulatory provisions that have triggered significant challenges for both employers and employees since the rules were issued in 1995.

Since its enactment in 1993, the FMLA has provided millions of American workers with the flexibility they need to balance the demands of both family and the workplace. The Coalition believes Congress intended for the Act to strike an appropriate balance between the need of employees to handle serious family and medical issues and the need of employers to know when employees will be on the job. While many provisions of the Act have been implemented very successfully – particularly the family leave provisions – Coalition members have seen both employers and employees struggle to understand and apply medical leave provisions of the Act.

After 15 years of experience with this historic law, the Coalition believes the time has come to update and modernize the FMLA regulations so that the rules work for both employers and employees. An extensive record has been developed through Congressional hearings, stakeholder meetings, the Department's 2006 Request for Information, and now the comments submitted on the proposed changes. The Coalition supports the Department of Labor's proposed revisions to the FMLA regulations in light of this 15-year history and has submitted comprehensive comments in response to the proposed rule, which we believe can strengthen the FMLA regulations for future generations of American workers and their employers. Below is an Executive Summary of the Coalition comments.

Comments on Proposed Changes to the Current FMLA Regulations

Eligibility of Employees

As stated in its submission to the Department's Request for Information (RFI) in 2007, the Coalition strongly disagrees with the position taken by DOL in the proposed section 825.110 that a five year gap between two periods of employment by an employee with the same employer is a reasonable time limitation. The Coalition emphatically urges DOL to reconsider this proposal before adopting a final rule. Specifically, the Coalition recommends that the DOL only permit the aggregating of two periods of employment by an employee in the circumstances set forth in its proposed section 825.110(b)(2) (military service, approved in advance, or consistent with a collective bargaining agreement). DOL's proposal overly complicates what should be a straight-forward, simple determination of whether an employee has been employed for at least 12 months by an employer. Alternatively, the Coalition recommends permitting aggregation of service that occurs only during the three years prior to the leave request, as this is consistent with the record retention period.

Similarly, the timing of the eligibility determination should be made at the commencement of the leave. Because the Act is quite clear that only eligible employees are entitled to FMLA leave, the Coalition submits that eligibility for FMLA leave only attaches to FMLA-qualifying leave that actually begins after the employee meets the requirements of being

employed by a qualifying employer for 12 months and having worked at least 1250 hours for that employer. For that reason, the Coalition also strongly recommends that DOL address and clarify the issue of whether an employee remains eligible for FMLA leave if the number of employees in a company falls below 50 by the time requested FMLA leave begins. Otherwise, the regulatory scheme could require an employer to provide allegedly protected FMLA leave while the statute states that the employee would not be eligible.

Serious Health Condition

This section contains a portion of the current section (§825.114 (a) and (c)), and will become the “general” section of the regulations defining a serious health condition. The regulations have been reorganized and will include separate sections on inpatient care (§825.114), continuing treatment (§825.115), and treatment for substance abuse (§825.119). The Coalition agrees with this reorganization, which will make the regulations easier to follow and administer, and it also approves of the new wording, which is far more readable than the previous ‘Question and Answer’ format.

The Coalition, however, disagrees with DOL’s position that non-serious conditions as listed in the regulations can be turned into serious health conditions without some sort of serious complication arising from them (Section 825.113). The Coalition believes that Wage and Hour Opinion Letter FMLA-57 correctly states the law, and the situations where a condition on this list rises to the level of a serious health condition should be given a very narrow construction. The Department should add language to the regulation stating that some sort of serious complication must result in order for an otherwise “non-serious” health condition to be considered a serious health condition. As currently written, the regulation inappropriately allows for an employee to transform a short-term acute condition into a qualifying serious health condition.

Continuing Treatment

The Coalition urges DOL to reexamine the issue of continuing treatment (Section 825.115) and recommends that the two or more treatments contemplated take place during the period of the employee’s incapacity, as the case of *Jones v. Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005) suggests. The Coalition also proposes a timeframe of one week from the initial visit for a follow-up visit, and any follow-up visit should be at the direction of the healthcare provider, to avoid situations where an employee simply schedules a follow-up visit to satisfy the FMLA’s regulatory requirements. More generally, the Coalition urges DOL to define the “extenuating circumstances” for when employees cannot see a healthcare provider two or more times during the 30-day period, to avoid extensive litigation.

