

TESTIMONY OF
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FOR
THE SOCIETY FOR HUMAN RESOURCE
MANAGEMENT

ON BEHALF OF
MORE THAN 200 ASSOCIATIONS, COMPANIES,
AND ORGANIZATIONS IN
THE FMLA TECHNICAL CORRECTIONS
COALITION
BEFORE THE
SUBCOMMITTEE ON CHILDREN AND FAMILIES

U.S. SENATE
WASHINGTON, DC
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Mr. Chairman and Members of the Subcommittee:

Good morning. I am Deanna R. Gelak, SPHR, Director of Governmental Affairs for the Society for Human Resource Management (SHRM), the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 120,000 professional and student members throughout the world.

I have served as the Chair for the National FMLA Technical Corrections Coalition on behalf of SHRM for more than four years. The Coalition is a diverse, broad-based, non-partisan group of organizations, associations and companies. 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.

While the legislation was originally focused on maternity/paternity leave, the Act was later expanded prior to enactment to include an employee's own **serious** medical condition. Throughout the legislative debate over the FMLA – at virtually every hearing, mark-up, press conference and floor discussion, one thing was always made clear by the bill's authors: the “serious health condition” part of the legislation was not intended to be sick leave or to cover conditions of a short duration, but rather, was designed by Congress only for serious conditions that would not be met by a company's sick leave plan.

I would like to make one point perfectly clear. Today, I am not here to discuss problems with the maternity or paternity leave portions of the legislation. Employers have accommodated those portions of the Act. In fact, most employers provided those leaves prior to the FMLA. The problems have centered around the “serious health condition” portion of the Act, with its implementing regulations, specifically those that relate to leave taken for an employee’s own medical condition. My comments today will only focus on that portion of the Act, which became particularly problematic when the Department of Labor issued regulations and other interpretations that departed from Congress’ intent for the FMLA.

As I begin my testimony, I would like to share just one brief personal story. Fifteen years ago I sat here in this Congress watching the first national hearing on the Family and Medical Leave Act -- then the “Parental Leave Act” -- deeply touched by the compelling witness testimony, and I might add, Senator Dodd’s unquestionable leadership and commitment to the issue. I must admit that at that time I was hoping that someday I would be fortunate enough to have a child and have the opportunity someday to “bond” with that child. Miraculously, someday for me finally came last year when we adopted our baby daughter, Tiffany. Not only has she brought great joy to my life, but she has given me a renewed understanding of the original intent and spirit that brought us the FMLA.

The Coalition believes that the FMLA should be streamlined to reduce administrative and compliance problems experienced by employers. Two previous Congressional hearings

have already thoroughly documented the unintended consequences of the FMLA's implementing regulations and opinion letters. Witnesses from companies all across America, including individuals who had publicly made endorsements of the FMLA prior to its enactment, have again and again documented the case for technical revisions.

The Problem

As FMLA utilization, enforcement and litigation have increased, significant implementation issues under the Act have surged. Last year, the number of FMLA-related lawsuits filed by employees nearly doubled from the previous year. Employers' questions surrounding compliance issues have continued to increase as well. During the period of January through April of 1997 the Society for Human Resource Management's Information Center experienced a 32% increase from the same time period in 1996. Furthermore, the Center experienced a 31% increase in 1998 from the same period in 1997. This trend is in complete contrast to the trend that we have seen with calls for help on the other employment laws. With the other laws, we have historically received fewer requests for help as time has progressed. However, with the FMLA, we continue to receive more and more calls asking for help with compliance.

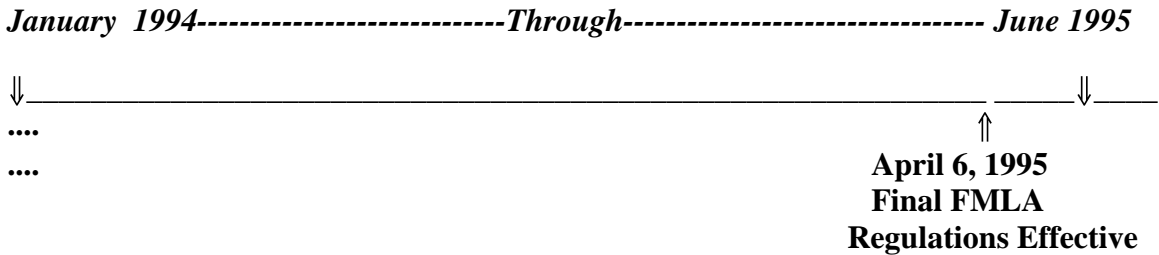
An early review of the FMLA conducted by the U.S. Commission on Leave did not document many problems associated with the Act because the Department of Labor's final implementing regulations were delayed and the Commission's survey was

conducted before employers and employees were fully aware of the law and the Labor Department's final rules. For example, the Commission found that the:

“the rate of leave use designated as FMLA is fairly low . . . (about 1.2 percent of all employees). Given that 55 of every 100 employed persons both work at a covered worksite and are eligible to take leave under the Act, the FMLA utilization rate among these employees is about two percent.” (U.S. Commission on Leave Report, Executive Summary, p. XIX).”

