

# OVERSIGHT OF THE FAMILY AND MEDICAL LEAVE ACT

## HEARING

BEFORE THE

SUBCOMMITTEE ON  
CHILDREN AND FAMILIES  
OF THE

COMMITTEE ON  
LABOR AND HUMAN RESOURCES  
UNITED STATES SENATE  
ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

THE IMPLEMENTATION OF THE FAMILY AND MEDICAL LEAVE ACT

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## PREPARED STATEMENT OF LIBBY SARTAIN

Mr. Chairman and members of the subcommittee: Good morning. My name is Libby Sartain, and I am Vice President, People for Southwest Airlines. I also Chair the National Compensation and Benefits Committee of the Society for Human Resource Management (SHRM). SHRM is the leading voice of the human resource profession, representing more than 70,000 human resource professional and student members from across the country and around the world. SHRM members are responsible for ensuring that our nation's workers are provided a work 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. I appreciate the opportunity to share my own company's experiences with our efforts to comply with the Family and Medical Leave Act.

First offering service in 1971 and now celebrating 25 years this year, Southwest Airlines Company has grown to become the sixth largest U.S. airline, with 23 years of consistent profitability. Since we are constantly striving to make Southwest Airlines the best employer it can be, we were extremely pleased when Southwest was named one of the top ten companies to work for in the recent book, *The 100 Best Companies to Work For in America*, by Robert Levering and Milton Moskowitz. We also topped the annual Airline Quality Rating report for 1995, and *Fortune* magazine listed Southwest as one of America's Most Admired Corporations in 1995.

Southwest Airlines has nearly 22,000 employees and provides more than 2,100 low fare flights a day. In 1995, the company's average one-way airfare was \$62 and the average passenger trip length was 520 miles. In 1992, 1993, 1994, and 1995 Southwest earned the "Triple Crown" for its customer service performance. This consists of the best baggage handling, the fewest customer complaints, and the best on-time performance record, according to statistics published by the Department of Transportation.

We have the best employees in the airline industry. Southwest Airlines has become and remains profitable with the help of a dedicated and productive work force, and we have worked hard to make employees partners in this profitability. In fact, Southwest was the first airline to share profits with its people through profit sharing—and today, Southwest employees own roughly 10 percent of the Company's stock.

We would like to commend the subcommittee conducting this hearing to examine the implementation issues related to the Family and Medical Leave Act. While the intent of the Act is certainly admirable, we believe that there have been numerous unintended consequences which need to be addressed.

SHRM believes 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. We would be happy to work with Members of Congress to address these issues, so that the Act works more effectively for all concerned.

I certainly understand the intent of the law—after all, I’m a mom—I’ve worked all of my adult life while balancing the needs of my employer and family. I am a wife and daughter of elderly parents—each of whom has needed my assistance due to serious illness in the last three years. I am also Vice President People for one of the best companies in America which promotes programs which create a comfortable, family friendly work environment. I am a champion of such programs—and have been for 20 years.

Implementing the FMLA has resulted in lost productivity and unbelievable administrative costs for Southwest Airlines. We have had to undertake the time and expense involved in modifying our computer system, but it is still not fully functional so we are searching for a better solution. We had to create a new Department to administer this leave. Where we once had one staff member at headquarters who tracked employee leaves, we now have three. All of our Reservations Centers have had to add staff to handle these leaves, and our Flight Attendant Supervisors must now spend more time insuring that the company is properly tracking and documenting leave, and less time actually training, leading, developing, and acting as mentors for new flight attendants.

It is very difficult to ensure that the FMLA is consistently applied because it is so complicated. We are a large company with many different departments and locations. One third of our people spend their time in the air. In order to guarantee the maintenance of a consistent practice throughout the company, we would have to hire and train an FMLA administrator for each location. But due to our low cost-low fare philosophy, we don’t have human resources people at each site, so a support level person is often saddled with trying to make sense of the law. Even though we have trained all of our managers, supervisors, and coordinators on the law, we are finding that they are bound to make mistakes in administering it because it is so

complicated.

It was assumed that the FMLA leave's entitlement would not lead to widespread abuse because it was unpaid, and only those employees truly in need would exercise this right. However, because of existing paid leave policies and collective bargaining agreements, the leave under the FMLA is fully paid in many instances. This existing paid leave coupled with the new FMLA definitions has resulted in federal incentives to characterize a variety of situations as Family and Medical Leave.

