



The National Coalition to Protect Family Leave

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Mr. Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

By electronic submission: <http://www.regulations.gov>

**Re: RIN 1215-AB35: Comments in Response to the Department of Labor's
Notice of Proposed Rulemaking**

Dear Mr. Brennan:

The National Coalition to Protect Family Leave submits these comments to the U.S. Department of Labor (“the Department” or “DOL”) in response to the Notice of Proposed Rulemaking published in the *Federal Register* on February 11, 2008. See, 73 Fed. Reg. 28 (Feb. 11, 2008).

The National Coalition to Protect Family Leave (“the Coalition”) is a broad-based, nonpartisan group of employer organizations, companies, and associations. The Coalition is dedicated to strengthening the FMLA for both employers and employees and to preserving the integrity of the Act’s leave protections.

Although we support the spirit and intent of the FMLA, Coalition members have experienced significant challenges in complying with the FMLA regulations. The Coalition applauds the Department of Labor for proposing these revisions to the FMLA regulations. As the preamble makes clear, the record on the need for these changes is extensive and has been compiled over several years. The Department has done a superb job of soliciting input to inform these changes and making sure that the process has been accessible and transparent. In addition to the specific changes noted below, the Coalition also wishes to note the vastly improved language and reorganization the Department is putting forth in these revisions. These changes alone will improve the operation of the FMLA.

Comments on Proposed Revisions to Regulations Implementing the FMLA

Eligible employee (Section 825.110)

Period of Employment. In its proposal, DOL adopts the ruling of the First Circuit Court of Appeals in *Rucker v. Lee Holding Co.*, 471 F. 3d 6 (1st Cir. 2006), a case in which the Department had filed an amicus curiae brief, and revises section 825.110(b) so that any employment periods of an employee for an employer within a five-year window would count in determining whether the employee satisfies the statutory requirement that an employee be employed “for at least 12 months” by their employer. 29 U.S.C. § 2611(2)(A). At the same time, the Department leaves unchanged the requirements in proposed section 825.500(b) that an employer keep, maintain and preserve records “for no less than three years.” 73 Fed. Reg. at 7987.

In its preamble, DOL reasons that the employer’s records would be available to determine if an employee met the 12-month employment requirement where such employee’s break in service occurred within the three-year record retention period. However, DOL proposes to shift the burden of production to the employee to provide some proof of employment when the employee alleges an employment period beyond the three-year record retention requirement applicable to an employer, but within the five-year window contained in the proposed regulation. The Coalition strongly disagrees with the Department that its proposal “strikes an appropriate balance between providing re-employed workers with FMLA protections and not making the administration of the Act unduly burdensome for employers.” 73 Fed. Reg. at 7964. Instead, the Department proposes to complicate an eligibility determination that ought to be based simply upon continuous service for a 12-month period.

DOL also proposes two exceptions in section 825.110(b)(2) to its five-year break in service rule. DOL recommends that any period of employment, regardless of the duration of a break in that employee’s service for that employer, be counted in determining whether the employee was employed at least 12 months by the employer in the following circumstances: (1) where the break in service was due to military service; and (2) where the break in service was an approved absence or unpaid leave and the employer expressed its intent to rehire the employee either in a written agreement or collective bargaining agreement. The Coalition does not object to these two proposed exceptions to the proposed rule but objects to counting any other non-continuous periods of employment.

As stated in its submission to the Department’s Request for Information (RFI) on the Family and Medical Leave Act of 1993, the Coalition strongly disagrees with DOL that a five-year gap between two periods of employment by an employee with the same employer is a reasonable time limitation. Notwithstanding DOL’s rejection of the suggestions made in response to the Interim Final Rule published on June 4, 1993, and effective August 5, 1993, and its position as argued in the *Rucker* case, the Coalition emphatically urges DOL to reconsider its proposal before its inclusion in a final rule. The Coalition recommends that the DOL only permit the aggregating of two periods of employment by an employee in the circumstances set forth in its proposed section 825.110(b)(2). Also, as noted previously, DOL’s proposal overly complicates what should be a straight-forward, simple determination of whether an employee has

been employed for at least 12 months by an employer. Alternatively, the Coalition recommends only permitting aggregation of service that occurs during the three years prior to the leave request, as this is consistent with the record retention period.

Timing of Eligibility Determinations. The Department proposes another clarification in section 825.110(d) on making FMLA eligibility determinations as of the date when the FMLA leave commences. DOL notes that the current regulation has caused confusion and spawned litigation. The proposal clarifies that in the limited circumstances in which an employee, who is on leave but it is not FMLA-protected leave because the employee has not satisfied the eligibility requirements, becomes eligible, then any period of the pre-existing leave that continues after the employee becomes eligible is protected by the FMLA.

The Coalition had urged a different interpretation in its response to the RFI. Section 103 of the Act clearly states that only an *eligible employee* is entitled to a total of 12 weeks of unpaid leave during a 12-month period for specified family or medical reasons. Further, the legislative history suggests that the appropriate point for determining whether an employee is an eligible employee is at the commencement of the leave. See, Sen. Report No. 103-3, at 23 (1993), H. R. Report No.103-8 Part I, at 35 (1993) (“...an *eligible employee* may take up to 12 weeks of leave per year...”)(Emphasis added). Also proposed section 825.110(d) states that the determination of an employee’s eligibility for FMLA leave must be *made as of the time the leave begins*. Thus, the Coalition contends that the critical factors in analyzing whether an employee is eligible for FMLA leave and, hence, protected, are the following dates: (1) hire; (2) satisfaction of the 1,250-hour and 12-month employment requirements; (3) notice of a need for FMLA leave, if any, is given; (4) FMLA leave is scheduled to begin; and (5) FMLA leave actually begins. The Coalition submits that eligibility for FMLA leave only attaches to FMLA-qualifying leave that actually begins after the employee meets the 12-month and 1,250-hour requirements, regardless of whether and when the employee gives notice by requesting leave, and does not attach to a block of leave or intermittent leave that begins *before* the employee becomes eligible and continues *after* the employee becomes eligible.

The Department unfortunately declined to propose any clarification of the conflicting regulations that specify the point in time at which a determination of an employee’s eligibility should be made. In proposed section 825.110(e), DOL retains the current rule requiring determination at the time an employee gives notice of a need for leave whether such employee, who otherwise would be eligible based upon the 12-month and 1,250-hour requirements, is excluded from coverage by the FMLA because the employer does not have 50 employees within a 75-mile radius. The Department noted that many commenters to the RFI on this issue urged DOL to harmonize this determination with the determination of employee eligibility in proposed section 825.110(d), *i.e.*, as of the date leave commences. However, DOL declines to do so, citing the preamble to the 1993 regulations as its rationale.

