

**STATEMENT OF
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Subject: Family and Medical Leave Act
Before: House Subcommittee on Oversight and Investigations
Committee on Education and the Workforce
Date: June 10, 1997

SUMMARY

I hope to illustrate to members of the Committee why the Family and Medical Leave Act (FMLA) is an administrative and financial nightmare for small business owners. FMLA is an unfunded mandate, and at my business FMLA accounts for 67% of our personnel legal bills. In addition, small business owners are vulnerable to liability suits. FMLA has a major impact on small business and therefore should be limited and reasonable.

FMLA needs fixing. It is so complicated that it requires me to have a second accounting system and three employees to spend time on administering it. As supervisors are personally liable under FMLA, this puts my employees at personal risk of litigation. In addition, the FMLA requires procedures prohibited by the Americans with Disabilities Act (ADA) forcing myself and my employees to have to choose which laws to follow and which ones to violate.

Intermittent leave has effectively abolished enforcement of starting and quitting times. FMLA requires perfect attendance awards to be given to leave-takers, thereby rendering perfect attendance awards valueless. Leave-takers are currently allowed to have other employment while on official leave from their primary employer -- yet we are paying for their health insurance. I have found FMLA to be far more confusing and difficult to comply with than all of the other work place laws combined.

Good Morning Mr. Chairman and members of the Committee. My name is George Daniels, and I am the President of Daniels Manufacturing Corporation located in Orlando, Florida. We manufacture mechanical tools used for the wiring systems of aircraft, trains, and other systems which use electrical connectors. Our business was founded near Detroit, Michigan in 1949 by my father and his partner. I am a member of the National Federation of Independent Business.

We presently have 140 direct employees and 20 temporary employees. **We receive neither grants nor contracts from the Department of Labor.** We have been subject to the Family and Medical Leave Act (FMLA) since its enactment on August 5, 1993. The final regulations became effective for employers on April 6, 1995.

**FMLA IS AN UNFUNDED MANDATE WHICH HAS
A DISPARATE IMPACT ON SMALL BUSINESS**

My small business is people intensive, rather than capital intensive, such as a large corporation, and therefore FMLA is an unfunded federal mandate with a disparate impact on my small business, and other small businesses.

Because of the disparate Impact of FMLA against small businesses it is my suggestion that Congress fix what is presently wrong with it before even considering any expansion of the act.

**FMLA NEEDS FIXING
FMLA IS VERY COMPLICATED AND EXPENSIVE**

In spite of my educational and professional background, I find FMLA to be the most complicated and treacherous work place law so far enacted. I have found FMLA to be far more confusing and difficult to comply with than all of the other work place laws combined.

FMLA has forced us to set up a separate and parallel accounting system to account for the FMLA leave time taken by each employee. We have 3 people who devote substantial amounts of their time to FMLA; our personnel administrator, our general accountant, and a retired Army Lt. Colonel with experience in personnel administration.

If there are no “new” FMLA employee issues to be resolved, our general accountant estimates that FMLA accounts for four (4) personal days per month at a cost estimated at approximately \$1,190 per month. However, when a “new” FMLA law presents itself, the time required of my employees could easily be 3, 5 or 10 times as much.

Last year we had an employee take 7 weeks of FMLA leave. This was at the end of the year: we therefore had to hire a consultant for 5 weeks to perform the leave-taker's duties. My general accountant determined that **the consultant cost us \$595 more for the 5 weeks than we would have paid the leave-taker for the entire 7 weeks.**

It is both difficult and expensive to find someone willing to work in a temporary job which, by definition, has no future.

FMLA IS AN ADMINISTRATIVE NIGHTMARE

In order to meet our affirmative duty to ascertain whether an employee's absence might be due to an FMLA qualifying condition and in order to assure that we do not discipline an employee for an FMLA qualified absence, we have had to develop an extra form to be completed by every employee who is being given a written warning or other discipline because of excessive absence or tardiness.

