

**COMMENTS OF  
HALLMARK CARDS, INCORPORATED  
ON THE IMPLEMENTATION OF  
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**

**June 10, 1997**

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**EXECUTIVE SUMMARY**

Hallmark Cards, Incorporated (Hallmark) has a long tradition of providing family-friendly policies and benefits to employees, and has been recognized for many years as a company that is sensitive to the needs of employees to balance both work and family. Nevertheless, many provisions of the Family & Medical Leave Act (FMLA) and the Department of Labor (DOL) regulations implementing the FMLA have caused significant costs and administrative burdens for Hallmark.

Among the FMLA requirements that have caused the most difficulty for Hallmark have been

- the broad definition of “serious health condition” that encompasses many minor medical problems and permits employees to use the FMLA for voluntary procedures;
- the administrative burdens of the detailed and restrictive DOL notification and medical certification procedures;
- the use of intermittent leave for chronic illnesses of an unpredictable nature, such as migraines, asthma, and other conditions, sometimes resulting in the employee being gone unpredictably as often as every week; and
- the provision in the DOL regulations that permits employees to choose FMLA leave rather than light-duty or other accommodations offered by an employer to enable the employee to return to work.

During 1996, Hallmark had over 1,900 full-time non-exempt employees take some amount of FMLA leave, out of a total full-time non-exempt population of approximately 8,500. Thus, 23% of Hallmark’s non-exempt employees took FMLA leave. These employees took a total of more than 346,000 hours of FMLA leave. Of this total, almost 273,000 hours (79%) was paid leave —the equivalent of over 130 full-time employees. Hallmark’s paid illness hours increased by approximately 35% from 1993 to 1996, which Hallmark attributes in large part to the FMLA and its interaction with Hallmark’s generous short-term disability (sick pay) policy.

As a result of the difficulties with implementing FMLA and the DOL regulations, Hallmark has had to consider revising some of its policies and benefits, such as short-term disability, to reduce the increased costs of the increased absence rates the company has experienced since passage of FMLA. It surely was not Congress' intent in passing FMLA that generous companies such as Hallmark even think about reducing benefits for employees.

In order to reduce the costs to employers of compliance with FMLA, while still preserving the primary intent of the law, Hallmark recommends that Congress consider making changes to the FMLA, such as

- refining the definition of "serious health condition," to restrict it to truly serious conditions;
- permitting greater flexibility by employers in communicating with employees and their health care providers;
- clarifying how long an employer must permit an employee to continue on intermittent leave, and
- requiring that employees return to work if an employer has offered an appropriate accommodation to enable the employee to deal with a health problem while still working.

Hallmark supports the purpose behind the FMLA of permitting employees to balance their work and family needs. However, many of the regulations implementing the FMLA have proven to be difficult to implement and costly to employers such as Hallmark, and should be re-visited.

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**A. WORK & FAMILY POLICIES OF HALLMARK CARDS**

**1. DEPARTMENTS AND PROGRAMS**

Hallmark Cards, Incorporated is a privately held corporation with sales in excess of \$3 billion. Hallmark has a Work & Family Services Department which arranges and administers a number of programs designed to help employees with issues such as child care, elder care, and other family issues. Information on the programs developed by the Work & Family Services Department is included as Attachment 1.

Hallmark has always offered its employees flexible leave of absence policies and a generous sick pay (short term disability) plan. Hallmark began offering a three month maternity leave more than 15 years ago, and has offered a six month parental leave to new parents since approximately 1990. Moreover, most employees at Hallmark quickly accrue six months of short-term disability leave at full pay, followed by long-term disability benefits at half pay. Hallmark's leave of absence and disability policies are more generous than required by the Family & Medical Leave Act of 1993 (FMLA). Because of these generous benefits, Hallmark has seen its paid sick time increase significantly since the effective date of the FMLA. These costs are detailed in Section C of these comments.

Hallmark employees who have serious illnesses, or whose family members have had serious illnesses, have been given generous leaves to deal with their personal situations. In one situation (admittedly unique), Hallmark provided an employee with a three year paid leave of absence when the employee had two critically ill children. Thus, Hallmark has long supported the need to balance work and family life, which is the purpose behind the FMLA, and has accommodated many employees' individual needs.

Another benefit which Hallmark offers its employees is a cafeteria plan under Section 125 of the Code known as the Flexible Benefits Plan of Hallmark Cards, Incorporated ("the Flex Plan"). Of Hallmark's more than 12,000 full-time employees, approximately 2,500 participate in the Flex Plan each year.

## **2. AWARDS AND RECOGNITION GIVEN TO HALLMARK**

Hallmark has a national reputation for being a family-friendly company with generous benefits. Some of the awards that Hallmark has received are included in Attachment 2. For example, Hallmark has been named among the top companies for working women by *WORKING MOTHER* magazine for 11 consecutive years. Hallmark has twice been listed in the top ten of *THE 100 BEST COMPANIES TO WORK FOR IN AMERICA* by Robert Levering and Milton Moskowitz (1984, 1993).

Recently, Hallmark was named a winner of the 1996 *PERSONNEL JOURNAL* Optimas Award (see the January 1996 issue of *PERSONNEL JOURNAL*), in part because of Hallmark's family assistance benefits, such as six-month leaves of absence for new parents, adoption assistance program, and sick child care program. In addition, Hallmark has been recognized in *THE NEW YORK TIMES* and in *USA TODAY* for its program with the State of Missouri in sending cards to new parents reminding them of state immunization requirements.