While the Coalition applauds DOL’s interest in promoting as much advance notice of a need for FMLA as possible so that an employee and employer can plan for the absence, it remains resolute that the Department ought to reconsider proposed section 825.110(e) and to modify this regulation in its final rule. The Act is quite clear that only an “eligible employee” is entitled to FMLA leave. The legislative history does not address any difference for the point in

time at which to determine employee eligibility—as of the date leave commences, versus the time the employee requests FMLA leave – in order to decide whether to exclude an otherwise eligible employee. This distinction is purely a creation of the Department’s regulations. Thus, the Coalition contends that proposed section 825.110(e) is inconsistent with the statute in that it mandates an employer to determine if an eligible employee is excluded because the employer does not employ at least 50 employees within 75 miles when the employee gives advance notice of the need for leave, instead of when the “eligible employee” takes actual FMLA leave.

This departure from the statutory authority is even more pronounced when coupled with the proposed regulatory mandate that “once an employee is determined eligible in response to that notice of the need for leave, the employee’s eligibility is not affected” if the number of employees falls below 50 by the time the employee’s FMLA leave begins. 73 Fed. Reg. at 7964-7965. The net effect of this conflict could be to erroneously grant FMLA-protected leave to an otherwise eligible employee but whom the statute clearly states should not be included as an eligible employee because the employer does not employ the requisite number of employees. The consequence of DOL’s failure to address this issue, even though it raised it in its RFI, results in clear contravention of the statute. In other words, by determining that an employee is eligible for FMLA leave because he has satisfied the 12-month and 1,250-hour requirements as of the date leave is scheduled to begin and by determining that an eligible employee is not excluded because the employer employs the requisite number of employees at the time the eligible employee requests leave, the regulatory scheme could require an employer to provide an employee with allegedly protected FMLA leave while the statute says that such employee would not be included as an eligible employee. This anomaly is compounded by additional regulatory language stating this determination of employee eligibility cannot change once the employee is deemed “eligible,” even if the number of employees falls below the required threshold before the leave begins.

The Coalition strongly recommends that the DOL address this issue in its final rule and clarify that the eligibility determination of FMLA leave must be made as of the date the leave commences. The Coalition contends that this change would further the goal to promote as much advance notice of a need for leave as practicable. The more notice an employer and employee have of a need for leave, the better they can predict eligibility and plan for the absence and leave. If the prediction for eligibility will not be met as the employer and employee envisioned, then the employee is afforded an opportunity to reschedule, if possible, the need for foreseeable leave to a point in the future when eligibility is satisfied. Also, this modification supports the purpose of the FMLA because many employers would grant the FMLA leave because the employee and employer were able to plan for the leave, even if the 50-employee threshold were not met at the time leave was scheduled to begin.

Finally, the Coalition applauds DOL for its deletions from the existing regulations as proposed in section 825.110, as well as for the manner in which it addressed the effects of the Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) in proposed section 825.300.

Joint Employment. In section 825.111, DOL proposes to modify the regulation to reflect the decision of the Tenth Circuit Court of Appeals in *Harbert v. Healthcare Services Group, Inc.*, 391 F. 3rd 1140 (10th Cir. 2004). In particular, DOL amends the current regulation so that the worksite of a jointly employed employee will be the facility of a secondary employer at which the employee has physically worked for at least a one-year period.

As stated in its response to the RFI, the Coalition concurs with the reasoning of the Tenth Circuit in the *Harbert* case. Consequently, the Coalition endorses the addition by DOL of language to proposed section 825.111(a)(3). As the *Harbert* court did, DOL's proposal appears to make a distinction between a jointly employed employee who is assigned to a fixed worksite, versus a jointly employed employee who has no fixed worksite and changes worksites, be it regularly or irregularly. Under DOL's proposal, the worksite for purposes of determining whether the former are eligible employees pursuant to section 101(2)(B) of the Act would be the fixed worksite of the secondary employer. Similarly, the worksite for the latter would continue to be "the primary employer's office from which the employee is assigned or reports." 73 Fed. Reg. at 7965. The Coalition commends DOL for its clarification in proposed section §825.111(a)(3) and urges DOL to include it in the final rule.

Serious Health Condition (Section 825.113)

Reorganization. This section contains a portion of the current section (§825.114 (a) and (c)), and will become the "general" section of the regulations defining a serious health condition. The regulations have been reorganized and will include separate sections on inpatient care (§825.114), continuing treatment (§825.115), and treatment for substance abuse (§825.119). The Coalition agrees with this reorganization, which will make the regulations easier to follow and administer, and it also approves of the new wording, which is far more readable than the previous 'Question and Answer' format.

List of Conditions. Section 825.113 includes the list of conditions that ordinarily will not be considered serious health conditions. This list is unchanged from the current regulations. However, consideration was given by the Department to deleting this list because of a concern that it may be "surplusage." Several courts have recognized that under certain situations, conditions on the list may, in fact, be serious health conditions. See, e.g., *Kauffman v. Federal Express Corp.*, 426 F.3d 880 (7th Cir. 2005) (bronchitis); *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001) (flu); *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir.), cert. denied, 531 U.S. 871 (2000) (diarrhea and stomach cramps); *Wheeler v. Pioneer Developmental Servs.*, 2004 U.S. Dist. LEXIS 24960 (D. Mass. Dec. 8, 2004) (upper respiratory infection); *Corcino v. Banco Popular De P.R.*, 200 F. Supp. 2d 507 (D.V.I. 2002) (pharyngitis). The Coalition agrees with the recommendation of the Department that this list should be maintained in the regulations because it serves "a baseline purpose as explanatory language similar to that which is included in the preamble." However, the Coalition disagrees with the Department's position that these "non-serious" health conditions can be transformed into serious health conditions. The Coalition believes that Wage and Hour Opinion Letter FMLA-57 correctly states the law, and the situations where a condition on this list rises to the level of a serious health condition should be given a very narrow construction. The Department should add language to the regulation stating

that some sort of serious complication must result in order for an otherwise “non-serious” health condition to be considered a serious health condition. As currently written, the regulation inappropriately allows for an employee to transform a short-term acute condition into a qualifying serious health condition.

Mental Illness Resulting from Stress. No changes were made to the last sentence of proposed section 825.113(d), currently part of section 825.114(c), which currently references “mental illness resulting from stress, or allergies....” The Coalition believes that this language is vague and overly broad. Stress is an unfortunate part of most jobs in today’s economy and is frequently open to interpretation or at best self-diagnoses. The cited phrase improperly suggests that stress alone can cause mental illness, a doubtful proposition given the complex and still largely unexplained etiology of mental illness. By not placing the role of stress in its proper context — that is, as a contributing factor in a breakdown or relapse due to a preexisting mental health condition — the cited phrase unnecessarily broadens the scope of the definition of a serious health condition. Also, by placing allergies in sequence, it suggests that mental illness can be developed from allergies. Therefore, the Coalition proposes that the language “resulting from stress” be removed from the last sentence of section 825.113(d).