Far from being the minor inconvenience to the employer as touted by FMLA's supporters, FMLA, if properly complied with, is administratively the most onerous and burdensome work place law I have ever had to contend with as a small business owner. FMLA is truly an administrative nightmare, especially for smaller firms.

FMLA ACCOUNTS FOR 67% OF OUR PERSONNEL LEGAL BILLS

Unlike large corporations with their in-house legal departments, we must rely upon outside legal counsel to provide us guidance in assuring that any of our contemplated personnel actions will not violate any of these work place laws.

My review of the billings from our outside legal counsel for personnel matters for the period January, 1995 through June 6, of 1997 indicates that we spent \$4,411.57 of which \$2,961.10 (67%) was related to FMLA matters, as contrasted with \$1,450.47 (33%) related to compliance with all other work place laws and regulations.

The toll-free FMLA help line (800-959-3652) is of little value. It scrolls through a menu of options. When you pick an option, the voice mail tells you that they will send a pamphlet.

FMLA REQUIRES A SECOND ACCOUNTING SYSTEM

We have had to implement a parallel accounting system to account for the FMLA leave

time taken, since, as a practical matter, FMLA leave must be compiled separately from the time clock system our company has used for years for wage and hour compliance. Our accountant estimates that this system cost us \$15,000 for design, implementation and training and that is costing us, at least, \$12,000 per year to operate. If FMLA is enhanced to allow leave for additional, non-medical, reasons we will then have to set up a third accounting system.

INTERMITTENT LEAVE HAS EFFECTIVELY ABOLISHED ENFORCEMENT OF STARTING AND QUITTING TIMES

FMLA permits leave-takers to take leave in increments as small as six minutes. Thus, 12 weeks of FMLA leave equates to 480 hours per year or 1.92 hours each work day, assuming a 5 day work week for 50 weeks.

So far we have had 32 FMLA leave-takers, of which 6 have taken intermittent (less than a full day) leave. I personally feel that, up to the present all of the FMLA leaves taken have been genuine, but would have been accommodated at my company before passage of FMLA.

However, the lack of any meaningful notice requirement for the intermittent absences mandated by the FMLA are especially difficult to deal with and schedule around. For instance, we have one FMLA leave-taker who basically comes and goes when they determine, informing us that this is due to the leave-taker's FMLA condition.

As other employees witness the convenience of the goings and comings of this leave-taker, the stage is being set for the other employees to manipulate the system and utilize FMLA to arrive and depart as they like.

Employers should have the right to require that intermittent leave be taken in minimum blocks of 4 hours. This would minimize the misues of FMLA by employees to excuse tardiness and justify leaving before the end of the workshift.

INCREASE SMALL BUSINESS EXEMPTION SIZE

Because of the disparate impact FMLA has on people intensive small businesses, the present small business exemption should be increased. This should be done for two reasons:

- (a) Larger companies have a greater capacity for substituting other employees to perform the tasks left unperformed by a leave-taker.

In a small business like ours if one employee out of three who perform the same task is

absent, the other two employees performing that task must make up the work which would have been performed by the leave-taker.

- (b) Larger companies can better afford the risk of litigation which will increase until regulations have been defined and clarified through the process of judicial review.

Because small businesses, if sued under FMLA don't have the money to pursue the case through the appellate level, such suits generally result in out-of-court settlements which have no precedential value and do not help define the law through the process of judicial review.

SUPERVISORS ARE PERSONALLY LIABLE UNDER FMLA

Whereas, under almost all work place legislation the company is liable for the excruciating, and often fatal, monetary damages, normally individual supervisors are not personally liable.

Because FMLA defines "employer" as it is defined in the Fair Labor Standards Act, it exposes individual supervisors to personal liability. Thus, any of our supervisors who make a mistake in administering FMLA may be sued personally for such a mistake.