In short, Hallmark is already providing most of the additional family-friendly policies and benefits recommended by the Commission on Leave, and has been recognized for its efforts in this regard. It is ironic that it is Hallmark's tradition of accommodating work and family needs that has led to the problems Hallmark has had in adapting to the FMLA. Despite Hallmark's lengthy experience with family-friendly policies, compliance with the FMLA has been very difficult and costly for Hallmark to administer.

## **B. PROVISIONS OF FMLA CAUSING DIFFICULTY FOR EMPLOYERS SUCH AS HALLMARK**

The Family & Medical Leave Act and the regulations under the FMLA issued by the Department of Labor have made significant changes in the way that employers handle employee absences. This section describes the provisions of the FMLA and the DCL regulations that affect employers such as Hallmark most significantly, including examples of some situations in which Hallmark employees have sought FMLA leaves that Hallmark believes exceed Congressional intent.

### **1. DEFINITION OF "SERIOUS HEALTH CONDITION" IN DOL REGULATIONS IS OVERLY BROAD**

The definition of "serious health condition" in the final Department of Labor (DOL) regulations interpreting the FMLA is extremely broad. Section 825.114 of the final regulations defines "serious health condition" to include, among other things,

- any absence of more than three days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor's visit, or a prescription, or a referral to a physical therapist);
- any treatment for prenatal care;
- any absence for a chronic health problem, such as arthritis, asthma, diabetes, etc., even if the employee does not see a doctor for that absence.

Hallmark believes that the breadth of the DOL's definition exceeds what Congress intended in passing FMLA. Inclusion of all of these absences in the definition of "serious health condition" loses sight of what the FMLA statute was meant to do — to protect employees who had *serious* medical problems in their families from losing their jobs.

Despite the list in Section 825.114(c) of minor conditions that do not rise to the level of a "serious health condition," many minor medical problems technically fall within the DOL's definition. Thus, employers are at risk of legal claims from the DOL or from employees if they deny the protections of the FMLA to employees who are absent for these minor problems. In late 1996, DCL further complicated the interpretation of what constitutes a "serious health condition" by issuing an opinion letter that contradicted a 1995 opinion letter;

The following are examples of conditions for which Hallmark employees have sought to take FMLA protected leaves, which Hallmark believes are beyond the scope of what Congress intended:

- An employee claimed months after taking a four-day absence (at the time of discharge for poor performance and attendance, based on this absence and many other non-FMLA absences) that the four-day absence should have been designated as an FMLA leave. The employee claimed that the absence was due to a bladder infection, that she had seen a doctor on the third day of her absence, and that she had been given a prescription. According to her supervisors, she had not informed them at the time of her absence that she had had a bladder infection, nor that she had seen a doctor, and she had not followed Hallmark's policy that employees call in each day that they are absent. This employee had taken prior FMLA leaves and had received prior FMLA notification forms, so she was clearly aware of the FMLA. Nevertheless, she did not indicate that she needed another FMLA leave, nor provide any information regarding her illness at the time of her absence, but waited until she was terminated a few months later to raise the issue. The local office of the DOL told Hallmark that the company should have given her the opportunity when she did allege that this absence was for an FMLA-covered reason to present a medical certification, though it was months after her absence.
- An employee claimed that mental stress due to her divorce and a vaginal infection qualified for FMLA leave, because she had been treated with Valium and an antibiotic. The employee's gynecologist completed a medical certification form indicating that the

employee should be given a six-week leave for these conditions. Under the DOL's regulations, the only basis for Hallmark to deny a six-week leave in this situation (which would be paid under Hallmark's short-term disability policy, since it was for the employee's own medical condition) would have been to obtain second and third medical certifications indicating that the employee did not need six weeks off.

- An employee sought FMLA leave to take care of a "personal family crisis" of an undisclosed nature. The employee obtained a medical certification from a doctor indicating that the employee's "sleeping, eating and concentration habits" were affected by the crisis, and that the employee needed time off "to consult with attorneys, state agencies and other advisors." Hallmark did deny FMLA leave in this situation, unless more information was submitted. However, if the doctor had provided medical facts indicating that the employee was unable to work, this situation might well have been within the DOL's definition of "serious health condition."
- An employee had problems with dental bridgework, but did not get treatment for over a month. The employee then developed a gum infection, and was absent from work for a week. Although treatment for the original dental condition would probably have been "routine" within the DOL regulations and therefore not covered by FMLA, it is unclear whether the later infection — caused by the employee's earlier failure to seek treatment --was a "complication," which would have placed the absence under FMLA under the new DOL opinion letter. Thus, the list of "routine" conditions in Section 814.114© is not very helpful.

Hallmark does not believe that Congress meant to include bladder infections, vaginal infections, stress from divorce, "personal family crises" and dental work in the definition of "serious health condition" under the FMLA. Yet the DOL's final regulations are broad enough to permit employees to claim that these situations should be protected by the FMLA.

## **2. EMPLOYEES SHOULD NOT BE ABLE TO USE FMLA LEAVE FOR PROCEDURES THAT ARE VOLUNTARY AND ARE NOT MEDICALLY NECESSARY**

The DOL's regulations provide that even absences for voluntary procedures (such as cosmetic surgery) are covered by the FMLA, if in-patient treatment is involved. However, Hallmark has found that some employees have had voluntary procedures certified by their doctors under some other aspect of the "serious health condition" definition.

For example, a Hallmark employee sought FMLA leave for a radial keriotomy. The procedure was performed on an outpatient basis; and the employee was absent from work for less than three work days (though more than three calendar days). Although the procedure was cosmetic surgery and the employee did not have any in-patient treatment, the employee was "incapacitated" for more than three days and did receive continuing treatment by a health care provider. It is unclear under the DCL regulations whether this type of procedure was a "serious health condition."