Continuing Treatment (Section 825.115)

The Department has proposed two substantive changes to this newly renumbered section (text currently found in section 825.114) and has asked for comment on a third provision.

Time for Treatment. The first substantive proposed change relates to the time frame during which an employee must seek treatment from a health care provider in order to satisfy section 825.115(a)(1) — that the employee is undergoing “continuing treatment.” Under the current regulatory scheme, an employee can show that he/she is undergoing continuing treatment by simply establishing that he/she has been to see a health care provider two or more times. The regulation does not specify over what period of time these visits should take place, leaving employers and courts alike to speculate on what the appropriate time frame should be for these visits to occur. To rectify this, the Department has proposed that the two or more treatments take place within a 30-day period, unless there are extenuating circumstances.

In the comments submitted to the Department last year in response to the RFI, the Coalition recommended that these treatments occur *during* the period of the employee’s incapacity, a position with which the Department has indicated that it does not concur. The Coalition urges the Department to re-examine this issue.

In *Jones v. Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005), the Court held that the plaintiff failed to establish that he suffered from a serious health condition in connection with a five-day absence he incurred for a back injury. The plaintiff saw his physician once during the period of his incapacity. His second visit to the doctor did not occur until approximately three weeks after his initial five-day absence. The employee remained off of work for several more days due to the flu. In explaining its rationale for requiring that the two treatments take place during the employee’s period of incapacity, the Tenth Circuit stated:

We disagree that the plain language of the regulation imposes no time limit on the requisite ‘two or more’ treatments. According to the regulation, a serious health condition that involves continuing treatment includes ‘[a] period of incapacity . . . and any subsequent treatment or period of incapacity, relating to the same condition, that *also involves* . . . treatment two or more times by a health care provider.’ (emphasis added). [citation omitted]

That the regulation . . . frames the definition in terms of a ‘period of incapacity’ that ‘involves’ at least two treatments indicates that the timing of the treatments, and not just the need for treatments, is important. *Id.* at 1320-21.

Looking at the facts in *Jones*, the Tenth Circuit observed that if section 825.114(a)(2)(i)(A) were read to apply an “indefinite time frame” to scheduling two or more treatments, such a construction “would place employers in a position of uncertainty regarding their FMLA obligations” and would invite employees to engage in “strategic behavior” by scheduling a second doctor’s visit “long after all symptoms have subsided, solely to bolster their claim of entitlement to FMLA leave in anticipation of litigation. We find it difficult to believe that the Congress intended such a result.” See also, *Lightfoot v. District of Columbia*, 2006 U.S. Dist. LEXIS 1358 (D.D.C. Jan. 10, 2006) (adopting the reasoning of *Jones*).

Assuming the Department has rejected the holding of *Jones*, however, the Coalition does not believe that the proposed language satisfactorily addresses employer concerns about having to wait an extended period of time (as much as 30 days or longer, in the event of extenuating circumstances) in order to determine whether the employee satisfies the “continuing treatment” component of the definition of a serious health condition.

To illustrate the problem, assume an employee is incapacitated for a brief period, such as four days, and then returns to work. At this point, the employee has only seen his health care provider on one occasion and has not received a regimen of continuing treatment. Accordingly, the condition does not qualify for FMLA under the incapacity in excess of three consecutive days plus treatment provision. Assume further that this absence is the employee’s final “occurrence” under an attendance program, which would subject him to discharge. Under the Department’s proposal, the employer’s hands would be tied for 30 days, which would create uncertainty for all parties — both with respect to the absence at issue and any subsequent absences. To avoid such a scenario, the Coalition proposes a time frame of one week from the initial visit. Further, the regulation should state that the follow-up visit is at the direction of the health care provider, to avoid situations where an employee simply schedules a follow-up visit to satisfy the FMLA’s regulatory requirements.

Additionally, the proposed language introduces new requirements that the Coalition believes have not been adequately explored or fleshed out by the Department. For example, in the comment section accompanying the proposed regulations, the Department seems to raise

questions as to when the 30-day period begins. The Department states that the 30-day period *ordinarily* would correspond “with the date of the employee’s first absence,” but then appears to ask whether this construction applies if the employee becomes incapacitated on a day he/she is not scheduled to work. Clearly, there needs to be a consistent and discernable method of tracking the 30-day period. The Coalition believes that if this 30-day requirement becomes part of the regulations, the period of incapacity should run from the first day the employee is incapacitated, regardless of whether that date falls on a scheduled workday. If the question is incapacitation, that question is independent of attendance.

The Department also introduces the concept of “extenuating circumstances” as a basis for overlooking those instances where an employee does not see a health care provider two or more times within the 30-day period. The Coalition urges the Department to define what it means by “extenuating circumstances” so that employers and employees, as well as the courts, are not left to divine what the Department had in mind when it came up with this phrase. To leave this undefined is an invitation to extensive litigation. This could be rectified by simply adding some specific examples. The Coalition suggests that the regulations provide that extenuating circumstances include where an employee, despite good faith efforts, is unable to secure an appointment within the 30-day period, or the health care provider specifically requests a follow-up appointment more than 30 days after the initial visit. Otherwise, there is a danger that the “exception” will become the rule.

Periodic Visits for Chronic Serious Health Conditions. The second substantive change proposed by the Department relates to chronic serious health conditions. One way an employee may establish that he/she suffers from a chronic serious health condition is by showing that the condition requires “periodic visits” to a health care provider for treatment. The current regulation does not explain what is meant by “periodic visits.” The Department proposes that employees see a health care provider at least twice a year to satisfy the periodic visits component. The Coalition does not believe that this proposal adequately addresses the problems employers have encountered with unscheduled intermittent leave for a chronic serious health condition. A requirement of only two visits per year for a condition that allows for up to 12 weeks or 60 workdays of job-protected leave per year is not enough. The Coalition proposes that the number be increased to four times per year.

Even if that change is made, the proposed language still allows the employee to, in effect, self-certify his/her own incapacity. Once certified with a chronic serious health condition, the employee gets to determine whether he/she is “incapacitated” and unable to work. Further, the definition assumes that once someone is diagnosed with a chronic condition, that condition remains constant or unchanging. To ensure that employees are not using a chronic condition to circumvent an employer’s legitimate absence control policies or to extend a weekend, employers need to be able to verify or confirm that the employee’s chronic health condition truly warrants the use of job-protected FMLA leave. Given that a significant issue raised by employers, as reflected in the comments to the RFI, is the misuse of unscheduled intermittent FMLA leave for chronic serious health conditions, the only way to confront this issue squarely is to strengthen the definition of a chronic serious health condition.

