

**HEARING ON THE FAMILY AND MEDICAL
LEAVE
ACT [FMLA] OF 1993**

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON EDUCATION AND
THE WORKFORCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JUNE 10, 1997

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**COMMITTEE ON EDUCATION
AND THE WORKFORCE**
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OPENING STATEMENT
THE HONORABLE HARRIS FAWELL
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OVERSIGHT HEARING ON THE FAMILY AND MEDICAL
LEAVE ACT OF 1993
JUNE 10, 1997

The subcommittee will come to order. I would like to welcome everyone to this hearing of the Subcommittee on Oversight and Investigations. This morning we are conducting oversight of the Family and Medical Leave Act of 1993. Let me take this opportunity to add a little bit about my perspective on this hearing.

For me, this hearing has one purpose — to look at how the FMLA has been working out in the real world. The prevailing assumption here in Washington is, I think, that the FMLA has been problem-free since its enactment. But out where working men and women earn their money, out where jobs are created and where things are being produced, we are seeing compelling evidence that the Act is causing problems which are doing a disservice to both employers and employees.

Whatever one's opinion of the FMLA, there can be no dispute that Congress has a responsibility to review its handiwork to see if this legislation is working as intended. Sometimes the temptation is Congress is to rush forward to force upon Americans more of our "good intentions" -- in fact I'm reminded of the English proverb, "Hell is paved with good intentions" -- but the right thing often is to simply slow down and review existing legislation to assess where things stand. This is what we are here to do this morning.

I do not think anyone would dispute that the FMLA has done some good for those with serious family or medical crises. But some of the troublesome results are difficult to ignore. There is evidence of upheaval to the workplace caused by the Act's "intermittent leave" provisions, of increased incidental absences, of additional burdens from overly broad and confusing regulations, of the Act

rendering useless some absence control plans and increasing costs.

You will hear today about the Commission on Leave, created by the Act itself and charged with reporting its impact. You will be told that according to the Commission's Report — release in April 1996 -- all is well with the FMLA. But contrary to these assertions, the Report was not a complete picture. In fact, the FMLA Commission admitted its Report was only an "initial assessment." Its two-year study began in November of 1993 - just three months after the Act even applied to most employers and more than a year before the release of final regulations in January 1995. The Report is based on old data looked at long before employers or employees could have been fully aware of the Act's many requirements and responsibilities.

We are here this morning to complete and update the picture of how the FMLA is doing out there, at the same time recognizing that competing demands place on America's working families do call for workplace policies allowing families to better meet those demands - this is why I support our Comp Time legislation, H.R. 1, which would allow workers to use paid time off to take care of personal or family needs, while the FMLA guarantees only unpaid time off. I look forward to the testimony we will hear today and I thank all the witnesses for being here.

At this time I would like to yield to my distinguished colleague, Ms. Mink of Hawaii, to ask if she has an opening statement.

**APPENDIX B - TRANSCRIPT OF NBC NIGHTLY NEWS, MAY 3, 1997,
“THE HIGHT COST OF GOOD INTENTIONS’, VIDEO PRESENTATION
The High Cost of Good Intentions”**

Date May 03, 1997
Time 08:30 PM - 07:00 PM
Station NBC-TV (NBC)
Location Network
Program NBC Nightly News

Brian Williams. anchor:

And later on in Focus, it’s good for families but what impact is the family leave law having back on the job.

(Unrelated Materials Omitted)

Williams: In Focus this evening the Federal Family leave law. It has made things a lot easier for some working parents but it’s caused some surprising problems for employers. A report card now from NBC’s Brigitte Quinn.

Brigitte Quinn, reporter:

Katie Baker is staying at home with her baby Neil. Her husband Bob teaches High School. Katie put her career as a research librarian on hold to watch her baby grow.

Katie Baker (Mother): I’ve been able to see the first time he’s ever rolled over or sat up or babbled for the first time. I’ve been able to experience all of that.