The Commission also noted that a high percentage of employees were still unaware of the FMLA (41.8%). Furthermore, the Commission on Leave questioned employers and employees about their experiences with FMLA leaves that were taken beginning in **January of 1994** for an eighteen-month period. However, the final FMLA regulations were not even effective for employers until **April 6, 1995**.

COMMISSION ON LEAVE EXAMINED LEAVE TAKEN FROM



The more recent *SHRM Work and Family Survey* conducted two years ago revealed that nearly 60 percent of the responding HR professionals reported that they faced problems complying with the rules and regulations of the FMLA. *The 1999 SHRM/Jackson Lewis Employment Practices Liability Survey* revealed that 63 percent of the respondents were frequently uncertain about how to coordinate employee leave under the FMLA, the Americans with Disabilities Act (ADA) and short-term disability programs.

I believe that the greatest cost of the Act's unintended consequences is to employees

themselves. As the Commission on Leave report found: “By far the most prevalent method that employers use to cover work is to assign it temporarily to other co-workers” (67.5%). The more recent SHRM survey found that the slack is picked up by other co-workers 92% of the time. With the FMLA’s regulations, increasingly, leave is being taken on little or no notice, requiring unscheduled overtime that is sometimes unwelcome by co-workers. Sometimes, the work is not done at all, leaving customers hanging.

WORK COVERAGE OPTIONS DURING FMLA LEAVES

Work Coverage Option	Employee	Gender	
Percentage of respondents indicating they:	Total	60% or more Female	60% or more Male
Assign work temporarily to other employees	92	95	98
Put some of the work on hold until the employee returns	42	43	38
Put all of the work on hold until the employee returns	6	5	6

Source: *SHRM 1996 Work and Family Survey*

The FMLA has been confusing to employees. The employer must ask questions about the employee’s or the employee’s family member’s illness to determine whether or not it is an FMLA absence. Employers are now required to ask questions regarding leave use that they never had to ask before. Employees find it hard to believe that the Act can really be that complicated, but it is. Laura Avakian, senior vice president of human resources for Beth Israel Deaconess Medical Center and the CareGroup in Boston publicly supported

the original FMLA prior to enactment. However, she recently stated that their company ends up “looking like the bad guys to employees because we are forced to ask why they were absent and obtain medical certifications from their doctors for our records. While most records and data collected for FMLA purposes are never touched, employers are feeling more pressure to ensure that their FMLA procedures and records comply completely with the very complex rules and regulations.” (Leonard, *HRMagazine*, “Relieving FMLA Headaches”, July 1999, p. 42). A copy of the article is attached to my testimony.

Employers have not been provided with clear and complete guidance that they have needed in order to comply with the FMLA and steer clear of litigation—litigation that can sink a business and eliminate jobs. One year, the Department of Labor issued a statement advising that conditions such as the common cold, flu, and non-migraine headaches were not serious health conditions. The next year, the Department of Labor issued a statement saying they could be. This is extraordinarily confusing for both employees and employers.

Companies are increasingly turning to vendors to help them comply with the FMLA’s administrivia. Many large employers have added FMLA specialists to their HR staffs. As record-keeping has become more complex, some employers have added FMLA administration to the growing number of outsourced HR functions. However, according to the *HRMagazine* interviews, “the services aren’t available to all employers. The law of diminishing returns means that it is only cost-effective and efficient for a firm to

supply FMLA services to larger-sized employers”. Id. p. 43. The article goes on to say that “As you might expect, outsourcing FMLA administration is a tricky proposition and requires an employer to take some risks while surrendering control of an important employee relations function to a third party.” Id. p. 44. Employment attorney Ann Covey has recently stated that “FMLA is such an employee-relations-intensive law, I see a lot of difficulty in delegating administrative functions to a third party. She believes that outsourcing FMLA functions is much too risky and problematic and would never recommend it to her clients.” Id. p. 44. Rebecca Carlson of FMLA Services, Inc. is quoted as saying that, “I doubt that any company is 100 percent compliant with the law. It is just that complex.” Id. p. 43.