As currently drafted, the regulation provides insufficient guidance on what chronic conditions would result in continuing (and not episodic) periods of incapacity. By way of example, the regulation identifies diabetes as a chronic serious health condition resulting in “episodic rather than a continuing period of incapacity.” Certainly, the other conditions referenced (e.g., epilepsy and asthma) are far more typical than diabetes of what would be characterized as a chronic, episodic period of incapacity. Categorizing diabetes as an episodic chronic serious health condition is not illustrative, but rather confusing to the reader. Depending on the type of diabetes (Type I or II), how long the individual has suffered from the condition, as well as how successful the individual has been in controlling the condition, diabetes is capable of causing both continuing (e.g., diabetic neuropathy and nephropathy) or episodic periods (e.g., diabetic comas) of incapacity, or even no periods of incapacity at all.

Revising the definition of chronic serious health condition might include providing a comprehensive (but not necessarily inclusive) list of common chronic conditions and a better explanation (including concrete examples) of what the Department means by a chronic serious health condition that results in an episodic, as opposed to a continuing period of, incapacity.

Thirty-day Time Frame for Treatment on One Occasion. The Department has asked for comments on whether a 30-day time frame should be added to section 825.115(a)(2), which allows for treatment on one occasion followed by a “regimen of continuing treatment.” In the comment section, the Department opines that the inclusion of a 30-day period to this subsection could potentially “extend the time period for receiving the regimen of treatment well beyond what is current practice.” The Coalition agrees with the Department that this language should *not* be added to section 825.115(a)(2).

In its comments to the Department last year in connection with the RFI, the Coalition recommended eliminating this section altogether, arguing that given today’s frequent use (some would say misuse) of antibiotics, “a prescription drug regimen, by itself, is a poor gauge for assessing whether someone is suffering from a serious health condition.” The Coalition continues to believe that this section of the regulations should be deleted; the addition of a 30-day time frame will not cure the inherent flaw contained in this subsection. The Coalition recommends that the Department includes language that more narrowly defines the term “regimen of continuing treatment” in order to exclude those instances where an employee may be prescribed medication that is not, in fact, recommended treatment for the condition (e.g., where antibiotics are prescribed in the absence of a bacterial infection) or medical conditions that require medication (e.g., a non-infectious skin infection) but are not incapacitating.

Days of Incapacity. In its comments in response to the RFI, the Coalition recommended that the number of consecutive days of incapacity be increased. The current requirement (unchanged in the proposed revisions) that an employee or covered family member need only be incapacitated for a period exceeding three consecutive calendar days has played a significant role in converting otherwise minor medical conditions into those that satisfy the definition of a serious health condition. The Coalition urges the Department to reconsider the recommendation by the Coalition and many other employer groups that the incapacity continue for at least seven consecutive calendar days to satisfy the definition. By extending the period of incapacity, many of the minor illnesses that currently receive FMLA protection would no longer qualify. The use

of a seven-day period is consistent with the waiting period employed in most employer short-term disability plans. Employee Benefit Research Institute, *Fundamentals of Employee Benefit Programs*, Part Four Other Benefits 6 (2005). That is, before an employee is eligible to receive short-term disability benefits, he/she must be incapacitated for a minimum of seven consecutive calendar days. In the alternative, the Coalition recommends that the period of incapacity be either seven consecutive calendar days or five consecutive scheduled workdays, whichever is longer.

In addition to changing the number of days from three days to five consecutive workdays or seven consecutive calendar days in defining a period of incapacity, the Coalition urges DOL to clarify in its final rule that “more than” means whole, full, or complete calendar days—so that more than five workdays is six complete, full, or whole workdays, or more than seven is eight complete, full, or whole days. DOL should affirmatively provide guidance in its regulations stating that partial days of incapacity do not count toward meeting the period of incapacity required. Only after the minimum number of complete, full, or whole days of incapacity is met would partial days count, either before the beginning or after the end of the required number of days of incapacity. Consequently, the Coalition recommends deleting the current definition of “period of incapacity” as a period “of more than three consecutive calendar days” and replace it with language such as a period “of five consecutive whole work days” or “seven consecutive whole calendar days.” This clarification, along with an increase in the number of days to five or seven, will act as a better bright-line rule that will provide notice to employers. Finally, the Coalition believes that these clarifications will instill some rigor in the definition of a serious health condition and, as Congress intended, preclude some minor illnesses from being covered by the Act.

Essential Functions (Section 825.123)

Any One Essential Function. The Coalition recommends that the Department change the definition “unable to perform any *one* of the essential functions of the employee’s position” (emphasis added) to “unable to perform the essential functions of the employee’s position, unless modified by the employer to accommodate a temporary restriction.” Allowing FMLA leave where only one essential function cannot be performed creates the unintended consequence of allowing employees who could work to go out on job-protected leave. As noted above with respect to light duty, employers should be permitted to require an employee to work in a position that is consistent with the employee’s restrictions, regardless of whether it is the same job (without the restricted duties) or some other position, and regardless of whether it is part of a formal “light duty” program or simply an employer’s common sense reallocation of job duties to accommodate the temporary restriction. Rephrasing the definition in this way also brings this analysis much closer to the analysis under the Americans with Disabilities Act (ADA) for a reasonable accommodation, thus reducing confusion for employers as to how these two laws intersect.

Reorganization and Addition of Language on Essential Functions. The Department has renumbered the section on essential functions from section 825.115 to 825.123 and has not proposed any substantive changes, except to add clarifying language that a sufficient medical

certification must detail what essential functions an employee cannot perform due to his or her serious health condition. In conjunction with this clarification, the Department has proposed a revision to Form WH-380 (Certification of Health Care Provider) to include a section on the form for employers to list an employee's essential job functions and, if employers wish, to attach a copy of the employee's job description.

The Coalition endorses the addition of this clarifying information and the proposed changes to the Form WH-380, in that both will help to obtain a more focused response from the health care provider to the question of whether the employee is unable to perform some or all essential job functions because of his or her medical condition. During the Roundtable held by the Department on September 6, 2007, to discuss the medical certification process, representatives from the health care industry indicated they are often asked to make determinations with workplace implications with scant and inadequate information about the workplace. Providing job descriptions and essential job functions should greatly help health care providers make better, more informed decisions.

Amount of Leave (Section 825.200)

The Coalition commends DOL for maintaining in proposed section 825.200(f) the rule that a scheduled holiday that falls within a week of FMLA leave counts against an employee's FMLA entitlement. It is appropriate that DOL has proposed to maintain the workable rule of existing section 825.200(f) and has offered a clarification on how to treat a holiday that falls during a week in which an employee uses less than a full week of FMLA leave. The additional language in proposed section 825.200(f) is equally instructive because it clarifies that a holiday falling within an increment of FMLA leave that is less than one week will count against an employee's FMLA entitlement only if the employee was scheduled and expected to work on the holiday. The Coalition concurs with DOL's proposal to retain the language of and to clarify with additional language section 825.200(f). It commends DOL for its proposal and urges DOL to include it in the final rule.

