

**Testimony of Deanna R. Gelak, SPHR  
Executive Director  
National FMLA Technical Corrections Coalition**

**“Parents Raising Children: the Workforce”  
Provided to the Subcommittee on Children and Families**

**U.S. Senate  
Washington, DC**

**April 22, 2004**

Mr. Chairman and Members of the Subcommittee:

I am Deanna Gelak, Executive Director of the National FMLA Technical Corrections Coalition. On behalf of the Coalition, I appreciate the opportunity to share our thoughts on the issue of “Parents Raising Children: the Workplace”. The Coalition, founded by the Society for Human Resource Management (SHRM), is a diverse broad-based, nonpartisan group of companies, associations and individuals dedicated to making the practical application of the Family and Medical Leave Act more consistent with its original intent. We encourage employers to voluntarily provide policies and practices above and beyond the Family and Medical Leave Act (FMLA) requirements such as flexible scheduling, paid leave, telework and other creative benefits that assist employees in balancing the demands of work and family. However, we are very concerned that interpretation problems and legal concerns with the FMLA’s application have actually caused a chilling effect on the voluntary expansion of paid leave policies. Therefore, we urge the members of the Subcommittee to support FMLA corrections efforts as the critical first step toward assisting parents in the workplace with more family-friendly programs.

### I. Employers are Already Doing Much in the Work-Family Flexibility Area and Many Would Like to do More

The SHRM® 2003 FMLA Survey found that 63% of employers already provide exceptions above and beyond the FMLA to provide more flexibility to employees. According to the SHRM® 2002 Benefits Survey, 82% of employers offer short term disability plans, 82% offer paid sick leave and the vast majority of employers offer other types of paid leave that the government does not require.<sup>1</sup>

While the federal FMLA is generally regarded as providing unpaid leave, much of the leave under the FMLA is already actually paid due to companies’ generous policies and collectively bargained agreements. Much paid leave does exist already and many employers would like to provide more paid leave. A U.S. Department of Labor Survey<sup>2</sup> found about two thirds (65.8%) reporting receiving some pay during their leave. The figure reflected a decline from the 1995 Department of Labor/US. Commission on Leave Report which found that (of FMLA-covered workers) 73% of leave taking employees report receiving full or partial pay for FMLA leaves (51.9% full pay and 21.5% received partial wage replacement)<sup>3</sup> In all worksites (including those not covered by the FMLA), employees report that the FMLA leave is 66.3% fully or partially paid (46.7 fully and 19.6 partially paid).

### II. FMLA Interpretation and Associated Legal Problems Are Actually Undermining and Discouraging Paid Leave Programs

Even as we recognize the benefits of the FMLA over the past 11 years, the Act’s “medical leave” urgently needs to be repaired to address inconsistent application of that part of the law and preserve the integrity of the system and better serve those Congress intended to protect.

---

<sup>1</sup> SHRM® 2002 Benefits Survey, Table G-1, p. 34.

<sup>2</sup> U.S. Department of Labor, Family and Medical Leave Surveys 2000 Update.

<sup>3</sup> U.S. Commission on Family and Medical Leave Report to Congress, 1995.

## **A. The Intent:**

Enacted in 1993, the FMLA had passed Congress to require job protection for up to twelve weeks of unpaid leave for families for birth or adoption (family leave) and leave to care for a child, spouse, or an employee's own "serious medical condition" (medical leave). The Congressional intent for "medical leave" was spelled out in the then Democratic majority's committee report which stated that "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."<sup>4</sup>

## **B. The Reality:**

The U.S. Department of Labor's interpretations of "serious health condition" for the Act's "medical leave" have proven to be a lesson in complexity, stretching the FMLA's "medical leave" far away from Congressional intent. (See [Attachment #1](#): Flow Chart of FMLA Processes presented during testimony before the U.S. House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs<sup>5</sup>.)