The Solution: Bipartisan Technical Corrections Legislation

The Coalition urges Congress to enact technical corrections legislation such as H.R. 3751 (introduced in the 105th Congress with four Democratic cosponsors), which would restore the FMLA to reflect Congress’ original intent. Corrections legislation should address the following well-documented FMLA problems:

1. “Serious” Health Condition

The coalition strongly endorses the bipartisan, Family and Medical Leave Clarification Act, H.R. 3751, which takes the then majority Democratic Committee Report word for word, adding it to the statute as follows:

The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. (U.S. Congress, *Family and Medical Leave Act*, H. Rep. 103-8, at 40 (1991) and S. Rep. No. 103-3, at 28 (1993)).

2. Intermittent Leave

When Congress passed the FMLA, the Act allowed employees to take leave in less than full day increments when medically necessary. This provision was intended to address those situations where an employee may need to take leave for treatments such as chemotherapy or radiation treatments. While we would not question the need for these types of leaves, the intent of the provision was stretched well beyond these types of leaves by the regulators implementing the Act. The Department of Labor determined that the leave must be provided and tracked in segments as little as six minutes (as small as an employer's payroll system tracks the leave, but not more than one hour). As a practical matter, intermittent leave under the FMLA has resulted in a whole host of problems related to maintaining attendance control policies. The problem is that employers' payroll systems track payroll -- not leave -- and this type of tracking must be done independently, usually manually since computer software does not exist for this purpose. The tracking of these small segments of leave is difficult to say the least. The Department's serious health condition regulations and interpretations have exacerbated this difficulty. It is no surprise that even at a very early stage of FMLA compliance, the Commission on Leave found that 40% of employers had experienced a great deal of

difficulty attempting to comply with this requirement. The intermittent leave provision should be restored to original Congressional intent to stop the needless waste of resources that are currently required to track these small segments of leave. The Coalition urges Congress to clarify the FMLA's intermittent leave provisions to allow employers to provide and track leave in half-day increments.

3. Extend the Two-Day Notice Period to Allow Adequate Time for Designation and Guidance

Another example of the administrative burdens created by the Act's implementing regulations is the requirement that employers notify employees that leave will be counted toward FMLA leave within just two business days. For most companies, it is almost impossible for employers to provide written guidance to the employee within two days concerning all of the employee's rights and obligations under the FMLA in addition to a notification as to whether or not the leave that they have taken appears to be covered by the FMLA. In fact, many physicians are so irritated by the excessive paperwork requirements of the FMLA that they are now charging employees or employers for this certification (on a per page rate). The Coalition urges Congress to extend the two-day notice period to allow adequate time for FMLA designation and the provision of employee guidance.

4. Invoking the FMLA

Employers are often left guessing when it comes to many aspects of the FMLA. The FMLA is different from many other employment laws in that invoking the FMLA is squarely on the employer's shoulders. An employee need not ever mention the need or desire to take an FMLA leave.

5. Don't Penalize the Progressive Employers Who Offered Pre-FMLA Paid Leaves

Unfortunately, generous companies that provided paid leave long before the FMLA was enacted are experiencing many disastrous results. Because of the FMLA regulations, these companies are now finding paid-leave programs to be most difficult to administer and sometimes unaffordable. Ironically, as a result of the FMLA, some employers are moving toward eliminating pre-FMLA generous programs and other companies are being discouraged by consultants from adopting them. Many companies believe that Congress should consider allowing employers to permit employees to take either a paid leave package under an existing HR policy or collective bargaining agreement or the 12 weeks of unpaid FMLA protected leave, whichever the employee considers more beneficial. Congress must provide employers offering paid leave some reasonable ability to manage absences.

Conclusion

A record has been established for technical corrections from numerous witnesses at multiple Congressional hearings. This is the third Congressional hearing thoroughly documenting the unintended consequences of the FMLA with its implementing regulations:

.... *The May 9, 1996 hearing in this Subcommittee;
 *The June 10, 1997 hearing in the House Subcommittee on Oversight and
 Investigations, Committee on Education and the Workforce; and
 *Now this hearing today.

A strong public record has now been thoroughly established. It is now time for the Senate to move forward to enact technical changes to the Act. It is our strong hope that the technical corrections legislation, such as H.R. 3751, which was introduced in the last session of Congress with four Democratic cosponsors, will be fully embraced by all of the original authors of the FMLA and advance quickly in the Senate with a bipartisan spirit.

Technical corrections do not need to be polarizing, combative or controversial, but they do need to be done as soon as possible so that the Family and Medical Leave Act operates in the manner and the spirit that Congress intended.

The entire FMLA Technical Corrections Coalition would be pleased to work with you toward that end. I would be happy to answer any questions.