Intermittent Leave or Reduced Leave Schedule (Section 825.202)

The Coalition commends DOL for its reorganization of the existing regulations on intermittent leave. In particular, the subsection headings and provisions that: (1) define intermittent and reduced schedule leave; (2) reinforce the requirements for a medical need and treatment regimen for intermittent or reduced schedule leave; and (3) note that an employers' consent is required for intermittent or reduced schedule leave after the birth or placement of a child, in proposed section 825.202, are helpful clarifications. Nonetheless, the Coalition has some suggestions for proposed section 825.202(b), which is based upon existing section 825.203(c), and which reads in part as follows:

Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under

the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition (emphasis added). 73 Fed. Reg. at 7970.¹

The Coalition believes that the word “related” adds nothing to the sentence or regulation and could be viewed as a relaxation of the statutory requirement in 29 U.S.C. § 2612(b) that FMLA leave, whether taken intermittently or on a reduced schedule basis, can be taken because a covered family member or the employee has a serious health condition. The statute further defines a “serious health condition” as an “illness, injury impairment, or physical or mental condition that involves: (A) inpatient care...; or (B) continuing treatment...” 29 U.S.C. § 2611(11). In its final rule, the Department should omit the word “related” to clarify that intermittent or reduced schedule leave is available for the treatment of a serious health condition, and not a non-serious health condition “related” to a serious health condition.

Also, the language after “health care provider” that discusses “recovery” is unnecessary verbiage and the Coalition recommends that DOL exclude it from the final rule. Proposed section 825.113(b) defines the term “incapacity” as an inability to perform certain activities such as work “due to the serious health condition, treatment therefore, or recovery therefrom.” 73 Fed. Reg. at 7965. Also, the definitions of “inpatient care” in proposed section 825.114 and “continuing treatment” in proposed section 825.115 include the term “incapacity” that includes recovery. Therefore, the recovery language in proposed section 825.202(a) is redundant since recovery from a health condition is included in the definition of incapacity and incapacity is used to define a serious health condition as either inpatient care or continuing treatment.

Scheduling of Intermittent or Reduced Schedule Leave (Section 825.203)

With respect to proposed §825.203, the Coalition endorses the clarifications proposed by DOL. The Department is absolutely correct that the FMLA requires an employee to “make a reasonable effort to schedule the treatment so as not to unduly disrupt the operations of the employer...” when the employee seeks foreseeable FMLA leave for planned medical treatment due to the serious health condition of a covered family member or of the employee. 29 U.S.C. § 2612(e)(2). This requirement to make reasonable efforts when scheduling treatment applies to foreseeable leave for planned medical treatment, whether the leave is taken in a block or on an intermittent or reduced schedule leave basis. Not only is the proposal an improvement over the current regulatory requirement for an employee to “attempt to schedule their leave” so that it does not disrupt the employer’s operations, but it also is an accurate requirement that effectuates the statutory language and Congressional intent. The Coalition commends DOL for this important clarification and urges DOL to include it in the final rule.

¹ 29 U.S.C. § 2612(b) authorizes the use of intermittent or reduced schedule leave in limited circumstances but such circumstances do not include “unanticipated medical treatment.” This issue will be explored in another section of this comment.

Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave (Section 825.204)

Generally, while proposed section 825.204 contains no substantive changes, the mere addition of subheadings improves the clarity and organization of the proposal over that of the existing regulations regarding the right of an employer to transfer an employee. In addition, DOL solicits comments on whether it should revise the proposed regulation and suggestions for language that would reflect such revisions. The Department noted that, in response to the RFI, it received numerous “comments criticizing the current regulations as regards employees who have a recurring need for unscheduled intermittent leave.” 73 Fed. Reg. at 7893. The essence of these comments is that an employer should have the ability to transfer an employee to an alternative, equivalent position in order to accommodate an employee’s need for intermittent or reduced schedule leave that is unscheduled or not foreseeable, just as an employer has pursuant to existing and proposed section 825.204 when the leave is foreseeable. For the reasons that follow, the Coalition joins the commenters discussed in Chapter VIII of the Report on the Department’s RFI, 72 Fed. Reg. at 35608, and strongly urges DOL to include language in the final rule that permits an employer to transfer an employee to an alternative, equivalent position when the employee’s need for intermittent or reduced schedule leave is unforeseeable or unscheduled.

Without question the statute expressly grants an employer the ability to require an employee to transfer temporarily to an alternative, equivalent position “[i]f an employee requests intermittent leave or leave on a reduced leave schedule...that is foreseeable based on planned medical treatment...” when such employee or covered family member has a serious health condition. 29 U.S.C. § 2612(b)(2). The statute does not condition the ability of an employer to transfer an employee to an alternative, equivalent position when the need for leave is foreseeable upon whether an employee provides more than 30 days notice, less than 30 days notice or such notice as is practicable, such as notice after the leave has commenced or even no notice at all. In fact, the statute does not recognize “unforeseeable” or “unscheduled” leave at all.

Accepting the premise that the statute authorizes foreseeable as well as unforeseeable or unscheduled intermittent or reduced schedule leave, the question is whether DOL could extend the transfer authority described in proposed section 825.204 to unforeseeable or unscheduled intermittent or reduced schedule leave. The Coalition is resolute that DOL not only could, but should do so. In fact, DOL already has interpreted broadly the statutory authority to transfer an employee under the circumstances described in 29 U.S.C. § 2612(b)(2), which contains a grant of authority to an employer to require an employee transfer to an alternative equivalent position only when the foreseeable intermittent leave for planned medical treatment is due to the serious health condition of a covered family member or of the employee. The statute does not expressly give an employer the right to require that an employee transfer to an alternative equivalent position where the employee takes foreseeable intermittent or reduced schedule leave because of the birth of a daughter or son or because of the placement of a daughter or son through adoption or foster care with the employee’s consent. However, DOL’s current as well as proposed section 825.204 do not reflect the statute’s grant to an employer of an ability to require an employee transfer to an alternative equivalent position where the employee needs foreseeable intermittent

or reduced schedule leave for planned medical treatment. Rather, both versions of this section state as follows:

(a) If an employee needs intermittent leave or leave on a reduced schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for the placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily...73 Fed. Reg. at 7971.

Therefore, one conclusion that can be drawn is that the Department reads the statute so as to enable an employer to require an employee who is taking intermittent or reduced schedule leave for the birth of a child or the placement of a child to transfer to an alternative equivalent position, since the statute does not expressly prohibit such an ability for an employer. Thus, it logically follows that the Department can also read the statute to permit an employer to require an employee to transfer to an alternative equivalent position when the need for intermittent or reduced schedule leave is unforeseeable (in the sense that the need became foreseeable at some point in time but not in time to provide any practicable advance notice of the need for leave) or is unscheduled, since the statute does not expressly prohibit that either.

