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TESTIMONY OF

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BETH ISRAEL DEACONESS MEDICAL CENTER AND CAREGROUP

BOSTON, MA

RE: THE FAMILY AND MEDICAL LEAVE ACT

SUBMITTED TO

THE COMMITTEE ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

U.S. HOUSE OF REPRESENTATIVES

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Beth Israel Deaconess Medical Center, Boston, is a major teaching hospital of Harvard Medical School.
A Founding member of CAREGROUP, an organized system of quality healthcare serving the individual family and community.

INTRODUCTION

Good morning. My name is Laura Avakian. I am Sr. Vice President, Human Resources, for the Beth Israel Deaconess Medical Center and for its parent corporation CareGroup in Boston, Massachusetts. I am a member of the Society for Human Resource Management (SHRM) and a past president of the American Society for Healthcare Human Resources Administration (ASHHRA). I very much appreciate the opportunity you are giving me this morning to comment on my company's experience with the Family and Medical Leave Act (FMLA) and also to represent to you some of the opinions of my colleagues in SHRM and ASHHRA on this topic.

The Beth Israel Deaconess Medical Center (BIDMC) is a major teaching hospital of Harvard University Medical School. We employ 9000 health workers in addition to over 600 physicians and housestaff (physicians in training). We serve both inpatients and ambulatory patients in a variety of settings, as well as teach medical students and other clinicians in training, and we conduct medical research that we believe is state of the art. CareGroup is comprised of the BIDMC, five other hospitals, over 100 primary physician practices, and several other related organizations. Altogether, the system employees approximately 13,000 individuals and, typical of most healthcare employers, spends almost 50% of its nearly \$1 billion operating budget on salaries and benefits for workers.

We are a complex organization in a complex industry that is experiencing great turbulence. My company is the result of the merger of Beth Israel Hospital and the New England Deaconess Hospital, an entity not even a year old. CareGroup was created at the same time as the hospitals merged, October 1, 1996. Yet Beth Israel had existed for more than 80 years and the Deaconess for 100 years -- both with extraordinary histories of excellent patient care and teaching; both deeply rooted in the communities they serve. Both have enjoyed a reputation as employers of choice in the Boston area, in no small measure because of our well-known family-friendly programs and benefits. Our determination to continue to be a good place to work and a good place to be cared for brings me here today.

I was a proponent of the FLMA when it was first being considered. In fact, I was quoted in an American Hospital Association publication stating it would be a “no brainer.” because Congress’ intent seemed to be that the good practices of most companies in providing time away for employees to take care of family matters would merely be extended to those less progressive. The hospitals I was familiar with already provided leaves with job guarantees of 12 or more weeks for maternity and other personal needs. But the FMLA as it exists today is very different from what I imagined, and I believe very different from what Congress intended. Without revision to its current provisions, and if its proposed expansion occurs, the FMLA threatens both the quality of work life and our ability to deliver cost-effective, quality care on my hospital and our medical system.

BETH ISRAEL HOSPITAL’S HISTORY WITH WORK/FAMILY PROGRAMS

Prior to the merger, I headed the human resources division of Beth Israel Hospital for 16 years. The Hospital has always had a reputation for being a good workplace, and its employee policies and practices resulted in our receiving significant public attention and awards. Boston’s Beth Israel Hospital was the first hospital to be included in *Working Mother* magazine as one of the top companies for working women in the country, and we have been included on its list for 10 consecutive years. We were also named as one of the top ten companies among the 100 cited in *The 100 Best Companies to Work for in America* (1993) by Robert Levering and Milton Moskowitz. Internal surveys invariably demonstrated that employees were proud to work here and valued the organization’s support in their attempts to balance work and family priorities.

The sensitivity of the Hospital to employee needs and the willingness of staff to partner with the Hospital in both designing and carrying out family-friendly programs created an atmosphere of trust and good will. We provided generous benefits and encouraged employees to put forward ideas to improve the work place. One such idea was a breastfeeding support program, conceived of and staffed by nurses on a voluntary basis, that enabled new mothers to return from leave on their own timetable and in a more satisfying way. Much of the scheduling on the inpatient units which, of course, operate 24 hours a day, is done by teams of employees who have devised all kinds of creative work arrangements to accommodate individuals’ personal needs. There are

dozens of scheduling designs and imaginative coverage plans that satisfy employees and assure continuity of patient care. We also implemented individualized work-at-home programs for some workers, as well as job-sharing, on-call, and consulting kinds of jobs for some others.