In addition, Hallmark employees have sought to use FMLA leave for infertility treatments and sterilization procedures, such as vasectomies, even when these procedures are performed on an outpatient basis. Doctors have certified infertility treatments of Hallmark employees as being for a “chronic” condition. Hallmark does not believe that these types of treatment should be covered by FMLA.

### **3. DIFFICULTY OF THE ADMINISTRATIVE REQUIREMENTS IN THE DOL REGULATIONS**

Not only does Hallmark believe that the broad definition of “serious health condition” exceeds Congressional intent, but Hallmark also believes that the notice and recordkeeping requirements of the final DOL regulations make compliance with the statute more onerous than Congress anticipated.

**Hallmark Seldom Receives 30 Days’ Notice from Employees.** Although the DOL regulations require that employees generally provide employers with 30 days’ notice of the need for FMLA leave, this requirement has proven to be ineffective, because so many relatively minor illnesses are covered by the DOL’s broad definition of “serious health condition.” Most of the absences which have caused Hallmark concern since the effective date of the FMLA have been for minor, short-term illnesses of employees or their family members, which meet the definition of serious health condition,” yet cannot be scheduled 30 days in advance. Only where the absence is for scheduled surgery or childbirth can the employee give 30 days’ notice.

Many minor illnesses of employees and their family members that formerly were subject to Hallmark’s attendance policy now are protected by the FMLA. Hallmark’s attendance policy took into consideration the serious nature of some absences, by examining the number of occasions of absence in addition to the absolute days of work missed. Hallmark has lost the flexibility to monitor its employees’ absences since the effective date of the FMLA, and the unplanned nature of many FMLA leaves causes loss in productivity.

As detailed below in Section C, Hallmark’s absence rates and short-term disability costs have increased significantly since the implementation of FMLA.

**Hallmark Has Difficulty Designating Absences as FMLA Leaves.** The DOL places the burden of designating whether the absence is covered by the FMLA on the employer. Under the DOL regulations, if an employer makes a mistake and does not properly designate the absence as FMLA leave, the employer may not be able to retroactively designate the absence as FMLA leave. The employee then retains a full 12 weeks of FMLA leave time. See Sections 825.208 & 825.301. Thus, employers must now question employees as to what types of illnesses the employees and their family members have, in order to determine whether an absence should be designated as FMLA leave. This requirement gives rise to problems under the Americans with Disabilities Act (ADA), which limits what employers can ask employees about their physical and mental disabilities. The confidentiality requirements of both FMLA and ADA cause additional problems, in that employers do not know who within the company can be informed of the reason

for absence, nor how far they can go in consulting with employees' doctors to determine the extent of the employee's disability and anticipated absence. For example, Section 825.307(a) appears to place greater restrictions on employer contact with the employee's doctor than does ADA.

**The Notice Requirements Change the Way Hallmark Deals with Its Employees' Absences.**

The notice requirements which the DOL places on the employer are also onerous. Employers are required to notify the employee in writing whether the absence is being designated as an FMLA absence, whether a medical certification will be required, whether a return to work note will be required, what benefits will be maintained while the employee is on leave, etc. See Section 825.301.

Since Hallmark requires a medical certification for each FMLA absence (except for conditions for which recertifications are restricted under Section 825.308), Hallmark must send Out an FMLA notification form and accompanying medical certification every time an employee is absent for a reason that might be covered by the FMLA — which includes most employee absences of more than three days when the company has some reason to think the employee might have seen a doctor and received a prescription. This has greatly complicated Hallmark's tracking of employee absences, in that employees and their supervisors used to communicate regarding absences on an informal basis, but now Hallmark not only needs to send-out the notification form whenever the absence might be covered by the FMLA, but must also record whatever the employee says about the reason for absence, in case the employee later alleges that the absence should have been an FMLA leave.

**The Medical Certification Process Is Cumbersome for Both Employers and Doctors.**

The medical certification process required by DOL is cumbersome. Under the regulations, employers have little or no means of questioning what the employee's doctor says, other than for the employer to send the employee for second and third opinions at the employer's expense.

It is likely to take at least two weeks for the employer to obtain the employee's initial medical certification. As indicated above, Hallmark's experience has been that most FMLA absences are not pre-scheduled. Thus, the employee is usually already absent when the employer learns of the need for a medical certification. The employer has two calendar days to send the FMLA notification and medical certification forms to the employee under Section 825.301. Since the employee is not at work, these forms often must be mailed, which adds to the length of time that the employee has to get the forms back to the employer. The employer cannot require that the employee have the FMLA medical certification back for 15 days after the employee receives it. The entire process from the time Hallmark learns of the absence until Hallmark receives back the completed form can often take close to three weeks. (This assumes that the employee submits the certification in a timely fashion. Frequently, there are additional delays caused either by the employee's or the doctor's delay.) Only then can the employer determine whether in fact the absence is covered by the FMLA.

Not only is the initial medical certification process cumbersome, but the employer's only option under the DOL regulations in the event that the employer disagrees with the initial certification is to

obtain second — and third -- opinions. See Section 825.307. Even where the initial medical certification does not clearly authorize FMLA leave, DOL has told Hallmark to send employees for a second opinion, rather than deny FMLA leave on the basis of the initial certification.