We would like to urge Congress to pass technical corrections legislation which would address the following areas:

### **I. The Definition of "Serious" Health Condition Should be Tightened**

While much of the legislative debate centered on the family leave and caretaking revisions of the bill, most of the leave claimed under the FMLA at Southwest Airlines has actually been for employees' own illnesses, which we previously covered under our well defined sick leave policy. Southwest Airlines strongly supports providing leave to employees who are truly ill. However, because of the overly broad nature of the definition of what constitutes a "serious health condition" under the Act's implementing regulations, an inordinate amount of difficulty has resulted. I have seen the following situations certified by physicians as serious health conditions under the FMLA: P.M.S., various respiratory infections, asthma, earaches. and emotional problems. Even though the regulations don't state that these are serious, it is very difficult and costly to challenge these physician diagnoses. In fact, we are not allowed to ask. In addition, sending employees for second and third opinions is too costly, time consuming and inconsistent with our culture. Unfortunately, several marginal employees with absentee problems have learned that by characterizing situations as chronic conditions, they can avoid disciplinary action. Almost any situation can become a federally protected "serious health condition" qualifying for the FMLA by allowing the absence to continue more than three consecutive days and by seeking treatment more than one time. This treatment could include one doctors visit and a prescription.

We urge Congress to clarify the Act to reflect the original intent of the law—to address those situations which are truly serious.

### **II. Difficulties with Intermittent Leave—8 Minute Intervals**

The FMLA allow employees to take leave in less than full day increments to address health conditions, is revision was intended to address those situations where an employee may need to

take leave for intermittent treatments (e.g. chemotherapy or radiation treatments). We have no problem granting long-term leave and they have always been available—People who take these types of leaves generally need them. However, 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 eight 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 employers have experienced a great deal of difficulty attempting to comply with this requirement. We believe that this provision should be streamlined to minimize unnecessary disruptions and administrative burdens while maintaining the original intent of the law.

Consider the problems it creates for Southwest Airlines: our flight crews do not work an hour, or even a day at a time—they are paid by the trip. Their work week consists of flying three or four days at a time across the country. They cannot be excused for an hour for a trip. Once they leave the work site, for any reason, the rest of their work week has to be completed by another employee.

Some of our ground employees have learned how to use the law to adjust their work schedules to earn more while working less. For example, some of our Reservations Agents have applied for FMLA leave for pregnancy and receive intermittent leaves for morning sickness. They call in and request four hours off of work in the morning. They work four hours regular time at the end of their shift and then pick up four or more hours at time and a half for overtime. This is a convenient way to receive more pay without working more hours.

To avoid working overtime, many of our employees have asked their physicians to certify that they have “serious” ongoing conditions which allow them to work only eight hours e.g. tendinitis and emotional disorders. It is difficult to substitute other workers or hire more employees in these situations.

### **III. Impact on Attendance Award Programs**

Unfortunately, the FMLA has also forced employers to abandon their attendance reward policies, because the Act prohibits us from successfully administering such policies. At Southwest Airlines, we have nine labor unions, and with non-contract employees, ten different

attendance control policies. Employee productivity is a key factor in our low cost, low fare structure. If employees are not at work, we must make up the difference with overtime or hire more employees. In the past, we have been able to encourage attendance with a perfect attendance reward program.

We also have been able to discourage unnecessary absences by effectively maintaining either point or occurrence systems as defined in our collective bargaining agreements and our company guidelines. However, once an employee claims that his or her absence was an 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 FMLA, our “perfect attendance” program is now viewed as a farce by those employees who earn the awards without any absences. Our employees who work hard to earn the awards without any absences would be better served if Congress were to address this problem.

We would like to urge Congress to clarify the Act to reflect the original intent of the law—to address those situations which are truly “serious” health conditions.

#### **IV. 2 Day Notification Requirement**

Another example of the administrative burdens created by the FMLA is the regulatory requirement that employers notify employees that leave will be counted toward FMLA leave within two business days. For an industry such as ours, it is almost impossible to notify our employees that leave they have taken will be counted toward FMLA leave within two business days. We often do not know the employee was absent for an FMLA reason until the employee returns to work. Sometimes we may not even know that they are off work or ill-due to last minute shift trading. The employee will often ask us to designate the leave as FMLA to avoid attendance control points, yet it may be weeks before we can confirm that the leave actually qualifies under FMLA. Physicians and employees often refuse to provide the necessary information. In fact, we have had numerous difficulties with employees’ physicians. While it appears that many physicians are willing to certify virtually any patient requests, many others have refused to fill out the paperwork, tried to charge us or the employee for filling out the paperwork, or even written to our CEO complaining about the excessive administrative requirements. While the law would allow us to deny the leave if we do not ever receive the completed forms, this would not be fair after the fact.

#### **V. Problems Integrating FMLA with Other Laws**

We have also had a great deal of administrative problems in coordinating leave under Workers' Compensation, 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, we are required to make a reasonable accommodation when an employee becomes disabled and returns to work. We may accommodate an employee by effecting a transfer to a job with 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 their medical leave, And 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, we must have a complete diagnosis and medical information to process the claim, and under the ADA, we must have a disability rating to determine the kind of accommodation which we must make. But under FMLA, we may not ask for the diagnosis!

## **VI. Impact on Customer and Employee-Employer Relations**

Prior to the FMLA, the company had the people we needed to cover our flights and the employees had many opportunities to accommodate their personal and legitimate health needs under our benefit plans, work rules, etc. With the FMLA, we now find leave being taken on little or no notice, requiring excessive overtime and the need for additional head counting activities. I have also noticed a subtle shift in employee attitudes which reflect an expectation of an entitlement instead of our earlier cooperative situation. Our absenteeism during holidays has increased dramatically due to lack of our ability to enforce reasonable attendance policies.