This atmosphere of trust and collaborative problem-solving is being eroded by our efforts to comply with both the spirit and letter of the FLMA. The bureaucratic procedures required to satisfy the recordkeeping requirements and the sense of invasion into individuals' personal illnesses and family concerns create tensions and distress among employees. They do not understand why we have created masses of forms and seemingly endless management training, with the most visible outcome being that a few employees with patterns of attendance abuse are now more flagrantly abusive than ever and seem immune from corrective action on the part of management. In my opinion, this erosion of team spirit and confidence in the judgment of one's supervisor is more significant even than the financial cost of providing coverage for the additional sick time that has been taken since the introduction of the FMLA.

BENEFITS PROGRAMS AND POLICIES

For more than 10 years, Beth Israel Hospital has offered a Flexible Benefits Program a cafeteria plan under Section 125 of the Code, with many options for health coverage and multiple choices for dental, vision care, legal assistance, short-term and long-term disability insurances, life insurance for oneself and for family members, as well as childcare and healthcare reimbursement accounts. Employees enjoy an employer-paid pension plan with a matching feature if an employee opts to make additional contributions to the plan. We have onsite childcare facilities that are heavily subsidized with fees based on an employee's income. We provide a "camp" for employees' elementary school age children during school vacation weeks. We also offer extensive wellness programming and an onsite fitness center for employees. Staff receive financial assistance for educational courses they may take to advance their skills or professional opportunities. We were among the first employers in the country to offer spousal equivalency benefits to gay and lesbian employees.

As an industry, healthcare has typically provided generous not away benefits. We are no

exception. We implemented an Earned Time program in 1982 -- a program that combines all paid -time-off (vacation, sick, holiday, and other personal time) into a bank of hours that employees begin accruing upon hire and continue to accrue on a weekly basis during their tenure. Absences for any reason are paid through deduction of hours from one's Earned Time bank. New employees accrue 30 days of Earned Time in their first year. The accrual levels are increased based on length of service, with the highest accrual being 44 days per year for employees with 15 or more years of service.

We introduced Earned Time because of its inherent fairness -- all employees with the same length of service receive the same amount of paid time away, regardless of the reason for the absence. It is based on an assumption that an employee knows best when and how to use his/her time away, and that he/she will act responsibly in notifying the employer of the intended absence. It fosters trust and shared responsibility for coverage. The employer does not pry into the reasons for the absence. An employee who does not need the time off or chooses not to take all of it that has been accrued may cash it out. Our employees repeatedly tell us this is their most highly-valued benefit. FMLA is particularly disturbing to us because it runs counter to the organizational culture symbolized by Earned Time.

As a result of this paid time off program and the disability options made available to employees, nearly all time away tends to be paid time, even leaves of absence of several months' duration. Since the mid '80s we have provided a 3-month maternity leave policy, often extending the leaves upon personal request to 4, 5, 6 months... even a year. Long before the FMLA, we granted paternity leaves and leaves for adoption of children. Many of our employees have immigrated from other countries and have family in their native lands they wish to visit for extended periods of time. We allowed them to accumulate paid time or made individual accommodation so they could make prolonged visits to their families.

Because our benefits were more generous than those required by the FMLA, we have seen additional expense in terms of some employees taking even more time since the Act's inception. As an employer, we feel we are being penalized for our generosity.

WHY FMLA IS CREATING DIFFICULTIES FOR BETH ISRAEL DEACONESS AND OTHER HEALTHCARE EMPLOYERS

My colleagues in many industries report difficulties with FMLA, but healthcare employers face unusual challenges that make FMLA even more problematic. Mandates to reduce the costs of healthcare pour forth from Congress, state legislators, insurers, employers and patients. Over the past decade, the industry has been reeling from cost-cutting, downsizing, merging, and restructuring. Staffing is at minimum levels, just enough to assure patient safety and successful outcomes; there is little flexibility to move staff around and no ability to create new jobs. Where FMLA causes unpredictable absences, time shifted from patient care to administrative duties, productivity loss — the consequence in hospitals is frightening. It is not one less car off the assembly line or a delayed shipment: human life hangs in the balance — and that, unfortunately, is not melodramatic hyperbole.