The second and third opinions are each likely to take at least an additional 15 days, and, by the time that doctors are found, appointments are scheduled, and results are obtained, could easily take longer than 15 days. Thus, in cases where the initial medical certification is disputed, it could easily be two months or more before the employer has sufficient information to determine whether an absence should be covered by the FMLA.

Moreover, there is no requirement in FMLA that employees provide the doctors giving second and third opinions with the, medical records from the initial examination. Thus, the reviewing physicians do not always have access to information on the employee's condition at the time of the absence, which reduces the reviewing physicians' ability to provide an accurate second or third opinion.

Furthermore, the second and third opinion process is extremely expensive. Hallmark has had quotes of more than \$1000 from physicians for providing second opinions. Hallmark has actually incurred costs of more than \$700 for a physician to provide a second opinion on an absence for a back injury, and more than \$600 for a second opinion on an absence for a mental illness. Hallmark had over 1,900 employees take FMLA leave during 1996. With this rate of FMLA usage, the cost of obtaining second and third opinions is a real deterrent to Hallmark's attempts to manage FMLA leaves. If each second opinion were to cost \$600, Hallmark would spend over \$1 million just on second opinions, quite apart from the cost of third opinions where the first and second opinions disagreed.

**Doctors Are Unfamiliar with FMLA Medical Certification Requirements and Are Uncomfortable Providing Second and Third Opinions.** Many doctors are unfamiliar with the FMLA and the requirements of the DOL regulations that employees submit medical certification forms. Hallmark has had several doctors in the Kansas City metropolitan area complain that *Hallmark* imposed the lengthy medical certification form on the medical community; they simply do not recognize that this is a federal regulatory requirement

In addition, doctors are unlikely to disagree with a fellow medical practitioner, particularly when the employee's condition has healed by the time the second doctor has been called in. Thus, where the employee has already returned to work when the second and third opinions are requested — which is often the case because the process takes so much time — requesting a second opinion is usually futile, yet it is the only means available to employers to check on an FMLA absence permitted under the DOL regulations. Moreover, Hallmark has had difficulty even getting doctors to provide second opinions, because the doctors do not want to second guess their colleagues. Particularly when the employee's medical condition has already improved by the time the second opinion is requested, the doctor is reluctant to say that the time off work was not appropriate.

As an example of the difficulties of the medical certification process, one Hallmark employee was off work for minor surgery due to an in-grown toenail. The doctor's initial FMIA certification indicated that the condition would last for a week, but also stated that the employee could perform the functions of his job. Hallmark denied FMLA leave, because it did not appear from this initial certification that the employee was "incapacitated" under the DOL regulations. The employee complained to DOL, and DOL told Hallmark that the company should not have denied the FMLA leave, but should have sent the employee for a second opinion, because the initial FMLA certification had authorized a week absence and therefore contained inconsistencies.

Given the cumbersome nature of the medical certification process under the DOL regulations, it appears that some relaxation of these requirements is needed. Granted, employers could choose to forego the medical certification and permit employees to take FMLA leave without obtaining the medical certification. However, companies should not be required to accept without question what the employee says about the reason for the absence, particularly when the company is paying the employee for many FMLA absences. Thus, the process for employers to review the need for FMLA leaves should be made more workable.

#### **4. EMPLOYEES SHOULD WORK WHEN THEY ARE ABLE, OR WHEN LIGHT DUTY IS OFFERED.**

The DOL regulations also provide that employees need not return to work if they have a "serious health condition," even if the employer has offered light duty work within the employee's work restrictions. Section 825.207(d)(2).

Hallmark offers many employees the opportunity for light duty work, both after work-related injuries and during non-work-related disabilities of a temporary nature. Depending on the situation, these light duty jobs might be the employee's regular job, with a few of the duties removed, or a temporary assignment to another department. Nevertheless, the DOL regulations require that Hallmark permit the employee to refuse the light duty assignment, if the injury is covered by the FMLA.

For example, a Hallmark employee who broke her leg in 1995 spent several weeks at home, when Hallmark could have accommodated her in her regular position at work. The injury had required in-patient surgery, so there is no question that the injury was covered by the FMLA. This employee's orthopedic surgeon who treated her leg authorized her to be off work for approximately three weeks after the surgery and hospitalization, and Hallmark had no dispute with this portion of her absence. However, the employee then provided an FMLA medical certification from an internist (who did not even treat the broken leg), who said that the employee was incapacitated for several weeks beyond what the surgeon had indicated. Hallmark could have accommodated the employee's work restrictions (she had a desk job, and did not need to move around substantially). Under the DOL regulations. Hallmark's only option when given the internist's medical certification was to seek a second — and likely a third — certification, at Hallmark's expense, or to permit the continued absence and to pay her under Hallmark's short-term disability policy.

Hallmark is reviewing its short-term disability policy to make it clear that pay will stop if an employee rejects a light-duty assignment that satisfies their medical restrictions, but policy changes will not completely fix the problem, because employees can still remain absent if the condition is covered by FMLA. Hallmark believes that an employer should be permitted to offer an employee work within the employee's medical restrictions in lieu of FMLA leave.

## **5. UNWORKABILITY OF THE INTERMITTENT LEAVE REQUIREMENTS.**

The FMLA also permits intermittent leaves or reduced work schedules. An employee can be absent every week for one day, or every day for 1.5 hours, and never exhaust FMLA leave time. Hallmark has had several employees turn in medical certifications for migraines or other chronic conditions, and then be absent on a weekly basis for a day or two. Since Section 825.308 limits re-certification of chronic conditions, it is difficult to determine whether chronic conditions are in fact the reason for the repeated absences.