Periodic Visits to Health Care Provider—Chronic Serious Health Condition

The Coalition believes that employees should see a health care provider at least four times per year for chronic serious health conditions. Only two visits per year, as the Department proposes as clarification for the term “periodic visits,” for a condition that allows up to 60 work days of job protected leave per year is not enough.

Even with this increase, however, employees are still effectively able to self-certify their own incapacity. Employers need to be able to verify or confirm that the employee’s chronic serious health condition truly warrants the use of FMLA leave. Because of the widespread misuse of unscheduled intermittent FMLA leave for chronic serious health conditions, the

Coalition urges the Department to strengthen the definition of a chronic serious health condition. This might include providing a comprehensive list of common chronic conditions and a better explanation of what is meant by an episodic period of incapacity.

Period of Incapacity

The Coalition also urges DOL to reconsider the proposal from many employer groups that the period of incapacity should continue for at least seven consecutive calendar days (or five consecutive work days) to satisfy the definition of incapacity, which would be consistent with the waiting period in most employer short-term disability plans. The current requirement (unchanged in the proposed revisions) that an employee or covered family member need only be incapacitated for a period exceeding three consecutive calendar days has played a significant role in converting otherwise minor medical conditions into those that satisfy the definition of a serious health condition.

Essential Functions

The Coalition recommends that DOL modify its proposal on essential functions of the employee's position (Section 825.123), to read "unable to perform the essential functions of the employee's position, unless modified by the employer to accommodate a temporary restriction." Employers should be permitted to require an employee to work in a position that is consistent with the employee's restriction. To help healthcare providers make better, more informed decisions, the proposed new form WH-380, which the Coalition welcomes, should also provide space for a job description and a list of a job's essential functions.

Intermittent Leave

The Coalition endorses many of the clarifications provided by DOL on the issue of intermittent leave, particularly the statement that an employee should "make a reasonable effort to schedule the treatment so as not to unduly disrupt the operations of the employer" when seeking foreseeable FMLA leave or planned medical treatment. The Coalition strongly urges DOL to include language in the final rule that explicitly permits employers to transfer employees to alternative, equivalent positions when the employee's need for intermittent or reduced schedule leave is unforeseeable or unscheduled. The Coalition also emphatically urges DOL to increase the minimum increment of intermittent or reduced schedule leave that is unforeseeable or unscheduled to half-day increments, or some variant of that, such as providing a two-hour minimum for unscheduled leave. Similarly, DOL should include a clarification that allows an employer to designate as FMLA leave an entire shift when it is not physically possible for an employee to start or return to work once an employee uses intermittent or reduced schedule leave during a shift.

Attendance Programs

The Coalition commends DOL for its clarification of existing Section 825.215, which will permit the restoration of incentive, bonus, and perfect attendance programs.

Employee Notice Requirements

The Coalition strongly supports DOL's proposal to require employees to follow an employer's standard call-in procedures when requesting FMLA leave. Employees receiving FMLA leave should not receive preferential treatment by eliminating such requirements. DOL's proposal does not, however, require employees to follow the timing requirements of an employer's call-in procedures, but rather indicates the employee must call in as "soon as

practicable.” While the Coalition strongly supports DOL’s proposal to modify its definition of “as soon as practicable” so that an employee may not wait two full business days to call-in, the proposal still leaves ambiguity as to what meets this standard and leaves room for abuse. As the Coalition previously reported to the DOL, when unforeseen leave is used, in many cases co-workers bear the burden of such call-ins, since in many cases, employers do not have enough time to adequately staff for the employee absences and still run their operations if the coworker is allowed to be out from work. In other cases, the co-worker must bear the burden of performing their own job and that of the employee on FMLA leave because of the lack of notice provided. As such, the Coalition suggests that the proposal should be improved, to benefit both employers and employees, by requiring employees to follow the timing associated with standard call-in procedures, unless extraordinary circumstances exist.