Quinn: The White House estimates that 12 million Americans have taken time off since President Clinton signed the medical leave act in 1 993. But it is unclear how many of those leaves the law made possible. Katie’s company, **AT&T**, like many corporations, was granting leaves before the law was signed. The signing ceremony was the culmination of a seven year effort to pass the legislation. But that was not the end. From here it went to the regulators. At the Department of Labor who wrote the rules which defined the law. Protecting jobs while providing up to three months of unpaid leave for child birth, adoption of a serious medical condition. But companies have seen claims for condition they believe are not

serious.

Conjunctivitis, pink eye, a hurt ankle, mild depression and disputing claims can be expensive. Westlake Polymers spent more than fifty thousand dollars fighting one before settling the case. The serious medical condition, an ingrown toenail. Workers at some companies are taking more short term sick leave often collecting full pay. **Bell Atlantic** sick leave jumped 55 percent. Hallmark's absentee rate jumped 42 percent. In some **AT&T** units daily absences have almost doubled from six to fifteen percent.

Burke Stinson (AT&T): In some cases people seem to be staying home hiding behind the skirts of the law when they should be at work. In some cases we are finding that ten to fifteen percent of the work force is out on a given day.

Quinn: Kenny Rucker represents workers at **Bell Atlantic**. He says that until the family leave law was enacted, union members felt forced to use vacation days.

Kenny Rucker (C.W.A.) Local 2222 President): They were being robbed of taking care of their family obligations and it shouldn't be that way. And this law is the first time that I am aware of that people aren't being beat up for taking care of their health and their families.

Quinn: Eleven year-old John Sylvios has asthma. When he stays home from school, his mother Dana must stay home from work. She says she has been warned about taking too many days off. The family leave law protects her now.

Dana Sylvios (Mother): To have to make a decision to have a perfect record or your child's health, It shouldn't be a difficult decision to make, but basically that's what I thought I was up against.

Quinn: Companies often complain about changes in the regulations. Originally, the common cold was not covered. Then late last year, regulators said, "yes, it may be covered." Deana Gelak represents human resource managers and says the family leave law has drifted far from it's original intent.

Deana Gelak (Society for Human Resource Management): FMLA was not sold to the American people or to Congress as a national sick leave program. It was sold as time for bonding with family members or for serious family emergency leave reasons.

Christopher Bond (Senator, Connecticut): This may not be perfect. We can go back and look at it. And if there are ways we can fix it, I'm all for doing that.

Quinn: Senator Christopher Dodd sponsored the original legislation and still feels that it's essential.

Dodd: Working people in this country ought never to be faced with having to choose between their economic security and the caring of their family.

Quinn: The law was passed to ease the burden on single and two parent working families.

But four years in the debate over cost and benefits is still raging. Brigett Quinn.

NBC

NEWS.

**APPENDIX C - STATEMENT OF MS. LYNN C. OUTWATER,
MANAGING PARTNER, JACKSON, LEWIS, SCHNITZLER &
KRUPMAN**

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REPRESENTING MANAGEMENT EXCLUSIVELY IN LABOR.
EMPLOYMENT & BENEFITS LAW AND RELATED LITIGATION

July 2, 1997

VIA FEDERAL EXPRESS

The Honorable Peter Hoekstra
Subcommittee Chairman
Subcommittee on Oversight and Investigations
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515-6100

Dear Chairman Hoekstra:

Thank you for providing me with an opportunity to testify before your Subcommittee regarding the Family and Medical Leave Act and its impact. I am pleased to provide a response to the following questions you posed to me.

First, you asked me to explain the significance of certain Department of Labor Opinions with respect to the definition of serious health condition to supplement my written testimony. To reiterate, Congressional intent in this regard was spelled out in the legislative history:

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, Committee on Education and Labor, Family and Medical Leave Act of 1993, H. Rept. 103-8, February 2, 1993, p. 40).

Thereafter, the Department of Labor officially recognized that conditions lasting just a few days would not be covered under the FMLA:

This scant statutory definition is further clarified by the legislative history. The congressional reports did indicate that the term was not intended to cover short-term conditions for which treatment and recovery are very brief, as Congress expected that such conditions would be covered by even the most modest of employer sick leave policies.

(U.S. Department of Labor, Summary of Major Comments on the Final Regulations Implementing the FMLA of 1993, December 30, 1994).