Moreover, there is the question of fairness to other employees when an intermittent condition is permanent. Hallmark has one employee who is taking every Friday off work because of her mother's permanent medical condition. This individual is receiving full-time benefits which other employees working a reduced schedule for non-FMLA reasons do not obtain.

Other companies have confirmed to Hallmark that complying with continuous FMLA leaves is generally workable (though the "serious" nature of some FMLA absences is questionable), but that many of the most difficult issues arise in providing employees with chronic conditions with intermittent leaves on an unpredictable basis. In many situations, it is difficult to know when the employee will be at work, and in many positions, an employee who has frequent, unpredictable absences can play havoc with the productivity and scheduling of an entire department. It is often not possible to transfer the employee to a comparable position to reduce the effect on the employer of these leaves.

Congress should address the intermittent and reduced work week provisions of the FMLA to reduce the impact on employer productivity and make them more workable for employers.

## **6. "PERFECT ATTENDANCE" AWARDS SHOULD NOT INCLUDE FMLA TIME**

Under the DOL regulations, no absence for FMLA reasons can be counted against the employee's attendance rating or otherwise used against the employee. In fact, the DOL even says that an employee who has taken FMLA leave (which can be up to 12 weeks) is entitled to a perfect attendance bonus, since the time cannot be counted against the employee for any purpose. Section 825.215(c)(2).

Many divisions at Hallmark have traditionally provided employees achieving perfect attendance (defined as missing less than 8 hours of accountable absence during the year) with a lunch or dinner

recognizing their achievement, publication of their names in the employee newsletter, and a \$50 gift certificate. Many employees at Hallmark work hard to achieve perfect attendance and voluntarily substitute vacation days (non-accountable) for illness days (accountable) in order to maintain their perfect attendance records. Some employees have ten or more consecutive years of perfect attendance, which the company wants to recognize.

The perfect attendance recognition would be meaningless for those employees who work to maintain their records if an employee is also recognized who was absent for 12 weeks out of the year, especially when some of the absences are for relatively minor conditions that other employees work through (such as sinus infections). Hallmark has chosen to eliminate the \$50 gift certificate previously given to employees with perfect attendance, so that there will not be an argument that people receiving perfect attendance recognition are receiving more pay than people who took FMLA leaves. Thus, Hallmark has had to eliminate a benefit for deserving employees because of the FMLA, which certainly cannot be what Congress intended in passing the FMLA.

Congress should eliminate the regulatory requirement that employees who take FMLA leaves be entitled to perfect attendance awards. The FMLA can continue to provide employees with job-protected leave without mandating that the FMLA leave be a non-event, which is what the DOL regulations currently require.

#### **7. MOST FMLA LEAVES AT HALLMARK ARE PAID.**

In almost all media and other discussion of the FMLA, FMLA leave has been characterized as unpaid leave in an effort to minimize the impact of the FMLA on employers. However, Hallmark pays employees for their own personal illness absences under its short-term disability plan. Thus, many Hallmark employees receive pay for FMLA absences, which cannot under the FMLA be counted against them for any disciplinary purposes. In other words, to get the relief of providing only unpaid leave under the FMLA, Hallmark must *take away* benefit from employees. Hallmark is being penalized by its generous employee benefits.

As indicated in Section C below, of the total of 346,544 hours of FMLA leave that Hallmark full-time non-exempt employees took in 1996, approximately 79% (272,612 hours) were paid hours. Most of this time was for employees' own personal illnesses, and was paid under Hallmark's short-term disability policy. This amounts to the equivalent of *over 130 full-time employees* that Hallmark *paid* during 1996 to be absent on FMLA leave.

#### **8. EFFECT ON BENEFIT PLAN ADMINISTRATION.**

In addition to the DOL regulations, the Internal Revenue Service (IRS) has also proposed regulations dealing with the impact of the FMLA on cafeteria plans. *See* Proposed Amendments to Regulations on Effect of Family & Medical Leave Act on the Operation of Cafeteria Plans, published at 60 Fed. Reg. 66,229, on December 21, 1995.

Proposed Q&A-6(a)(2) of the proposed IRS regulations provides that an employer may not require an employee to reinstate coverage in a health flexible spending account (FSA) after an FMLA leave. Hallmark currently requires participants in the health care contribution portion of Hallmark's cafeteria plan who take a leave of absence for any reason to pay the full remaining annual FSA contribution for the plan year from their remaining paychecks upon return to work.

Proposed Q&A-6(a)(2) would permit employees to game the cafeteria plan, particularly with the broad definition of "serious health condition" in Section 825.114 of the DOL's regulations. Almost any absence of more than three days, and almost any absence of more than one hour for a chronic condition, can be an FMLA leave under the DOL's broad definition of "serious health condition." Employees who have already received reimbursements under a health FSA for an amount greater than their remaining contributions for the plan year will elect not to reinstate coverage. Because Hallmark offers such generous paid leave and disability benefits, employees can revoke their coverage under the health FSA in Hallmark's Flex Plan with little or no loss in pay.

Under the DOL final regulations to the FMLA and the proposed regulations issued by the IRS on December 21, 1995, the following scenario is possible: An employee can request \$1,200 in payment under a health FSA, with pre-tax deductions to be taken of \$100/month. The employee can incur significant health care expenses in February, thus obtaining reimbursement of the entire \$1,200 in February, although the employee has only paid \$200 in contributions. Proposed Q&A-6(a)(2) would permit the employee to revoke coverage at any time during the plan year upon any FMLA absence. Thus, this employee who incurred \$1,200 in medical expenses in February can be absent for four days in March for a medical condition for which the employee received medical treatment and a prescription (a "serious health condition" under the definition in the DOL's final regulations for the FMLA), and then elect not to continue participation in the health FSA. The employee does not have to terminate employment, but merely needs to have a minor health problem that the DCL has deemed to be a "serious health condition."

