

PREPARED STATEMENT OF CYNTHIA GRAHAM

Mr. Chairman and members of the subcommittee: Good morning. I am Cynthia Graham, Human Resource Analyst for Southern States Utilities in Apopka, FL. Southern States Utilities, Inc. (SSU), with 500 employees, is the largest investor-owned water and wastewater utility operating in 25 Florida counties. We have 152 service areas and represent over 160,000 customers.

The purpose of the Family and Medical Leave Act of 1993 (FMLA) was to balance the demands of family and work for both men and women in a manner consistent with the legitimate interest of employers. However, our experience has been that several aspects of the FMLA cause more conflict than harmony in the workplace due to the ambiguity of its content and the law's interaction with other employment regulations such as the Fair Labor Standards Act (FLSA), the Americans With Disabilities Act (ADA), and state workers' compensation laws. Thus, compliance with the FMLA is often more of an employer's administrative burden than an employee's benefit.

Employers, taxed with the unnecessary administrative quagmire of the FMLA, are unable to utilize valuable time and resources for employee and business development. Hence, job growth is thwarted by compliance requirements. Additionally, money spent on FMLA administration is taken away from other budgeted benefits such as health insurance, retirement plans and life insurance, all important factors creating a stable domestic environment for American workers. Specific difficulties that we have encountered are as follows: the definition of a serious health condition, the daily administration of its requirements, the management of statutory conflicts with other employment regulations.

SERIOUS HEALTH CONDITION

The January 6, 1995, Final Rule on the FMLA issued by the Department of Labor (DOL) created additional questions for employers. For example, the definition of a serious health condition "includes any condition that involves either inpatient care or 'continuing treatment by a health care provider.' It is the meaning of this latter term that has led to much debate." Continuing treatment may include any of the following:

A period of incapacity (inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment or it, or recovery from it) of more than

three consecutive days plus either two or more treatments (which do not include routine examinations) by a health care provider (or by a nurse or assistant under the health care provider's direct supervision, or by any provider of health care services under orders of or on referral by a health care provider) or one treatment by a health care provider followed by a regimen of continuing treatment, such as prescription drugs or therapy requiring special equipment, any period of incapacity due to pregnancy (including severe morning sickness, regardless whether treatment is received during the period of incapacity, and even if the incapacity is less than three days) or for prenatal care;

Any period of incapacity (again, even if less than three days and even if no treatment is sought during the period of incapacity) or treatment for such incapacity due to a chronic serious health condition, which is defined broadly to include one which: (A) requires periodic visits for treatment by a health care provider (or a nurse or assistant under the direct supervision of a health care provider); (B) continues over an extended period, including recurring episodes of a single condition; or may cause episodic rather than a continuing period of incapacity (for example, asthma, diabetes, epilepsy);

Any permanent or long-term period of incapacity due to a condition (such as Alzheimer's, a severe stroke, or the terminal stages of cancer) for which treatment may not be effective, and where the employee or family member suffering from the incapacity is under the continuing supervision of but not necessarily the active treatment by, a health care provider.

Any period of incapacity relating to receipt of multiple treatments by, under orders or on referral by, a health care provider, either for restorative surgery after an injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical treatment (such as chemotherapy or radiation treatments for cancer, physical therapy for severe arthritis, or dialysis for kidney disease).

As described above, any health condition has the potential to become qualified. Even if the regulations list non-qualifying illnesses such as minor ulcers, migraines and dental diseases as having the potential to become serious health conditions should complications arise. For example, in *Reich V. Midwest Plastic Engineering, Inc.*, the Department of Labor took the position that chicken pox qualified as a serious health condition even though it did not meet any of the above outlined criteria. Additionally, a "health care provider" may include midwives, nurse practitioners, clinical social workers, Christian Science practitioners and a variety of other

providers. Due to the broad definition of what constitutes a serious health condition, employers are baffled when presented with a request for leave.