RECORDKEEPING AND ADMINISTRATION

The Family and Medical Leave Act and the regulations issued by the Department of Labor for the FMLA have forced significant changes in the way we and most employers deal with employee absences. The universal groan from my counterparts in other health organizations is about the onerous recordkeeping that is required, most of it demonstrating no clear value, with the result being a system of time targets and paperwork. If a supervisor forgets to complete a piece of paper or makes a mistake in completing it, FMLA eligibility can start all over again. Because the employer has the obligation to educate staff about the Act, keep the records and police employees' utilization, supervisors must spend considerably more time in activity they perceive to be a cumbersome time sink. We spend many hours training supervisors to understand when and how to use the forms, how to determine when medical certification is required, how benefits will be maintained, and how to account for verbal and anecdotal statements that may result in qualification for FMLA time.

It is very difficult to ensure consistent application of documentation rules. In the past, I could review payroll records to analyze employees' absenteeism and use of paid time off. Our system

tracked “scheduled time off” and “unscheduled tune off”; we categorized absences this way to understand our costs, since covering an unscheduled absence is nearly always done through overtime or temporary help. There are few positions we can leave uncovered in the event of an employee’s unanticipated absence. We have undertaken the expensive process of revamping our payroll system to comply with FMLA, but I have little confidence that the system is a comprehensive composite of FMLA time since so much of the record maintenance depends on the supervisor’s tracking of every sick call and every lateness that is accounted for by a verbal explanation that may qualify for FMLA.

In a hospital where employees’ and managers’ time is needed to assure a smooth flow of personalized patient care, time spent on such minutiae is resented. Particularly when its result is a game of “gotcha”. The actual, real-life consequence of the Act is that the records are pertinent only in the case of employees using the Act to avoid disciplinary action for attendance abuse. Conscientious employees never request an accounting of how much FMLA time they are entitled to. They have ample paid time off, the ability to plan extended leaves of absence, and the assurance of a job guaranteed upon return. FMLA time is extraneous, and they resent the “Big Brother” feeling that comes from their managers tracking every hour of their time that is, or could potentially be, FMLA time.

PROBLEMS WITH DEFINING “SERIOUS ILLNESS”

The vague definition of “serious illness” in the DOL regulations makes a manager’s job extraordinarily difficult in deciding whether an illness qualifies under the FMLA. In our experience, minor ailments, such as a child’s earache or a case of flu, are documented as FMLA leave because both employees and supervisors have trouble understanding what should be documented, and they are fearful that inconsistency or an error will result in either disadvantaging the employee or the hospital. Further, employees who are seeking to evade disciplinary action for absenteeism may ask for FMLA time for virtually anything. You must understand that in an organization where hundreds of doctors are available and are friends with staff in all the other jobs, obtaining a physician’s certification can be a relatively easy process.

Mental health disabilities pose particular difficulties under the FMLA. We had a case where a nurse in our Neonatal Intensive Care Unit (NICU) experienced panic attacks and would flee the unit. Because she was under a physician's care and undergoing therapy for this condition, her times of flight from the unit were considered valid FMLA time. The NICU houses the most severely ill infants and the staffing is intense and constant. We could not accommodate this nurse's pattern of flight from her responsibilities. We attempted to find a place elsewhere in the hospital to transfer her, as FMLA would allow, but it proved very difficult. Neonatal nursing requires a highly specialized set of skills. Moreover, there are few areas of this institution where panic attacks would not jeopardize patient care. Eventually the employee resigned, but only after placing some patients at needless risk.

PROBLEMS WITH INTERMITTENT LEAVE REQUIREMENTS

The intermittent leave provisions of the FMLA may be the most problematic part of the Act. An employee can have regular tardiness and never run out of FMLA leave time.