A similar employee who elects an extra week of vacation as an unpaid leave of absence cannot similarly revoke a prior election to participate in the health FSA. Therefore, proposed Q&A-6(a)(2) in fact prefers the employee taking an FMLA leave over other employees, which is not good tax policy, and is also likely to lead to serious employee relations issues.

### **C. HALLMARK'S COSTS ASSOCIATED WITH FMLA**

#### **I. HALLMARK HAS HAD A HIGH INCIDENCE OF FMLA USAGE.**

Of the approximately 8,500 full-time non-exempt Hallmark employees, a total of 1,963 employees (or about 23% of the full-time non-exempt workforce) took some amount of FMLA leave during 1996. This is a much higher FMLA utilization rate than reported in the Commission on Leave report, which reported that around two to four percent of eligible employees take FMLA leave.

During 1996, the full-time non-exempt population at Hallmark took a total of 346,544 hours of FMLA leave. At 2080 hours/year for a full-time employee, this is the equivalent of *over 160 person-years* of lost time during 1996. See Table 1 below.

In fact, FMLA leave has become the biggest category of absence time at Hallmark. In 1996, approximately 66% of the total absence time that full-time non-exempt employees took at Hallmark was FMLA leave — mostly for the employee’s own illness, which was formerly covered solely by Hallmark’s short-term disability (sick leave) policy.

**2. MOST FMLA LEAVES AT HALLMARK ARE PAID LEAVES.**

Of the 346,544 hours of FMLA time taken by the full-time non-exempt population at Hallmark during 1996, 272,612 hours (79%) was *paid* time. See Table 1 below. Thus, in 1996, Hallmark paid the equivalent of 130 full-time non-exempt employees to be absent on FMLA-covered reasons. The average non-exempt hourly wage at Hallmark is just under \$14.00/hour, so *the cost to Hallmark of this paid FMLA time was over \$3.8 million*. This does not include the administrative costs and loss of productivity resulting from these absences, which is probably the greater cost

**TABLE 1:**

**Full-Time Non-Exempt Workforce — 1996 FMLA Leave Time**

**(Total Population 8,501)**

<b>Hours FMLA Leave Taken</b>	<b># Employees</b>	<b>Paid Hours</b>	<b>Unpaid Hours</b>	<b>Total</b>
<b>&gt; 1 hour to &lt; 39 hours (less than one week)</b>	<b>559</b>	<b>7,144</b>	<b>3,107</b>	<b>10,251</b>
<b>40 hours to 173 hours (less than one month)</b>	<b>680</b>	<b>47,400</b>	<b>12,233</b>	<b>59,634</b>
<b>173 hours to 479 hours (one month to 12 weeks)</b>	<b>548</b>	<b>140,932</b>	<b>23,385</b>	<b>168,296</b>
<b>more than 480 hours (FMLA time exhausted, and absence continued)</b>	<b>176</b>	<b>77,135</b>	<b>31,226</b>	<b>108,362</b>
<b>Totals</b>	<b>1,963</b>	<b>272,612</b>	<b>73,931</b>	<b>346,544</b>
<b>FTE Equivalent</b>		<b>131.06</b>	<b>35.5</b>	<b>166.56</b>
<b>Cost at Average Wage of \$13.97/Hour</b>		<b>\$3,808,289</b>		

**3. INCREASE IN ABSENCE HOURS AND PAID ILLNESS (SHORT-TERM DISABILITY) EXPENDITURES SINCE FMLA'S EFFECTIVE DATE**

Obviously, Hallmark had a significant amount of paid absence time prior to the effective date of the FMALA. However, since the effective date of the FMLA, Hallmark has seen a substantial increase in the number of absence hours.

Not only has Hallmark experienced *an* increase in the amount of total time that employees are away from work, but Hallmark has also incurred an increase in paid additional disability benefits since the effective daze of the FMLA, because of the company's generous short-term disability policy. In 1993~ Hallmark's total paid illness time (which includes both non-FMLA absences due to the personal illness of employees and FMLA leaves due to employee serious health conditions) for full-time non-exempt employees was \$5.8 million. In 1996, Hallmark's total paid illness time for full-time non-exempt employees increased to \$7.8 million — an increase in three years of more than 36%. See Table 2 below. Note that in 1996 approximately \$3.8 million of this cost was for FMLA time, according to Table 1 above. (These figures are limited to non-exempt employees, because illness time is tracked more closely on non-exempt employees, and the information is therefore more reliable.)

At the same time, Hallmark's full-time non-exempt workforce has declined slightly, making the increase in the average amount of paid illness time per non-exempt employee even more significant. The average paid illness dollars per employee increased from \$677 in 1993, to \$924 in 1996— an increase of 36% in this three year period.

**TABLE 2:**

**Paid Sick Time for Full-Time Non-Exempt Employees**

	1993	1996
Average Full-Time Non-Exempt Head Count		
Total Paid Illness Time for Year for Full-Time Non-Exempt Employees	\$5,831,155	\$7,858,170 (increase of 35% over 1993)
Average Paid Illness Dollars per Full-Time Non-Exempt Employee	\$677	\$924 (increase of 36% over 1993)

Hallmark believes that much of this increase in paid illness time is due to employees' use of FMLA leave for their own illnesses.

