

TESTIMONY OF LYNN OUTWATER

ON BEHALF OF
THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT
AND
THE FMLA CORRECTIONS COALITION

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF
THE COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

JUNE 10, 1997

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Mr. Chairman and Members of the Subcommittee:

Good morning. My name is Lynn Outwater. I am a member of the Society for Human Resource Management (SHRM) Employee and Labor Relations Committee. SHRM is the leading voice of the human resource profession, representing more than 84,000 human resource professional and student members from across the country and around the globe. SHRM members are responsible for ensuring that their companies are in compliance with employment laws such as the Family and Medical Leave Act (FMLA). SHRM members play a key role in ensuring that our nation's workers are provided an environment which allows them to best use their capabilities and maximize their contributions to their organizations' goals; to contribute to the economy as a whole; and to enable their organizations to maintain competitive positions. We are a professional association. We do not allow any companies to join--only individuals.

The FMLA Corrections Coalition is a diverse, broad based, non-partisan group of organizations, associations, and companies. A listing of the 160 Coalition members is attached to my testimony. 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. At the same time, the Coalition members believe that the FMLA and its implementing regulations should be streamlined to reduce administrative and compliance problems experienced by employers. For example, the definition of serious health condition is vague and overly broad, and the intermittent leave provisions are complicated and difficult to administer. In addition, some companies believe that Congress should consider allowing employers to permit employees to choose between taking

paid leave under an existing sick leave plan, disability program, or collective bargaining agreement on the one hand, or the 12 weeks of FMLA protected leave, on the other hand--but not both.

Also, I am the managing partner of the Pittsburgh office of Jackson, Lewis, Schnitzler and Krupman. Jackson Lewis is one of the largest firms in the country dedicated to representing management exclusively in workplace law. With 250 attorneys in nineteen offices, the firm has a national perspective and a sensitivity to the nuances of regional business environments.

Guided by the principle that a positive work environment for employees results in enhanced morale and increased productivity, Jackson Lewis devotes a significant portion of its practice to management education and advice regarding sound preventive programs to ensure management's compliance with all applicable workplace laws. The firm's annual workplace law conferences, conducted each year around the country, recognized me as a leading source of information on employment law trends. In addition to national and regional workplace law updates and numerous other publications, Jackson Lewis attorneys serve as consulting legal editors for *Family & Medical Leave Act: Policy, Practice & Legal Update*, published quarterly by Business & Legal Reports, Inc., and authored by BLR's *Family & Medical Leave Act Compliance Guide*. Additionally, in August of 1996, I authored the *FMLA's Impact on Elder Care*, for the Balanced Health Report. The firm represents employers before state and federal courts and administrative agencies on a wide range of issues, including all aspects of employment litigation. The firm counsels employers in all matters involving workplace law, including health and safety, family and medical leaves, and disability issues.

There is not a day that goes by that an attorney in our firm does not advise, consult or educate our clients with respect to questions and concerns they have under the Family and Medical Leave Act. The quantity of inquiries continues to rise with the increasing number of complaints being filed with the Department of Labor, more reported cases, and the publicity surrounding the legislative developments under the FMLA.

We would like to commend the Subcommittee on Oversight and Investigations for conducting this hearing to examine the significant implementation issues related to the FMLA. The FMLA was sold to Congress and the American people as leave to bond with new family members and leave for “serious medical conditions”. However, since the FMLA’s enactment and the issuance of its implementing regulations, we’ve drifted far, far away from the law’s original intent. Concerns over this approach of legislating through regulations have been raised by the courts, the media, members of Congress and, especially, by employers who have been frustrated and confused by them.

A federal judge recently ruled that the Department of Labor contradicted the intent of Congress, finding a portion of the FMLA regulations to be “blatantly unconstitutional and invalid”.

Essentially, the court found that the Department of Labor had regulated beyond its authority and improperly stepped into the role of lawmaker when it promulgated a section of the final rules implementing the Family and Medical Leave Act. The particular section in question, Department of Labor regulation, 29 C.F.R. Section 825.1 10, puts the burden on the employer to tell employees who have not worked 12 months and 1250 hours about their FMLA ineligibility.

Taken literally, if an employer failed to notify an employee of their ineligibility, even if they had only worked one day for their employer, they would be found to be eligible simply because the employer failed to notify them of their ineligibility for FMLA leave per the regulations. Other portions of the Labor Department's regulations which were expanded beyond Congressional intent will no doubt be addressed through additional litigation.

This hearing is especially timely--as a follow up to the very early U.S. Commission on Leave report-- since it has taken some time for employers and employees to become familiar with the FMLA and the full implications of literal compliance with the Labor Department's final rules. The early review conducted by the U.S. Commission on Leave did not find many problems associated with the Act because it was conducted before employers and employees were fully aware of the law and the Labor Department's Final Rules. In fact, the Commission found that 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 employees and employers about their experiences with FMLA leaves that were taken beginning in January of 1994 for an eighteen month period. However, the final FMLA regulations did not even become effective for employers until April 6, 1995.