ADMINISTRATIVE BURDENS

Further, the employee is not required to specifically ask for FMLA leave to be covered by the statute. It is the sole responsibility of the employer to “recognize the circumstances under which FMLA may apply, to designate the leave as FMLA, and to implement the necessary notice procedures.” The employer must ascertain when an employee begins utilizing his/her twelve (12) weeks. An example from a national insurance company illustrates what problems may arise. An employee coming back from a two week vacation disclosed that he had spent his paid time-off caring for a terminally ill relative and requested an additional twelve (12) weeks of unpaid leave. Had the insurance company known that the employee was using paid leave for purposes outlined under the FMLA, the two weeks could have been used as part of his twelve (12) week entitlement. Unless employees relay detailed information regarding the purpose and circumstances for all scheduled and unscheduled absences, employers are unable to determine when an FMLA qualifying event occurs.

Once an FMLA leave begins, additional administrative burdens exist in record keeping. The fact that any period of incapacity can qualify under leave requirements combined with the small increments of time allowed to be taken create problems for the employer in recording the annual twelve (12) weeks of leave. Under the provisions for intermittent and reduced work schedule leave, an employee may reduce “their normal work schedule in increments as small as the shortest period of time that the employer’s payroll system uses to account for absences, or in increments of one hour, whichever is smaller.” Thus, we may be required to track blocks of time as small as fifteen (15) minutes. Potentially, this could mean entering 1,920 records for each employee requiring thousands of payroll dollars for the purpose of FMLA administration. A survey of 299 employers conducted jointly by William M. Mercer Inc., benefits consultants and the Institute of Industrial Relations at the University of California, Berkeley indicates that 27.9 percent of employers require an automated human resource information system to track leave use. The survey results reinforce the fact that the FMLA requirements are so complex that they warrant a sophisticated automated record keeping system.

CONFLICTS WITH THE REGULATORY ENVIRONMENT

In addition to the difficulties of complying with the Family and Medical Leave Act, there are

additional problems in coordinating FMLA compliance with other employment laws and regulations such as the Fair Labor Standards Act, the Americans with Disabilities Act, and state workers' compensation laws.

First, under the FLSA, employers are not allowed to deduct exempt employee wages for periods of less than one day. As noted earlier, the FMLA allows for unpaid leave in increments as small as fifteen (15) minutes. The Department of Labor has granted an exception in cases where employees meet the minimum requirements of FMLA eligibility. Unfortunately, if an employer grants leave for a professional employee not qualified for leave, the company jeopardizes not only the employee's exempt status but also that of all similar job classifications. According to the William M. Mercer survey, 22 percent of larger companies employing 2,001 to 5,000 employees and 29.6 percent in excess of 10,000 employees offer FMLA leaves to ineligible employees, and this generosity could easily lead to a serious violation of Wage and Hour laws.

Second, there is a direct conflict of purpose between state workers' compensation laws with return-to-work programs and the Act. Under the FMLA, employers "may not provide the employees with a modified duty assignment if the employees would rather take unpaid medical leave." Giving employees the right to reject light duty assignments undermines the intent of return-to-work programs. In addition, many employers are not aware that the calculation of FMLA time begins in conjunction with lost time due to an on-the-job injury. However, time worked in a light duty job does not count toward the twelve week FMLA leave entitlement. Again, this causes difficulties in computing the actual duration of leave taken. Additionally, should an employer fail to calculate leave on the onset of a work injury, the employee may not meet the annual hourly work requirements qualifying him/her for FMLA leave.

Finally, once an employee has exhausted his/her FMLA leave, any continuation of leave and the right to reinstatement falls under ADA regulation. Although both the FMLA and ADA require a covered employer to grant medical leave, the laws' definitions differ. An FMLA "serious health condition" is not necessarily an ADA disability. An employee with a "record of a 'serious health condition' does not necessarily mean that she has a record of an ADA disability." Herein lies another problem of perceiving workers with serious health conditions as having an ADA covered disability. The employer must then analyze the employee's situation in regards to a reasonable accommodation based on the essential functions of the job.

In summary, despite the original intent of the FMLA, employers are left with more questions

than answers. Employers are forced to spend more time bogged in a quagmire of confusing regulatory requirements than working to creatively accommodate the work life needs of employees. Overall economic growth is hindered by an Act which creates unnecessary administrative burdens which draw away from its benefits. I urge Congress to quickly address these administrative problems so that the Act will work more effectively for all concerned.

I would be happy to answer any questions.