Prior to the FMLA, Hallmark worked with absent employees to stress to them the importance of maintaining good attendance. Employees were informed regularly how their attendance was rated. Employees' performance ratings, promotional opportunities, merit increases and ability to post into other jobs, among other things, depended on the employee maintaining a satisfactory attendance record. Typically, employees taking parental leave or who had a lengthy absence due to a hospitalization were not penalized, but employees with frequent, unmerited absences were counseled about the effect that their absence had on the productivity of their department.

With the advent of the FMLA, the company can no longer impose any discipline, even the downgrading of attendance ratings, for absences due to any cause covered by the FMLA, which, as explained above, includes many minor illnesses. It appears that since the effective date of the FMLA, many of our employees feel less obligated to come to work every day, and the increase in our paid absence hours shows that Hallmark is paying the price for this shift in attitude.

#### **4. ADMINISTRATIVE COSTS OF COMPLIANCE WITH DOL REGULATIONS**

In addition to the financial costs described above, the FMLA has imposed very real administrative burdens on Hallmark. Hallmark created a task force when the DOL's interim regulations were published in 1993 to consider how to comply with the FMLA. Compliance with the FMLA was initially handled through the Work & Family Services Department, but as the complexity of complying with the DOL regulations became more apparent, the primary responsibility was shifted to the Employee Relations function.

**Changes to Forms.** After the interim regulations were published in 1993, Hallmark made changes in its booklet describing employee benefits (the closest thing to an employee handbook that Hallmark has), in its policies regarding employee absences for personal and family illnesses and for disability and parental leave, and in forms used to obtain medical information supporting an employee's absence (the medical certification form). In addition, Hallmark began using the FMLA notification form published by the DOL, though this form was adapted to conform to Hallmark's specific policies and workplace practices.

After these changes were made to comply with the interim regulations, Hallmark had to make further changes when the final DOL regulations were published in January 1995, particularly to the FMLA notification form and the medical certification form. Thus, Hallmark spent many hours from the summer of 1993 through the spring and summer of 1995 adapting its practices and forms to comply with the FMLA.

**Training.** After adopting these policy and form changes, Hallmark conducted training programs for all Human Resources managers. Hallmark decided that compliance with the FMLA regulations was too complex to make all managers responsible for sending out the notification forms in a timely fashion, so the Employee Relations Department is responsible for sending out FMLA notification forms in the corporate location, and Human Resources Managers have this responsibility in the outlying locations.

Nevertheless, because much of the information needed to comply with the FMLA is only available to immediate supervisors (such as what employees say when they call in to report an absence), the Human Resources Managers conducted training for all supervisors on the FMLA, including training on what questions managers can and cannot ask employees when they call in to report an absence, when to contact the Employee Relations or Human Resources managers, and what absences can and cannot be used in evaluating an employee's attendance rating.

The education of managers is an ongoing process. For example, as Hallmark continues its efforts to manage FMLA, such as through revisions to the short-term disability policy and attendance guidelines, additional training will be needed.

**Review of Medical Certifications.** Completed medical certification forms are returned by employees and their doctors to Hallmark's Medical Department or plant nurses. The nurses are responsible for reviewing the medical certifications to determine if they are correctly completed and provide sufficient information to make a judgment whether the employee is entitled to FMLA leave. At Hallmark's headquarters facility in Kansas City, Missouri, which has a population of approximately 5,000 employees, the Medical Department reviews more than 100 medical certification forms each month — more than 25 on average every week.

A recent estimate by the Medical Department indicated that review of these medical certifications, follow-up consultations with employees and their doctors, and discussions with supervisors and Human Resources representatives takes the Medical Department 8-10 hours per week on average, or 20% of one nurse's time. This does not include the time of the Human Resources departments which must review the nurses' approvals or disapprovals of the FMLA medical certifications and communicate with the employees' managers regarding when to expect the employee to be at work.

**Advising Employees and Managers on FMLA Compliance.** In addition to the above items, various Hallmark professionals spend a significant amount of time advising both employees and managers on compliance with the FMLA. A poll of the Employee Relations Managers at Hallmark's headquarters regarding how much time they spend on FMLA-related issues on a regular basis indicates that the average time spent each week on FMLA compliance is around 4 hours/week, or ten percent of their time. This includes time spent sending out notification forms to employees, discussing the FMLA with employees, managers and the Medical and Legal departments, following up on the results of medical certifications, and other FMLA-related administrative responsibilities.

The Hallmark Legal Division fields on average 10-15 phone calls each week from Human Resources Managers and the Medical Department personnel on compliance. Each of these calls takes approximately 15 minutes, by the time the facts are explained, the regulations are reviewed, and the advice given. Thus, the Legal Division time alone on FMLA compliance is approximately two to four hours each week.

**Payroll System.** In addition to the costs described above, any change in governmental recordkeeping requirements can have widespread implications for businesses, which may not be

intended. For example, Hallmark's mainframe payroll system, which is integrated with the company's benefits system, is difficult to program. The DOL tracking requirements for the FMLA required Hallmark to change several absence codes in the payroll system. These changes necessitated computer programming time, changing payroll and absence input forms, and training employees in Payroll, Human Resources, and all employees responsible for inputting employee absence hours.

**Ongoing Policy Changes.** Hallmark is continuing to review its attendance and short-term disability policies, to determine whether additional changes are needed, in order to cope with the increased absence time and cost since implementation of the FMLA. For example, a short-term disability task force has been meeting regularly for about 18 months to recommend ongoing changes and clarifications to control paid absence time.