As FMLA utilization and enforcement have increased, significant implementation issues under

the Act have surged. Employers' questions surrounding compliance issues have continued to increase as well. During the period of January through April of 1997, the SHRM Information Center received 659 calls from human resource professionals with questions on how to comply with the FMLA. This is a 32% increase from the same time period in 1996.

The stakes for employer compliance have risen as well. Mistakenly ignoring or misreading the complex FMLA regulations can put employers in court or out of business. In fact, the courts have held that there is personal liability for employers under the FMLA and that an individual manager may be sued and held individually liable for acts taken based upon or relating to the FMLA (U.S. District Court for the Northern District of Illinois in Freemon v Foley, 911 F. Supp. 326 (N. D. Ill. 1995)). Also, in 1996 FMLA publicized monetary awards have increased to include "front pay" remedies and liquidated (double) damages.

Employers are also often guessing when it comes to the FMLA. In one such illustrative case, a federal district court had held that an employee did not satisfy the notice requirements of the FMLA because she did not expressly invoke the statute's protection when she asked her employer for leave. This case involved a month of leave for an ingrown toenail where the employee had never even mentioned needing medical leave. The U.S. Court of Appeals for the Fifth Circuit reversed the district court and held that employees who take time off for situations covered by the FMLA need not expressly mention the Act when they notify their employers of their need for leave. Manuel v. Westlake Polymers Corp, 66 F.3d 758 (5th Cir. 1995). Thus, Manuel, the employee, was entitled to a trial on whether Westlake, the employer, should have guessed that she might have needed FMLA. The parties reportedly settled for less than \$20,000,

most of which went to Manuel's lawyer. Meanwhile, the employer "had spent an estimated \$100,000 in legal fees. And when the smoke cleared, the law was no clearer than before."

(Forbes, Un-Natural justice, May 5, 1997).

Since the enactment of the FMLA, I have personally provided training and advice for thousands of human resource professionals and other executives across the country on FMLA compliance issues and have been struck by the confusion which has resulted in the real world as employers have tried in good faith to comply with the law. SHRM and the other members of the Coalition believe that both employers and employees would benefit by streamlining the FMLA to reduce administrative and compliance problems experienced by employers who are making a good faith effort to comply with the Act

It is very difficult to ensure that the FMLA is consistently applied because of the complicated implementing definitions and regulations. Even though I have spent countless hours training experienced human resource executives, managers, and line supervisors on the intricacies of the law, I have found that unintentional mistakes continue to be made in administering it because it is so complicated.

The recent SHRM Work and Family Survey (December 1996) found that 6 Out of 10 employers have experienced significant costs because of the FMLA, but approximately half (51%) of the survey respondents said their organizations had not experienced any benefits from complying with the FMLA.

It was assumed that the FMLA's leave entitlement would not lead to overuse because it was unpaid, and only those employees truly in need would exercise this right. However, because of many employers' existing paid leave policies, some state laws, and collective bargaining agreements, the leave under the FMLA is fully paid in many instances. According to the U.S. Commission on Leave 66.3% of FMLA is paid (46.7 % fully paid). This existing paid leave sandwiched on top of the broad, yet vague, FMLA definitions has resulted in employees requesting or characterizing a variety of minor situations as FMLA leave.

Perhaps one of the most important aspects of the FMLA's problems is the impact on other employees in the workplace. 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. Other respondents indicated that they hired outside temporary replacements (71%), or put some (42%) or all (6%) of the employee's work on hold, until the employee returned.

Respondents to the SHRM survey had strong opinions on changes to the FMLA which would make it better. Over half of the respondents (54%) felt that the definition of serious health condition should be tightened and four out of ten respondents thought employers should be allowed to offer intermittent leave to be taken in at least half day increments. A third of the respondents (33%) suggested eliminating leave benefits for intermittent and reduced work schedules, and three out of ten respondents would like to see the employee notification requirements revised. Almost one-fifth (19%) would advocate repealing the law altogether.

SHRM and the members of the FMLA Corrections Coalition would like to urge Congress to pass technical corrections legislation which would restore the law to its original intent and address the following areas:

I. The Definition of “Serious” Health Condition. Should be Tightened

Congressional intent on the definition of ‘serious health condition’ 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).

The Department of Labor 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).

However, this has not been the case. 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. Last 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. This year, the Department of Labor issued a statement saying that they could be. This is extraordinarily confusing for employers, and employees.