Here is an example from my hospital: An employee who is scheduled to work a shift that begins at 7 a.m. and ends at 3:30 p.m. has a child with cerebral palsy. The employee is consistently tardy, although the amount of time she is tardy fluctuates, due to problems getting her child situated in the morning. Her department felt it would be easier for her to have a shift that started later in the day and easier for the department since a night shift employee has to stay until he is relieved by this individual. She was offered the exact same job at the exact same rate of pay on a shift starting later. She did not want to do this, saying it would cause her day care problems at the end of the day. We solicited an opinion from the area DOL office and were told that requiring the employee to change her shift to a later time would not be substantially the same job and therefore would not be allowable. The DOL also said that the change in shift start time would likely constitute a denial of her rights to a FMLA leave and would also be another basis for a violation. Since her child's cerebral palsy is a permanent condition, this employee is seemingly forever immunized from tardiness.

We are troubled by the unfairness to other employees in this and similar situations. What about

the night-shift employee who never knows when his shift will end? What about the morale of co-workers who watch this behavior, knowing their own is judged by a different standard?

CONFLICT WITH OTHER LAWS

Another difficulty is the apparent conflict between FMLA and other laws such as the Americans with Disabilities Act (ADA). As an employer, we must question the employee as to the nature of his/her illness or that of a family member in order to determine whether an absence should be designated as FMLA leave. The ADA limits an employer's inquiry into their employees' disabilities. It is unclear how far one should go in talking with an employee's physician about the disability or duration of absence. Workers' Compensation issues further compound the problem and create additional complexity.

Massachusetts state law prohibits discrimination on the basis of sexual orientation. Therefore, were we to deny leaves or benefits to employees caring for same sex partners, we would be in violation of state law. Because the FMLA does not include same sex partners as "family", gay employees could technically receive FMLA benefits twice -- once because we comply with state law and again if the employee seeks leave under FMLA. In either circumstance, we feel we are forced to ask questions of the employee that are inappropriate and perceived to be an invasion of privacy.

RECOMMENDATIONS

Before Congress considers expanding the scope of the FMLA, we urge consideration of changes to the current statute that would make it more workable for employers and more likely to produce the result of helping employees balance their work and family lives. We believe that employees have many legitimate reasons to request and expect flexibility and support from their employers when they need time away. Beth Israel Deaconess Medical Center has historically responded to these needs sympathetically, gladly, and with a sense of shared responsibility for assuring the continuity of patient care. Legislation that attempts to regulate when and how employees should be given time off should first take into account what an employer already

provides and should not punish good employers by giving them make-work recordkeeping and morale-destroying requirements.

My organization and my ASHHRA colleagues fully support the recommendations put forth by my colleagues on the SHRM panel. Additionally, I would like to highlight the following recommended changes:

- That some recognition be given to how much leave an employer provides before FMLA leave kicks in. In our case, since most FMLA leave is paid leave already provided under our Earned Time policy, the additional time and administration are burdensome, non-valued added, and penalize us for having had generous benefits prior to FMLA.
- As described in the comments above, tracking intermittent leave in hourly increments is highly problematic. Perhaps it could be defined in increments of full work days or allow the employee/employer to determine an accommodation in the individual circumstance. At the very least, the proposal to allow use of FMLA leave in 8-minute intervals must be rejected.
- "Serious illness" requires more precise definition. Perhaps the list of minor illnesses that would not be included could be more thoroughly developed.
- Eligibility for FMLA leave should be 12 *continuous* months of employment. Healthcare organizations often hire individuals for summer jobs, afterschool work, or on-call assignments in sporadic fashion. It is difficult for a manager to know with certainty whether an employee with any history of these kinds of temporary or short-term jobs has satisfied the eligibility requirement.
- A significant amount of inquiry should be conducted before defining new reasons for FMLA leave. In my 23 years in human resources administration, I have never heard of an employee being denied time to attend a teacher-parent conference.

Finally, I would like to express my appreciation for the opportunity to present these comments. I

continue to believe that the intent of the FMLA is worthy and that it was meant to support the very workplace values that have been in place in my organization. It is deeply disturbing that it has been transformed into a recordkeeping nightmare and into processes that create divisiveness and poor morale. I hope that our input may help achieve a more satisfactory outcome for workers and employers alike.

STATEMENT ON FEDERAL CONTACTS

Beth Israel Deaconess Medical Center is a federal government contractor. Our most substantial contracts are in the form of Medicare reimbursement and grants from the National Institutes of Health that support medical research.

Bath Israel Deaconess Medical Center has no contracts with the Department of Labor.