Shortly after Congress passed the FMLA, the regulators issued inconsistent and vague interpretations which:

- \*Converted the Act's serious health condition requirement into a national sick leave program where incidents of abuse cannot be fairly addressed,
- \*Caused a litigation explosion,
- \*Caused leave to be tracked and offered by minutes,
- \*Created confusion in the workplace for employees and employers, and
- \*Led to inconsistent application of the law.

For example, one year, the DOL issued a letter stating that the cold, the flu and non-migraine headaches were not serious health conditions (covered under "medical leave") and the next year, the Department of Labor issued a letter stating that they might be.

Inconsistent interpretations have led to a litigation explosion. For example, the validity of thirteen DOL FMLA regulations has been challenged in 68 court decisions<sup>6</sup>. Moreover, on March 19, 2002, the Supreme Court struck down a portion of the existing DOL regulations as inconsistent with Congressional intent in the first FMLA case before the Supreme Court (*Ragsdale v. Wolverine Worldwide, Inc.*). Additional such litigation is expected unless FMLA technical corrections are established.

According to the Society for Human Resource Management (SHRM) 2003 FMLA Survey, half (50%) of human resource professionals indicated that they have had to grant FMLA requests that they did not believe were legitimate because of the Labor Department's

---

<sup>4</sup> U.S. Congress Committee on Education and Labor, Family and Medical Leave Act of 1993, H. Rept. 103-8, February 2, 1993, p. 40

<sup>5</sup> SHRM Testimony of Kenneth A. Buback (Chart B), April 11, 2002.

<sup>6</sup> REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED, Spencer Fane Britt & Browne LLP, August 2003.

medical leave interpretations and approximately a third (34%) of human resource professionals were aware of employee complaints in the past 12 months due to coworker's questionable use of FMLA.

A survey conducted by former President Clinton's Department of Labor confirmed FMLA implementation problems. The DOL report found that the share of covered establishments reporting that it was somewhat or very easy to comply with the FMLA has declined 21.5% from 1995 to 2000<sup>7</sup>.

### **III. Implications for Voluntary Paid Leave Expansions**

Employers want to do more but hesitate to do so until the Labor Department interpretations are corrected since it is practically impossible to plan for increased utilization and address misapplication or abuse under the current situation. This has resulted in organizations rethinking progressive sick leave programs and the voluntary expansion of paid leave policies. Unfortunately, FMLA misapplications have penalized employers with the most generous leave policies and had a chilling effect on the expansion of paid leave. This problem is being recognized by the courts where numerous Department of Labor FMLA interpretations continue to be struck down and challenged.

More employers would establish and expand paid leave policies if these misinterpretations --which currently foster misapplication, create confusion and invite litigation--are addressed. This is an important immediate step since voluntarily provided private sector funded paid leave is preferable to government/taxpayer funded paid leave.

### **IV. Recommendations and Conclusion**

Since FMLA interpretation problems have actually undermined and discouraged the voluntary expansion of paid leave programs, the first federal policy step in the FMLA work-family flexibility area should be to establish the urgently needed technical corrections in order to restore the Act to original Congressional intent. Based on a review of the well-documented FMLA compliance problems and seven Congressional hearings ([see Attachment #2 – Congressional Hearings Chart](#)), this is clearly the most important, most urgently needed and most prudent immediate step. The hearings have documented the need for FMLA technical corrections and have demonstrated that the companies which provided generous/paid leave benefits prior to the FMLA's enactment have been hit the hardest with the unintended consequences. This has had a chilling effect on the voluntarily expansion of paid leave. Given the existence of privately funded leave and the desire for many companies to voluntarily do more if FMLA application issues are addressed, FMLA interpretive corrections should be the immediate step in the family and medical leave policy area.

Thank you for the opportunity to share our views. We hope that you will turn to us as you continue to review important issues related to parents in the workforce.

---

<sup>7</sup> The Family and Medical Leave Act of 1993, Public Law 103-3, Sec. 403.