## **VII. Impact on Employees**

The FMLA has been confusing to employees in many instances. We are now required to ask questions regarding leave use that we 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, such as our own, 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 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.

The FMLA has also caused hardship for employees receiving reduced compensation through workers’ compensation or short term disability payments. According to Department of Labor relations, an employer may not allow an employee receiving workers’ compensation or short term disability payments to make up the difference between the income from these benefits and their pre-injury/illness income by using paid vacation or sick leave.<sup>1</sup> In the past, to diminish the economic loss to an employee, many employers allowed employees to make up the difference by charging paid leave accounts for the amounts not covered by workers’ compensation or short term disability insurance. The FMLA regulations now prohibit the employer from providing this assistance to employees.

### **VIII. Impact on More Generous Policies**

Unfortunately, the generous companies that provided paid leave long before FMLA was enacted are experiencing many disastrous results. These companies, such as our own, are now finding paid-leave programs to be difficult to administer and unaffordable. As a result of the FMLA, some employers may eliminate existing generous programs and other companies are being discouraged from adopting them.

Congress must provide employers offering paid-leave some 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 these programs.

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<sup>1</sup>The preamble to the Department of Labor’s final FMLA regulations provide: “An employee who incurs a work-related illness or injury elects whether to receive paid leave from the employer or worker’s compensation. *An employee cannot receive both.* Therefore, where a work-related illness or injury also causes a serious health condition that makes the employee unable to perform the functions of the positions of such employee’ within the meaning of the FMLA, and the employee has elected to receive worker’s compensation benefits, an employer

## IX. Conclusion

Prior to the implementation of the Family and Medical Leave Act, not one of our employees was ever denied any kind of leave of absence or disciplined for serious personal medical or family medical problems. We have always bent over backwards to accommodate our employees. But now, because of certain terms within the FMLA, the law puts us in an adversarial relationship. Employees are demanding what they perceive to be their right under the law rather than working out a constructive solution with their local leadership—employees who are not productive, have had chronic absences that are not related to a truly serious health condition, and don't try to work out a positive solution with their supervisors, but have instead sought refuge under vague definitions in the FMLA.

SHRM urges Congress to streamline the FMLA to ease administration and better serve the workers it has sought to protect, without changing the fundamental intent of the statute. We would be pleased to work with you toward that end.

Again, thank you for the opportunity to appear here today. I would be happy to answer any questions you might have.

SOCIETY FOR HUMAN RESOURCE  
MANAGEMENT,  
606 NORTH WASHINGTON ST.,  
Alexandria, VA. June 5, 1996.

The Honorable DAN COATS,  
Chairman, Subcommittee on Children and Families,  
625 Hart Senate Office Bldg.,  
United States Senate,  
Washington, DC.

DEAR CHAIRMAN COATS: On behalf of the Society for Human Resource Management (SHRM), the leading voice of the human resource profession which represents the interests of more than 70,000 members, thank you again for conducting the hearing on May 9 to examine Family and Medical Leave Act implementation issues.

As promised during the hearing, the results of our informal 1996 survey of our members are

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cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that is covered by payments from the State workers' compensation fund. *Similarly an employee cannot elect to receive both worker's compensation and paid leave benefits.*" (Emphasis added).

enclosed for the hearing record. The enclosed summary states that “the data suggest that problems of compliance are severe enough among some employers to interfere to a substantial extent with their ability to comply”. Figure 3 contains data showing that most employers are incurring additional administrative costs as a result of the FMLA and one in four is taking on additional benefit costs. We also sent the Commission on Leave’s Westat Survey to SHRM members attending our March 1996 legal and legislative conference and 71 percent of the respondents indicated that their organization has found compliance with the FMLA “somewhat” or “very difficult”. Both of these surveys are consistent with our June 1994 survey which found that three fourths of the members were experiencing daily administrative problems in attempting to comply with the FMLA. A separate survey on The Top 10 Human Resources and Health Care Issues conducted by the Indiana Chamber of Commerce indicated that Indiana employers identified compliance with the Family and Medical Leave Act as their “biggest human resources-related legislative or regulatory concern” (enclosed).

I am also enclosing for inclusion in the record a May 6, 1996 Lawyers Weekly USA article which discusses the widespread nature of FMLA implementation problems.

I am also sending these documents to the Department of Labor via Gerry Palast and Ann Bookman for their use. As Libby Sartain and Cynthia Graham stressed in their comments during the hearing, technical corrections to the Act would greatly ease administrative problems for employers.

Again, Chairman Coats, we appreciated the opportunity to constructively discuss FMLA administration issues and look forward to continuing to work with you to address these concerns.

Sincerely,

DEANNA R. GELAK, PHR

*Director, Congressional Affairs*

Enclosures: Surveys of SHRM Members on FMLA Implementation Issues May 6, 1996  
Lawyers Weekly USA Article.