In addition to the point that there is no statutory construction hurdle that would preclude DOL from extending section 825.204 to unforeseeable or unscheduled intermittent or reduced schedule leave, such a decision would be consistent with the legislative history of the FMLA that makes no such distinction either. For example, the Senate Report describes 29 U.S.C. § 2612(b)(2) as a:

[P]rovision [that] gives employers greater staffing flexibility by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced schedule to positions that are more suitable for recurring periods of leave. At the same time, this provision ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer.

We anticipate that a reduced-leave schedule will often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the week that the employee is on leave rather than hire a full-time temporary replacement. Senate Report 103-3 at 27 (January 27, 1993).

The Report of the House of Representatives is virtually identical in its wording. See, House of Representatives Report 103-8, Part 1 at 37 (February 2, 1993).

Therefore, based upon the fact that (1) the FMLA does not expressly prohibit the extension of section 825.204 to unforeseeable or unscheduled intermittent or reduced schedule leave, (2) the Department has construed broadly the ability of an employer to require a transfer by employee on intermittent or reduced leave, (3) the legislative history encourages it, and (4) the previous comments submitted on this issue and summarized in the Report on the RFI, the Coalition strongly urges the Department to include such a modification of proposed section 825.204 in its final rule.

Increments of Leave for Intermittent or Reduced Schedule Leave (Section 825.205)

The remaining section in the proposal that addresses intermittent leave is section 825.205. The Department mainly proposes to improve the organization of section 825.205, but has declined, much to the chagrin of the regulated community, to propose any change in the minimum increment of intermittent leave, at least “at this time.” 73 Fed. Reg. at 7894. Instead, proposed section 825.205(a) includes the problematic language from current section 825.203(d) and begins as follows:

When an employee takes leave on an intermittent or reduced leave schedule, an employer may limit leave increments to the shortest period of time that the employer’s payroll system uses to account for absences or use of leave, provided it is one hour or less. 73 Fed. Reg. at 7971.

In its preamble, DOL acknowledged the extensive concerns about the size of increments of intermittent leave that may be taken and admitted that “[n]o issue received more substantive commentary to the RFI than the employee use of unscheduled intermittent leave.” 79 Fed. Reg. at 7893. The Department reviewed many of the problems with the current regulation governing the size of increments of intermittent leave identified by employers and noted that “many employers suggested... that intermittent leave be taken in greater increments (e.g., two- or four-hour blocks or one-day or one-week blocks).” 79 Fed. Reg. at 7893. The Department also cited a number of comments from employee advocates that support the current rule and that “urged the Department to resist making any changes in the minimum increment of leave that an employee could take...” *Id.* As one defender of the current regulation noted, the purpose of intermittent leave is to help employers so that workers do not miss more work than necessary. The Coalition agrees with this description of the purpose of intermittent or reduced schedule leave.

The Department concludes its discussion of this important issue by stating that it “understands the burdens imposed by employees using unscheduled intermittent leave...[and] is aware of the importance of such leave to employees with serious health conditions.” 73 Fed. Reg. at 7894. It then closed with its evasive yet curious statement that it was “not proposing to increase the minimum increment at this time.” *Id.*

The Coalition emphatically urges DOL to increase the minimum increment of intermittent or reduced schedule leave that is unforeseeable or unscheduled, or for which an

employee provides no advance notice. The Coalition suggests several alternative recommendations to assist DOL in its efforts and for DOL's consideration.

First, the Coalition recommends that DOL require that employees take unforeseeable or unscheduled intermittent or reduced schedule leave in half-day increments, at a minimum. Thus, if an employee's scheduled workday normally is eight hours, then the increment for unscheduled or unforeseeable intermittent or reduced schedule leave would be four hours; if an employee's normal workday was 10 hours, then the increment would be five hours. Such leave increments would facilitate employer tracking of employee FMLA leave usage, and is consistent with Congress's expressed intent to provide 12 weeks – no less but no more – of job-protected leave per year. This also would dissuade employees who use their intermittent leave to sidestep their employer's attendance policies – to avoid disciplinary action for arriving late to work – and encourage them to be more selective about when they take their leave. An alternative recommendation is that DOL permit an employer to require that its employees take unforeseeable or unscheduled intermittent or reduced schedule leave in half-day increments only if the employer includes language in the eligibility notice (see proposed section 825.300) stating that the increment of any unscheduled or unforeseeable intermittent leave or reduced scheduled leave taken by an employee will be measured based upon one-half of the employee's normal workday.

A variation on the initial recommendation is to establish a smaller increment, such as a two-hour increment, that applies in any instance in which an employee takes unscheduled or unforeseeable intermittent or reduced schedule leave. Similarly, another variation on these alternatives would be to require that an employer have a clearly written policy stating that the increment for any unforeseeable or unscheduled intermittent leave is a half-day of an employee's normal or usual workday (or a two-hour increment) and to require that such policy be communicated to employees.

A final recommendation would be to increase the increment of intermittent or reduced schedule leave only when an employee fails to provide an employer with at least a minimum number (such as seven or five) of days notice in advance of a need for intermittent or reduced schedule leave; the current regulation on the size of an increment of leave would continue to apply where an employee provides more than the seven or five workdays advance notice. Other variations and alternatives, or combinations thereof, exist; the Coalition urges DOL to be proactive and innovative on the issue in its final rule so that the regulations are reasonable and workable, instead of simply declining to propose any change in the minimum increment leave “at this time.” 73 Fed. Reg. at 7894.

Lastly, if DOL is unwilling to make the aforementioned changes, the Coalition requests that DOL clarify that in all, cases, regardless of an employer's payroll system, an employer may always track leave in increments of at least an hour. Many employers have different payroll systems to track different payroll issues, and in fact in many cases track FMLA leave separate and apart from its payroll system. Therefore, it is arbitrary to require employers to track leave in the smallest increments that its payroll system tracks, when that payroll system may not even be used to track the FMLA or other leave usage. Moreover, the current DOL requirement penalizes employers who have more sophisticated payroll systems that can track payroll in increments as

small as a minute as compared to employers who do not. As such, the Coalition respectfully asks DOL to clarify that in all cases, regardless of the employer's payroll system, an employer should be able to track leave in at least hour increments. Such a clarification will provide consistency in how employers track intermittent leave and also provide a rule that is uniform as applied to all employers.

DOL also requests comments on the question of whether to permit the designation of an entire shift as FMLA leave when there is a physical impossibility that prevents an employee, who uses intermittent or reduced schedule leave, from beginning work once an employee's shift has started. In a 1994 opinion letter, the Department said that only three hours per week should be charged to a flight attendant's FMLA entitlement where the flight attendant needed only three hours of foreseeable intermittent leave every Friday to care for an ill mother. Taking this three-hour increment of intermittent leave precluded the flight attendant from working a Friday flight assignment and the opinion letter stated that the remainder of the leave time should be charged to another paid or unpaid leave program. Wage and Hour Opinion Letter FMLA-42 (Aug. 23, 1994). In its proposal, DOL expressed concern that its interpretation could subject an employee to disciplinary action, since the remaining leave time is not FMLA-protected. As the preamble suggests, this issue is particularly significant for the transportation industry, such as airlines and railroads.