II. Difficulties with Intermittent Leave

When Congress passed the FMLA, it 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 intermittent treatments (e.g. chemotherapy or radiation treatments). While we would not question the need for these types of leaves--in fact, they have been provided by employers prior to the FMLA--the Congressional intent of the provision was stretched by the regulators as they implemented the Act. As a practical matter, intermittent leave under the FMLA has resulted in a whole host of problems related to maintaining attendance control policies. The Department of Labor determined that employees can take the leave in as little as six minute increments. The tracking of this leave is difficult to say the least. This difficulty has been exacerbated by the FMLA's vague definition of serious health condition and the fact that no penalty exists for employees who fail to provide advance

notice to the employer of their need for leave. It is no surprise that the Commission on Leave found that approximately 40% (39.2% to be exact) of employers have experienced a great deal of difficulty attempting to comply with this requirement. SHRM members have also reported great difficulty with this provision, as have many of our clients. We believe that this provision should be streamlined to minimize unnecessary disruptions and administrative burdens while maintaining the original intent of the law.

III. Impact on Employee Attendance Award Programs

Unfortunately, the FMLA has also forced many employers to abandon their attendance reward policies, because the Act prohibits them from successfully administering such policies. In the past, employers have been able to recognize perfect attendance with reward programs and bonuses. They have also been able to discourage unscheduled absences by effectively maintaining either point or occurrence systems as defined in collective bargaining agreements or company guidelines. However, once an employee claims that his or her absence was a FMLA covered absence, it cannot be considered in determining whether the employee is eligible for a perfect attendance award. Because of the problems associated with leaves under the FMLA for minor conditions, many employers' "perfect attendance" programs have come to be viewed as meaningless by those employees who earn the awards without any absences. Several employers have discontinued their award programs for this reasons. The employees who work hard to earn the awards without any absences would be better served if Congress were to address this problem by limiting the use of the FMLA for the serious conditions which Congress intended.

IV. 2 Day Notification Requirement

Another example of the administrative burdens created by the FMLA implementing regulations is the requirement that employers notify employees that leave will be counted toward FMLA leave within two business days. For most companies, it is almost impossible for employers to provide written guidance to the employee within 2 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. Given the various certification processes, it may be weeks before employers can confirm that the leave actually qualifies under the FMLA. Also, physicians and employees often refuse to provide the necessary information on a timely basis. 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).

V. Problems Integrating FMLA with Other Laws

Employers have experienced significant problems as they have attempted to coordinate leave under Workers' Compensation, the FMLA, and the Americans With Disabilities Act (ADA) requirements. For example, an employee may start out with a worker's compensation injury which is also a serious health condition under the FMLA. The injury may eventually be determined to be a disability covered by the ADA. Under the ADA, employers are required to make a reasonable accommodation when an employee becomes disabled and returns to work. Employers may accommodate an employee by effecting a transfer to a vacant job with the same or lower pay and benefits or to a part-time position with part-time benefits.

Under the FMLA, health benefits must be maintained, and the employee must be returned to the same or equivalent job following a medical leave. Also, under the FMLA, a disabled employee may be able to use intermittent or reduced leave to achieve part-time status with full-time benefits. Under workers' compensation, employers must have a complete diagnosis and medical information to process the claim, and under the ADA, to determine the kind of accommodation which must be made. But under the FMLA, employers may not ask for all that information. While employers must provide leave for a serious health condition under the FMLA, they are only required to "reasonably accommodate" leave requests from individuals with disabilities under the ADA. Employers are therefore put in the position of determining whether employees' various health situations constitute serious health conditions under the FMLA, disabilities under the ADA, or both, to determine the employers' obligations. If, for example, an employer determines that an extended leave would unduly disrupt the operations of the employer, and denies the leave request under the ADA, the employer maybe violating the FMLA's provisions which entitle the individual to medical leave. On the other hand, an employer would not be required to provide leave if the person with a disability requesting the leave does not have a condition that is a serious health condition under the FMLA. Sound confusing? It is for employers.

VI. Impact on Work Environment

With the FMLA, increasingly, leave is being taken on little or no notice, requiring excessive overtime, sometimes unwelcome by co-workers. I am also aware of a subtle shift in employee attitudes which reflects an expectation of an entitlement instead of an earlier more cooperative situation.

VII. Impact on Employees

The FMLA has been confusing to employees in many instances. 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!

As a result of the FMLA, many companies are now requiring employees to obtain medical certifications when they take sick leave, while prior to the Act no such certifications were necessary. This is because the Department of Labor has taken the position that if the employer's sick or medical leave plan "contains less stringent certification requirements than those of the FMLA, and paid sick, vacation, personal or family leave is substituted for unpaid FMLA leave... only the employer's less stringent sick leave certification requirements may be imposed."

Therefore, unless employers protect themselves by requiring medical certifications for sick leave, they may be unable to ever determine the legitimacy of a questionable medical leave by requiring a doctor's certification of the need for leave.