Personal liability of supervisors, should be eliminated from FMLA, since it is really unfair for a supervisor to lose his or her home and life's savings for making a mistake in the administration of a law as confusing as FMLA.

Since, in most small businesses, it is the owner who is also the supervisor, not only does the small business owner expose his entire business Investment to the risk of an FMLA suit, but the business owner also exposes his family and personal assets to such a suit. **This is a real disincentive for anyone to invest in starting up or enlarging a small business.**

Did Congress really intend that supervisors should be personally liable for mistakes made in administering FMLA leave?

FMLA REQUIRES PROCEDURES PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT (ADA)

Section 6.5 Confidentiality and Limitation on Use of Medical Information, requires that all employee medical information be kept in special files subject to limited access and not be kept in personnel files which are available to supervisors. The section states in part:

"All medical-related information must be kept confidential, with the following exceptions:
Supervisors and managers may be informed about necessary restrictions on the work or

duties of any employee and necessary accommodations...”

It is clear that ADA prohibits supervisors from being privy to the medical conditions of employees except for a very few extremely narrow, safety related exceptions.

However, FMLA (Sec. 825.302 Wage & Hour Division.: Family and Medical Leave) actually requires employers to interrogate employees, not only about the employee’s own medical condition, but also about the medical conditions of some of the employee’s relatives which might trigger FMLA leave eligibility on the part of the employee.

Many of our supervisors find conducting such interrogations to be personally distasteful. Additionally, our supervisors literally are put in the position of having to violate one law in order to comply with another law. No one should be put in this position.

**FMLA REQUIRES PERFECT ATTENDANCE
AWARDS TO BE GIVEN TO LEAVE-TAKERS**

Did Congress really intend that an employee absent for weeks on FMLA leave should still be eligible for a “perfect attendance” award or incentive? This undermines the value of perfect attendance awards.

(FMLA Advisory Opinion No. 2, August 16, 1993.)

**FMLA LEAVE TAKERS SHOULD BE PROHIBITED
FROM WORKING OTHER JOBS WHILE ON FMLA LEAVE**

The only way we can prohibit an FMLA leave-taker from working for himself or at another job while we continue to pay the leave-taker’s health insurance and holding his or her job open, is if we adopt a strict “no-moon lighting” policy applicable to all employees.

Except to prevent FMLA abuse, we would never want to institute an anti-moonlighting policy. Anti-moonlighting policies would pose an onerous burden on our employees.

Quite simply, if the nature of the employee’s need justifies FMLA leave from the company that pays the leave-taker’s health insurance, then that need should be great enough to prevent all other, including self, employment.

**LIABILITY EXPOSURE UNDER FMLA
SHOULD BE LIMITED AND REASONABLE**

FMLA is a very complicated law, exacerbated by the fact that we, as the employer, are extremely limited in querying the employee's doctor about how much leave is really needed, especially in the case of intermittent leave.

If we make a mistake in the application of our FMLA policy, the damages should be limited to the real out-of-pocket damage suffered by the "wronged" employee, instead of providing, as is now the case, a chance for the "wronged" employee and his or her attorney to hit the litigation wheel of fortune and collect a jackpot.

CONCLUSION

Just recently, we were about to give an employee a warning for excessive absenteeism, however being FMLA risk adverse we decided that we would have to exclude the possibility of disciplining for an absence that might retroactively be claimed to have been FMLA qualified. We had to postpone the discipline until we could develop an adequate form and have it reviewed by our outside personnel lawyer.

RECOMMENDATIONS

1. Drop personal liability of supervisors.
2. Allow employers to account for FMLA In time blocks of not less than four hours.
3. Restrict employees from other employment when they take family leave from their primary employer. (As their primary employer is paying their health insurance.)
4. Limit FMLA to really serious conditions, not the common cold and ingrown toe nails, as is now the case.
5. Reduce the draconian damage awards which could put a company out of business.
6. Control FMLA from growing as an unfunded mandate.