The Coalition agrees with the comments cited by DOL in the preamble and urges DOL to include in its final rule a clarification that allows an employer to designate as FMLA leave an entire shift, or any remaining portion thereof, in which it is not physically possible for an employee to either start work or return to work once the employee uses intermittent or reduced schedule leave during the employee's shift. The Coalition offers language to address these circumstances as follows:

An employer may designate a complete or entire workday, job assignment or shift, or any remaining portion thereof, as FMLA leave and count it toward an employee's entitlement when the following conditions are met: (1) the employee uses intermittent or reduced schedule leave during the employee's normal workday, job assignment or shift; (2) the intermittent or reduced schedule leave is taken on a foreseeable, unforeseeable or unscheduled basis; (3) it is physically impossible for the employee to return to the normal workday, job assignment or shift; (4) the employee's physical impossibility from resuming or returning to work is due to the work location, travel associated with the work or the nature of the work, such as an ongoing or uninterrupted project or clean laboratory conditions that can not be breached; and (5) the employer has notified the employee of this policy.

DOL could add an example to illustrate this new provision based upon the airline or railroad comments cited in the preamble.

Unworked Overtime Hours (Section 825.205(b))

Also in its proposed section 825.205(b), DOL attempts to clarify how to account for unworked overtime hours when computing the amount of FMLA leave that should be counted against an employee's entitlement. Currently, the test applied to whether an employer can count unworked overtime against an employee's FMLA entitlement is whether an employee would be required to use some form of leave to cover unworked overtime hours in a non-FMLA context. In its proposal the Department states that the distinction in the Preamble of the current regulations among the "three types of overtime" and its "focus...has caused confusion" based upon its "enforcement, experience and responses to the RFI." 73 Fed. Reg. at 7894. This "confusion," it continued, "has been compounded by language in the preamble" in existing section 825.205. *Id.*

The preamble to proposed section 825.205(b) simply states that an employee who is limited to eight hours a day or 40 hours a week due to a serious health condition, has a "right not to work overtime hours without being subject to any discipline...[and] is [on] a reduced leave schedule." 73 Fed. Reg. at 7894. DOL continues:

[T]he correct focus should not be on whether the employee would normally be required to use leave to cover the overtime hours, but on whether the employee would otherwise be required to report for duty but for the taking of FMLA leave. If the employee would be required to work the overtime hours were it not for being entitled to FMLA leave, then the hours the employee would have been required to (but did not) work may be counted against the employee's FMLA entitlement. *Id.*

However, the proposed regulations are vague, at best, and silent, at worst, on this question because they contain no similar language. While the preamble is correct that an employee on a reduced FMLA leave schedule has a "right" not to work overtime, it ignores the realities of the workplace that an employer may need an employee to work overtime or may seek volunteers to work overtime. The Coalition urges DOL to reconsider this proposed "change." One option for DOL to consider is to include—within the meaning of "overtime required to be worked by an employee"—circumstances in which an employer rotates overtime on a volunteer or "as needed" basis among its employees so that each employee takes a turn to work the requested overtime or be subject to possible disciplinary action. In such a case, when it became the turn of the employee on reduced FMLA leave schedule to work overtime but which the employee has a right not to, then the employer could count such unworked overtime against that employee's entitlement.

Substitution of Paid Leave (section 825.207)

Terms and Conditions of Paid Leave Policy. The Coalition believes that DOL's proposal to allow employers to enforce the terms and conditions for paid leave when an employee substitutes paid leave for FMLA, is consistent with the main statutory goal of the FMLA, namely

that nothing in the FMLA be construed so that it would discourage employers from adopting or retaining more generous leave policies. See, 29 U.S.C. § 2653. A contrary interpretation serves to create preferential rights for employees taking FMLA leave.

Indeed, the Coalition believes that inherent in the provision of paid leave voluntarily provided by employers are the terms and conditions associated with utilizing such paid leave. Thus, leave is not available for employee use unless the terms and conditions for its use are satisfied. Such an interpretation is consistent with DOL's opinion letters on this topic, as well as the statute, which specifically provides for an unpaid leave entitlement unless accrued leave is available to substitute. *Id.* In many cases, employers encourage the substitution of paid leave and will voluntarily waive the terms and conditions associated with leave usage, but in the case of proven FMLA misuse, employers should be able to impose the terms and conditions to help discourage such employees from remaining out of the workplace.

Substitution of Paid Leave When Employees Receive Partial Disability Payments. The Coalition supports DOL's proposed regulatory clarification that employers and employees may agree to have paid leave run concurrently with FMLA leave to supplement disability benefits, *e.g.*, where an employee only receives two-thirds of his or her salary from the disability plan, provided that such an agreement is permitted under applicable state law. However, the Coalition believes that the proposal could be improved by allowing substitution of paid leave, regardless of employer and employee agreement, for the unpaid portion of FMLA leave when disability benefits are received.

The FMLA provides that paid leave can be substituted for unpaid FMLA leave at either the employee's or the employer's option. 29 U.S.C. § 2612(d). When disability benefits are received by an employee that do not provide the employee with his or her full salary or rate for that week, part of the leave is in fact unpaid. As such, the Coalition believes that the statute permits either the employer or employee to substitute leave to make the employee whole while on leave.

The Coalition believes that such an interpretation is consistent with the statute and beneficial to both employers and employees. From an employer's standpoint, it is advantageous to have the employee use their paid leave concurrently with FMLA leave, rather than take FMLA leave and then use their paid leave. The advantage to the employee, however, arguably is even more significant. In many cases, employees want or need their full paycheck (and in fact depend on it) to meet their basic needs. If an employer can deny the employee's ability to substitute paid leave for the unpaid portion of FMLA leave when disability benefits are received, it could be extremely detrimental to the employee. As such, the Coalition believes that such a change should be included in the final rule.

Equivalent Position (Section 825.215)

The Coalition commends DOL for its proposed clarification of existing section 825.215, especially the language that addresses in subsection (c) an employer's incentive programs, such as perfect attendance awards. As the Department summarized from comments to the RFI, the current regulatory scheme is "illogical and unfair," has "caused many companies to modify, or

eliminate altogether, perfect attendance reward programs,” “place[s] employees taking FMLA leave in a better position than those” who do not and is “perceived” as unfair. 73 Fed. Reg. at 7898. Consequently, DOL’s proposed section 825.215(c)(2) corrects the error in the current regulation and makes it legal for an employer to disqualify an employee from an award or bonus under an incentive program for achieving a specific goal where such employee does not meet the goal due to absences for FMLA leave. DOL’s proposal further clarifies that employees on FMLA-qualifying leave and employees on other, non-FMLA-qualifying leave would have to be treated the same or the employer may be in violation of the FMLA’s non-discrimination protections.