VIII. Impact on More Generous Policies

Unfortunately, the generous companies that provided paid leave long before FMLA was enacted are experiencing many disastrous results. Because of the vague and overly broad FMLA definitions, 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-existing generous programs and other companies are being discouraged by consultants from adopting them.

Congress must provide employers offering paid-leave some reasonable ability to manage absences. Employers should be permitted to give employees the choice between unpaid FMLA leave or more generous paid leave under the company's attendance or benefit policies -- but employees should not be allowed to combine the best of these programs in every case.

IX. Conclusion

Prior to the implementation of the Family and Medical Leave Act, employers were accommodating the personal medical and family leave needs of their employees. But now, because of certain terms within the FMLA's definitions and implementing regulations, good employers have been penalized. Employers are spending more time in an administrative quagmire than could have possibly been anticipated by Congress when the bill was passed.

SHRM and the 160 members of the FMLA Corrections Coalition urge Congress to restore the FMLA to its original intent in order to ease administration and to better serve the workers Congress sought to protect. Senator Dodd recently recognized that "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." We are encouraged by Senator Dodd's statement.

We applaud Chairman Hoekstra and the members of this Subcommittee for conducting this review on the practical issues related to FMLA compliance. We urge Congress to act swiftly to pass constructive technical corrections to the Act to reduce compliance problems, so that the Act is restored to its original intent and works more effectively for all concerned.

Thank you for the opportunity to appear here today. I would be happy to answer any questions.

Testimony of Lynn Outwater
Society for Human Resource Management

SUMMARY

STATEMENT OF LYNN OUTWATER ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE FMLA CORRECTIONS COALITION JUNE 10,1997

Lynn Outwater is a member of the Society for Human Resource Management (SHRM) National Employee and Labor Relations Committee. SHRM is the leading voice of the human resource profession, representing more than 84,000 human resource professional and student members from across the country and around the globe. SHRM members are responsible for ensuring that their companies are in compliance with employment laws such as the Family and Medical Leave Act (FMLA). Lynn is also the managing partner of the Pittsburgh office of Jackson, Lewis, Schnitzler and Krupman.

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Lynn Outwater, the Society for Human Resource Management, and the law firm of Jackson Lewis, Schnitzler and Krupman do not have any grants or contracts with the U.S. Department of Labor.

Testimony of Lynn Outwater
Society for Human Resource Management

BIOGRAPHY

LYNN C. OUTWATER is the managing partner of the Pittsburgh office of Jackson, Lewis, Schnitzler & Krupman, a national law firm with 19 offices in key cities throughout the United States. The firm's over 230 lawyers limit their practice exclusively to Labor, employment and benefits law on behalf of management.

Since 1976, Ms. Outwater has represented management confronted with employment-related matters. A special emphasis of her practice is assisting employers in the development and implementation of preventive workplace practices, procedures and programs.

Ms. Outwater received her undergraduate degree from Fordham University. She obtained a Juris Doctorate degree from Albany Law School. She also holds a Master at Laws (in Labor Law) from New York University School of Law. Ms. Outwater is a member of the Pennsylvania and New York Bar Associations. Ms. Outwater has served as Chairperson of the Labor Law Committee of the New York State Women's Bar Association. Ms. Outwater serves on the Editorial Advisory Board of Law Governance Review. She is a member of the National Employee and Labor Relations Committee of the Society for Human Resource Management and a member of the University of Dallas Graduate School of Management Board of Visitors.

Ms. Outwater frequently lectures on labor and employment law topics before

Jackson Lewis clients and employer associations. Ms. Outwater is a sought after speaker as evidenced by her appearance on the PBS television program, *On the Issues*, a series that explored issues confronting American business today. Ms. Outwater, was the only management attorney to participate as a panel member on the series segment entitled “Job Today, Gone Tomorrow.” Other panelists included Secretary Robert Reich, U.S. Department of Labor; George Becker, President, United Steelworkers of America; Mitchell Fromstein, Chairman & CEO, Manpower, Inc.; and Frank Swoboda, National Labor Reporter, The Washington Post.^b

Among the articles Ms. Outwater has authored are “Sexual Harassment in Home Care: What Employers Should Do About It,” Caring Magazine, May 1994; “Preventing Workplace Substance Abuse Without Legal Pitfalls,” Innovations in Human Resources, Spring 1995; “Sexual Harassment in 1995 and Beyond,” National Association Medical Staff Services Journal, April 1995; “FMLA’s Impact on Elder Care,” Balanced Health Report, August 1996; and “Hiring, Firing, and the Law - Minimizing the Risk of Employment Litigation,” Law Governance Review, Autumn 1996. Ms. Outwater recently co-authored a book entitled, ‘Minding Your Business: Legal issues and Practical Answers for Managing Workplace Privacy,’ for the firm’s client, The Society for Human Resource Management.