Employee Cure of Medical Certification Flaws

The Coalition welcomes DOL’s proposal for bright-line rules whereby an employee has seven days to cure an incomplete or insufficient medical certification (Section 825.305). The proposal should also be modified to add clarity on the timing of an employee’s need to return a certification in a “timely” manner. On the certifications themselves, the Coalition strongly supports the elimination of a checkbox on the form for a healthcare provider to certify that a serious health condition exists and suggests that it should be mandatory for a healthcare provider to supply information on the itemized subcategories of medical facts to determine accurately if a serious health condition exists.

Medical Certification Forms

The Coalition strongly supports DOL’s proposed changes to the process for authentication and clarification of medical certifications, including permitting employers to speak directly to an employee’s healthcare provider in the limited circumstances outlined. It suggests including a definition as to what constitutes a good faith doubt as to the validity of the initial medical certification. Regarding recertification (Section 825.308), Coalition members believe they should be able to obtain second and third opinions in connection with recertification, not only at the beginning of a new leave year as DOL proposes.

Fitness for Duty Certification

Similarly, DOL should permit certifications on fitness for duty for a specific position and fitness for duty upon returning from a block of leave so long as the request is job-related and consistent with business necessity according to the standard of the Americans with Disabilities Act. Currently, the inability of an employer to question the statement provided by an employee’s healthcare provider regarding whether an employee may return to work raises risk for both employer and employee. The employer should be able to challenge the statement rather than simply waiting to observe post-reinstatement behavior and perhaps risk injury to the employee or others.

Military Family Leave Amendments

The Coalition has also provided responded to the Department’s request for input on how to develop regulations implementing the recently enacted Military Family Leave Amendments (MFLA).

The Coalition believes that employers as a whole are very supportive of the dedicated men and women who currently serve or have served in the Armed Forces, the Reserves, and the National Guard. Likewise, many employers have shown compassion and understanding towards employees who have family members called to active duty and may need time off work to address urgent matters occasioned by such a call to active duty or to care for a loved one injured in the course of fulfilling his or her military duties. Many employers have been providing leave and other accommodations voluntarily well before enactment of H.R. 4986.

The Coalition recommends that DOL adopt regulations that are simple, based on commonly used terms, explained by examples, and that do more than simply incorporate by reference terms such as “active duty” and “contingency operations.” Many employers and employees are not familiar with military terms, and the better the Department can explain these terms, the more likely employees and employers will know what is expected. The Coalition believes that the Department of Labor should work closely with the Department of Defense in these matters so that the explanations and definitions are consistent with the understandings used in the military for these terms, while also being understandable for civilian employers and other employees.

With respect to MFLA leave, we have used the term “exigency leave” to refer to leave related to a servicemember’s call to active duty that results in an urgent need for an employee to take leave. We have used the term “caregiver leave” to refer to servicemember family leave to care for a covered servicemember who is injured while on active duty.

Exigency Leave Issues

Factors Related to being called up: The Coalition recommends that DOL clarify that exigency leave is not available unless three criteria are met: (1) the servicemember must normally be a member of a reserve component (as opposed to the Regular Armed Forces, according to the statutory definition in 10 U.S.C. § 101(a)(13)(B).; (b) the servicemember must be called to active duty; and (c) the active duty must be to support a contingency operation (as opposed to any other type of military operation, such as a State call to duty not required by the Federal Government).

The Department has indicated that it intends to cross-reference 10 U.S.C. § 101(a)(13)(B) in the final MFLA regulations. However, we strongly recommend that the Department include more than a mere “incorporation by reference.” Without a full explanation of “active duty,” both employees and employers will have serious difficulty ascertaining their respective rights and obligations under the MFLA. Most employers are not familiar with statutory references, and it is unreasonable to expect an employer to read 10 U.S.C. § 101(a)(13)(B) and easily locate the seven specific federal statutes referenced therein, let alone understand or appreciate what they mean.

Factors related to the definition of “qualifying exigency”: The Coalition recommends that the Department establish a definition of a “qualifying exigency” for military family leave. This would be based upon three factors: (1) causation; (2) the non-medical nature of the need; and (3) the urgency of the need.