On April 7, 1995, the Deputy Assistant Administrator of the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Daniel F. Sweeney, wrote to the Honorable Ernest F. Hollings, in pertinent part, as follows:

This is in response to your letter of March 14 forwarding a copy of a letter from your constituent... regarding the Family and Medical Leave Act of 1993 (FMLA). The correspondence addresses... concerns: that the Department's interpretation of the term serious health condition does not reflect the intent of the Act's authors and is being applied inconsistently.

Deputy Assistant Administrator Sweeney wrote that the FMLA defines serious health condition to mean either:

'Inpatient care in a hospital, hospice, or residential medical care facility' or 'continuing treatment by a health care provider.' Regulations, 29 CFR Part 825, published as a Final Rule on January 6, 1995 and effective April 6, 1995, state that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and

therefore do not qualify for FMLA leave. (Emphasis added).

Deputy Assistant Administrator Sweeney went on to write that:

The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications.) See § 825.114(c) of the final FMLA Regulations, 29 C.F.R. Part 825.

Thereafter, in correspondence from Maria Echaveste, Administrator, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, dated December 12, 1996, Ms. Echaveste wrote as follows:

This is in reference to our letter to you dated April 7, 1995, in connection with an inquiry you received from..., Human Resources Manager for..., in which he expressed the view that an employee who has been incapacitated for more than three days and treated at least once by a health care provider, which results in a regimen of continuing treatment prescribed by the health care provider, may not have a qualifying 'serious health condition' within the meaning of the Family and Medical Leave Act (FMLA). Upon further review of this issue and of the conclusion expressed in our letter, we have determined that our letter expresses an

incorrect view, being inconsistent with the Department's established interpretation of qualifying 'serious health conditions' under the FMLA regulations, 29 CFR Section 825.114.

Ms. Echaveste went on to write:

The FMLA regulations also provide examples, in section 825.114(c), of conditions that **ordinarily**, unless complications arise, would not meet the regulatory definition of a serious health condition and would not therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involve qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA.

Ms. Echaveste then concluded as follows:

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not 'convert minor illnesses *** into serious health conditions in the ordinary case (absent complications),' is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory 'more than three Consecutive calendar days' period of incapacity and 'regimen of continuing treatment by a health care provider' tests are otherwise met. The regulations reflect the view that, ordinarily, conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

You have also asked me to comment upon the New Jersey Family Leave Act which Representative Roukema spoke of during the hearing. The essential differences which pose greater challenges under the Family and Medical Leave Act are as follows:

- As you are aware, the Family and Medical Leave Act of 1993 (FMLA) allows eligible employees to take up to a total of 12 work weeks in any 12-month period for FMLA covered leave reasons. In contrast, the New Jersey statute only provides up to 12 weeks of family leave in any 24-month period for eligible leave reasons.

- Under the New Jersey leave statute, family leave may be taken upon the birth or adoption of a child, or to care for a relative with a serious health condition. In contrast, the federal FMLA provides leave because of the placement of a child with the employee for foster care, in addition to adoption, which the New Jersey leave statute does not.
- However, the most important distinction is that the federal FMLA allows employees time off for their own serious health condition, whereas the New Jersey Statute does not. Much of the testimony provided dealt with anecdotal instances that are problematic because of an employee's own serious health condition. Also, some of the testimony focused on the problems employers have when leave is taken on an intermittent basis rather than all at once for an employee's own serious health condition.
- For example, under the FMLA, but not under the New Jersey statute, a pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness.
- The Department of Labor has made it clear that there is no limit, under federal law, on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. The only limitation is that the employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. With some employers' payroll

systems, this would allow for leave increments in as small as six to eight minute increments.

In closing, I would like to thank you for the opportunity to have been of assistance in the most important endeavors your Subcommittee is undertaking. I appreciate your keeping the record open for my responses until July 3, 1997. I hope my additional written comments have been helpful.

Sincerely,

JACKSON, LEWIS, SCHNTZLER & KRUPMAN

Lynn C. Outwater

LCO:ch

JACKSON. LEWIS, SCHNITZLER & KRUPMAN