Clearly, for all the reasons described in this section, compliance with the DOL regulations under FMLA has imposed a significant administrative burden on many departments at Hallmark.

## 5. NEGATIVE IMPACT ON EMPLOYEE MORALE

Another unintended cost of FMLA is negative impact on employee morale. Hallmark conducted an employee survey in 1996, in which employees had an opportunity to make anonymous comments on issues of concern to them. Many employees commented on FMLA, and almost all of the employee comments were negative.

Some of the verbatim comments from Hallmark employees on FMLA were

- FMLA has helped my family with our sick baby without hurting my attendance.” (*This was the only comment in the survey about FMLA that indicated that the employee felt he or she had received a persona) benefit from FMLA.*)
- “Too many people in my department taking advantage of FMLA policy. FMLA is a management nightmare.”
- While I cannot prove it, I feel there is way too much abuse of the FMLA policy. The same employees seem to have many occurrences not related to operations or family members. While most people might be off I day with a headache or toothache, some stretch it for 4 to 7 days. Others have to do the work and it affects morale and is a large cost to the company.”
- FMLA is being abused by certain individuals in the company.”
- “The FMLA is an incentive for people to miss work due to various things. It is appropriate in some cases, but is highly abused. Causes resentment.”

- “I recently had an employee on FMLA, and she told me the doctor asked her how long she wanted to be off, and when she responded FMLA was for twelve weeks, he said OK, we will put down three months.”
- “I think FMLA needs to be looked at a little closer. Too many people are taking advantage of their illnesses trying to milk all they can to stay off a little longer. It affects the people who are here every day that have to do their work as well as their own. I think FMLA really needs to be withdrawn or procedures need to be changed because it does affect those that are here every day. They get the same treatment as someone who is here every day. It’s not fair.”
- “FMLA is eating us alive. We must find some way to get control over this system.”
- “Since the family medical leave act (FMLA) went into effect, it seems most absences for personal illness fall into this category. In my opinion we don’t have an attendance policy anymore, since these absences are excused. People will continue to abuse the policy until the government changes it to reflect what it should be - serious illness, or serious family illness, not sinus headaches, etc.”
- “FMLA needs to be changed from its present structure or it will destroy a lot of companies. Barrier: Liberals in Congress who want to expand FMLA before they know how this version works.”
- “Hallmark’s liberal attendance policy and short-term disability policy, when combined with state and local FMLA laws [*sic*], seriously decreases our efficiency through increased absenteeism. Hallmark should lobby government to more reasonably define acceptable FMLA absences. We should consider modifying attendance policy and illness pay to discourage the abuse of this well-intended, but poorly executed law.”

It is significant that given the chance to make any comments they wanted to Hallmark management in this survey, many employees chose to comment on FMLA, and most of the comments were negative. These unsolicited comments reflect the attitude of many working Americans towards FMLA. While some of the comments show an incomplete understanding of FMLA, the perception is certainly that FMLA as currently implemented is more of a problem than a cure.

#### **D. • CONCLUSION AND RECOMMENDATIONS**

In summary, the DOL regulations implementing the FMLA impose significant restrictions on an employer’s ability to address individual employee situations. The regulations attempt to regulate with great minutiae the most basic aspect of the employment relationship - whether the employee is at work, what policies an employer may have for dealing with employee absences, and how an employer should communicate with employees about those absences.

As a result of the problems explained in this letter, Hallmark recommends that Congress consider technical changes to the FMLA statutory language and the regulations implementing the statute, including the following:

- refining the definition of “serious health condition” to limit application of the FMLA to situations that are truly serious— perhaps by expanding the list of minor conditions that are clearly not covered by FMLA, by eliminating the exception regarding “unless complications arise” (an exception that can swallow the rule), by extending the “more than three day” rule to a longer period of time, and by requiring that an employee or family member be totally incapacitated (totally unable to perform job duties or the normal activities of daily living) before FMLA leave is available;
- restricting use of FMLA leave for the employee’s own “serious health condition” to situations in which the employer cannot accommodate the employee’s absence in a light duty position or in some other fashion;
- limiting use of intermittent FMLA leave in some fashion — for example, to increments of a full work-day and to a maximum duration of six months, unless the employer and employee otherwise agree on different limits;
- permitting employers greater flexibility in how they notify employees of their FMLA rights and designation of time off as FMLA leave; and
- permitting employers greater leeway in questioning the medical certifications provided by employees and more flexibility in communicating with employees’ health care providers to determine whether leave is really necessary or whether the employee’s work and family needs can be better accommodated in some other fashion.

The FMLA is a well-meaning statute intended to help employees manage their work and family situations. Unfortunately, as with many well-intentioned laws, the details of implementation have caused problems for employers. Greater flexibility in the regulations implementing the intent of the FMLA would be of help to employers— such as Hallmark — that even before passage of the FMLA were trying to accommodate employees with medical and family problems. Hallmark urges Congress to consider technical changes to the FMLA, along the lines described in these comments.

Finally, in considering the policy directions recommended in the Commission on Leave’s report and in the various FMLA expansion bills proposed in this term — particularly the suggestion of wage replacement in the Commission on Leave’s report and the proposals to expand the types of conditions for which FMLA leave would be permitted — Congress should consider the costs borne by employers such as Hallmark which have already been paying for most of their employees FMLA leaves and have seen drastic increases in the amount of paid absence time since the effective date of FMLA. In lieu of these expansions, Hallmark urges Congress to adopt technical corrections to FMLA along the lines of those suggested in these comments.