Consistent with the legislative history, the Coalition suggests a causation standard in response to DOL’s call for comments on the “degree of nexus” between the military exigency

and eligibility for leave. Leave should be limited to needs directly caused by the military service. Allowing leave for routine, everyday occurrences would subject employers to complaints and claims of discrimination from other employees not eligible for this type of leave. Similarly, exigency leave should be limited to non-medical factors, because Congress did not specifically intend it to substitute for regular FMLA leave. Finally, the Coalition believes that the need for leave must be critical or immediately necessary and there must be no other reasonable alternatives to taking exigency leave. The Coalition also recommends that DOL include a provision requiring the employee to make “diligent, good faith efforts” to address deployment-related needs during non-work hours to the extent reasonably possible and in a way that will minimize disruption of employer operations. The situation will be different, for instance, where a servicemember has 30 days’ notice or 48 hours’ notice of deployment to active duty.

For greater clarity and to avoid needless litigation, the Coalition recommends that DOL should include a comprehensive list of needs that will generally qualify for exigency leave and provides a number of suggestions for this list.

Foreseeability of leave: To avoid confusion and align the military leave regulations with the FMLA, the Coalition recommends including the same principles of foreseeability of leave in the military leave regulations as it does the non-military FMLA regulations. We recommend the employee notify the employer as soon as reasonable and practical and provide the employer with information about the need for leave. The Coalition recommends that DOL develop a "request for leave of absence" form to assist employees in notifying employers of the need for leave.

Confirmation of leave requirements: In response to DOL’s request for comments on the content of the certification of MFLA leave, the Coalition proposes that there should be confirmation that the servicemember’s leave is covered by exigency leave and verification that the exigency is “qualifying” under the statute for each purpose for which leave is requested. A copy of the servicemember’s orders should ordinarily meet the first requirement, supplemented by reasonable documentation as the occasion permits or requires. The certification should be complete and sufficient, with the employee given a reasonable opportunity to cure any deficiencies. Ideally, the employee should provide all information within a time frame of 5 work days to 15 calendar days.

Caregiver Leave

Covered Servicemember: With respect to caregiver leave, the Coalition’s understanding is that the term “covered servicemember” means a servicemember with an injury or illness that includes all of the following components: (1) is line-of-duty related; (2) is active-duty related; (3) is incurred while serving in or on behalf of the Armed Forces; (4) is still under active treatment or monitoring or is otherwise on the temporary disability list; (5) is rendered medically unfit to perform all military-related duties he or she would otherwise be expected to perform; and (6) is serious in nature. The Coalition recommends that terms from workers’ compensation law, readily known to both employers and employees, be used to the extent possible in providing guidance on these terms.

The Coalition does not believe that Congress intended this provision to cover members of the National Guard called to State, as opposed to Federal, duty.

Because the definition of “serious illness or injury” under MFLA is different than that under the FMLA, the Coalition recommends that a separate medical certification be required.

Next of kin: The Coalition recommends that DOL adopt a definition of “next of kin” for purposes of MFLA as the “nearest blood relative willing and able to care for the injured service member.” Verification of the next of kin should be required; alternatively, the employer should be allowed to require a signed statement that the employee seeking caregiver leave is, to the extent of the employee’s knowledge, the nearest blood relative willing and able to care for the injured servicemember.

Calculation of total leave entitlement: With regard to the calculation of leave under MFLA, the Coalition believes, based on statutory construction, that the 26 weeks of caregiver leave is a one-time opportunity while that employee is employed by that employer. The Coalition recommends that Congress make a technical amendment to clarify that the “12-month period” referred to in the MFLA is the employer’s normal 12-month period.

If leave can be both FMLA and caregiver: In cases where leave may qualify as both FMLA leave and caregiver leave, the Coalition believes that the employee should decide which type of leave to apply for; however, the employee should specifically mention caregiver leave or the care of a covered servicemember so that employers will know the leave applied for is caregiver leave. The employer should be permitted to temporarily transfer an employee on intermittent or reduced schedule exigency or caregiver leave to an alternative position, as the Coalition recommends for FMLA leave.

Organizations Supporting NCPFL Comments

Airline Industrial Relations Conference
American Foundry Society
American Hotel & Lodging Association
Arkansas SHRM State Council, Inc.
Association of American Railroads
Associated Builders & Contractors, Inc.
Big Horn Mountain Chapter of the Society for Human Resource Management
Big Sky Society for Human Resource Management Chapter
Capital Region Human Resource Association
Cabarrus Regional Society for Human Resource Management
Central Arkansas Human Resources Association
Chesapeake Human Resources Association
Cleveland Society for Human Resource Management
Colorado Society for Human Resource Management State Council
College and University Professional Association for Human Resources
Dallas Human Resource Management Association, Inc.
Delaware SHRM State Council
East Alabama Society for Human Resource Management
Eastern Iowa Human Resources Association
El Paso Society for Human Resource Management
Enid-SHRM
Garden State Council – SHRM, Inc
Greater Southeast Michigan Society for Human Resource Management

HR Policy Association
HR State Council of New Hampshire
HR Tampa
Human Resources Association of New York
Human Resources Association of Southern New Jersey
Human Resource Association of Southern Maine
Human Resource Association of Broward County
Human Resource Association of the Midlands
Human Resource Association of the National Capital Area
Human Resource Association of North Central Louisiana
Human Resources Management Association - Greater New Orleans Area
Human Resource Management Association of Greater Kansas City, Inc.
Human Resource Management Association of Rhode Island
Human Resource Management Association of West Central Missouri
International Foodservice Distributors Association
Independent Electrical Contractors, Inc.
Indiana State Council of the Society for Human Resource Management
Inland Northwest Society for Human Resource Management
International Franchise Association
International Public Management Association for Human Resources
Kentucky Society for Human Resource Management State Council
Lakeshore Area Human Resources Association
Lane County Oregon Human Resource Association
Louisiana Society for Human Resource Management
Maryland SHRM State Council
Michigan Council of the Society for Human Resource Management
Mid-Michigan Human Resource Association
Mississippi State Council of the Society for Human Resource Management
Missouri State Council of SHRM, Inc.
National Association of Convenience Stores (NACS)
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Business Group on Health
National Multi Housing Council/National Apartment Association
National Newspaper Association
National Public Employer Labor Relations Association
National Retail Federation
National Restaurant Association
National Tooling and Machining Association
Nature Coast Human Resources Society
Nevada State SHRM Council
North American Die Casting Association
North Carolina Society for Human Resource Management State Council
North Central Arkansas Society for Human Resource Management
North Dakota SHRM State Council
Northwest Arkansas Human Resource Association
Oklahoma State Council for Human Resource Management

Pittsburgh Human Resources Association
Printing Industries of America
Quincy Area Society for Human Resource Management
Raleigh-Wake Human Resource Management Association
Retail Industry Leaders Association
Rhode Island State Council for the Society for Human Resource Management
Rock River Human Resource Professional Association
San Antonio Human Resource Management Association
SHRM Alabama State Council, Inc.
SHRM Vermont State Council
Society of Human Resources Professionals
Society for Human Resource Management
Society for Human Resource Management - Columbia
Society for Human Resource Management Maine State Council
Society for Human Resource Management Montana State Council
Society for Human Resource Management Nebraska State Council
Society for Human Resource Management of New Mexico State Council
Society for Human Resource Management Pennsylvania State Council
Society for Human Resource Management Racine and Kenosha Area Chapter
Society for Human Resource Management Snake River Chapter
Society for Human Resource Management Texas State Council
Society for Human Resource Management – Western Connecticut Chapter
Southeast Kansas Human Resources Association
Southside Virginia Society for Human Resource Management
Southern Oklahoma Human Resource Association
Southern Rhode Island Human Resource Council
Sumter Human Resource Management Association
Textile Rental Services Association of America
Tulsa Area Human Resources Association
U.S. Chamber of Commerce
Volunteer Chapter of SHRM
Western Arkansas Human Resources Association
Western Kansas Human Resource Management Association
Williamson County Human Resource Management Association
Winchester Area Society for Human Resource Management