The Coalition concurs with the Department’s assessment that the language of the existing section 825.215(c)(2) is confusing and unfair. It is confusing because the current regulation attempts to distinguish between a bonus for job performance, such as exceeding production goals, and a bonus based upon the non-occurrence of certain events, such as for perfect attendance or working safely. As DOL recognizes, this is an artificial distinction that “defies the plain meaning of attendance.” 73 Fed. Reg. at 7899. DOL deserves credit for acknowledging that a bonus for perfect attendance or working safely requires “performance” manifested by an employee’s attendance or safe work, just as a production bonus requires “performance” manifested by an employee’s productive or efficient work. DOL also correctly noted there is an apparent inconsistency between existing sections 825.215(c)(2) and 825.215(d)(2) and the proposal eliminates such conflict. Thus, the Coalition endorses DOL’s proposed formulation of section 825.215(c)(2) and agrees that the proposal better effectuates the statutory intent of Congress, and urges DOL to include the proposal in its final rule.

Light Duty/Waiver of Rights (Section 825.220(d))

The Department proposes to clarify two points made in subsection (d), and seeks further comment regarding the impact of one of its proposed clarifications.

Waiver of Rights. The first clarification refers to the waiver of rights language. Following a recent spate of court rulings, it is no longer clear whether an employee could voluntarily waive rights (be they retrospective or prospective) without first obtaining Department or court approval. The Department in its proposal makes it clear that employees are free to waive their rights under the FMLA as long as those rights pertain to past claims. Employees may not be induced to waive any prospective rights under the law.

In its comments to the Department in response to the RFI, the Coalition urged the Department to revise the regulation to state that private individuals may agree to the settlement of past claims arising under the FMLA, without having to first obtain the permission or approval of the Department or a court of law, and to further clarify that the current prohibition only applies to the waiver of an individual’s future right under the FMLA. Consistent with these comments, the Coalition does not object to the proposed language.

Light Duty. The second clarification pertains to “light duty” and whether its use in lieu of FMLA leave has any impact on an employee’s annual FMLA leave allotment. Section

825.220(d) reads, in part, “In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ‘light duty.’” Although two federal courts, having relied on the above-mentioned language, had taken the position that an employee’s time spent in a voluntary light duty assignment could be counted against one’s annual (FMLA) leave entitlement, the Department states in the comments section that it did not concur with the courts’ interpretation. To rectify this, the Department proposes to strike the language that has led some to conclude that an individual’s placement in a light duty position can be counted against his or her FMLA leave allotment. In connection with this move, the Department invited further comment on whether deleting this sentence “may negatively impact an employee’s ability to return to his or her original position from a voluntary light duty position.”

In its comments to the Department’s RFI, the Coalition opined that employers should require that an employee accept a light duty assignment *consistent* with the employee’s medical restrictions. The Coalition also recognized that the Department might not want the time spent on light duty to be counted against an employee’s FMLA entitlement. While the Department clearly states in the comments section that placement in a light duty position does not impact one’s FMLA entitlement, the Coalition recommends that the Department add a statement to that effect in subsection (d) as further clarification.

As for addressing whether the deletion of the sentence will have a negative impact on an employee’s ability to return to his or her original position, most employers do not want to keep an employee in a light duty position longer than is necessary because someone else often has to perform that employee’s original job duties. Frequently, the employer either has to hire a temporary worker, incurring additional overhead expenses, or have other employees fill in, which can cause morale issues and/or added expenses due to unbudgeted overtime costs. Provided that an employee is able to resume his or her original job responsibilities, the omission of this language should have no impact on an employee’s reinstatement rights, except in the possible instance where an employee has been unable to perform his or her regular job duties for an extended period of time (i.e., a year or longer), and that role has been filled by another employee who is now established in it.

Employer Notice Requirements (825.300)

Electronic Postings. The Coalition fully supports DOL’s proposal to provide that the “posting” notice requirement could be satisfied through electronic means. The Coalition believes that this will improve communications between employers and employees related to FMLA rights and responsibilities because, as DOL notes, many employees work remotely (even at home) and allowing electronic access will help ensure that more employees have access to such information.

However, we do not share DOL’s view that 29 U.S.C. § 2619 supports the proposition that “the employer must make sure that the information is accessible to applicants as well as employees, so simply posting such information on an intranet that is not accessible to applicants will not meet the requirements.” 73 Fed. Reg. at 7903.

First, the Act, at 29 U.S.C. § 2619, merely states the general requirement that posting occur in locations where an employer customarily posts notices for employees and for applicants. Section 2619 does not create an obligation for employers to apprise applicants of their FMLA rights. Indeed, such applicants have no FMLA rights unless and until they become employed by an FMLA-covered employer and they meet the statutory requirements for eligibility (*e.g.*, the employee has been employed for 12 months and has worked for 1,250 hours of service in the preceding 12 months). The DOL may only issue a regulation where the statute is silent or ambiguous with respect to the specific issue. See, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the instant case, the proposed regulation speaks to an issue where the Act has spoken unambiguously. Specifically, the Act requires that any location where an employer “customarily posts notices for employees” suffices. DOL’s proposed regulation goes beyond the scope of, and beyond even the intent of, the Act. As such, we propose that this provision be eliminated.

Distribution of General Notice. The Coalition supports DOL’s proposal to have the poster and “general notice” be the same document for communicating employees’ general rights and responsibilities under the FMLA. The Coalition suggests, however, that the proposed requirement to distribute the general notice every year to employees if there is no employee handbook, regardless of a leave request, imposes an unreasonable paperwork burden on employers without handbooks and should be eliminated from the final rule. It is not clear whether the annual requirement to distribute to each employee would apply on an employee-by-employee basis, or would simply be required once a year for distribution to the general employee population, regardless of an employee’s specific anniversary date. For employers with high employee turnover, keeping track of whether an individual employee received a notice once a year could create a huge administrative burden. The Coalition believes that if an employer complies with the posting requirement, additional distribution should not be necessary. Indeed, the poster is the only notice required by the statute itself. See, 29 U.S.C. § 2619.

Content of Proposed Prototype General Notice. The Coalition also notes that the prototype notice does *not* include information as to what constitutes sufficient information that an employee needs to communicate to an employer when requesting FMLA leave, despite DOL’s statement that such information is in fact included. See, 73 F.R. 7908. The Coalition believes it is important to have the employee notice obligations stated on the distribution notice so that employees are aware of their obligations, and if such obligations are not met, employers do not have further obligations under the FMLA. This is particularly important in light of the changes for employee notification the Department is proposing in these revisions. (See, discussion of the Coalition’s views on employee notice obligations set forth below). The Coalition does not otherwise object to the content of the General Notice to be provided to employees.

Eligibility Notice-General Comments. The Coalition supports DOL’s new “label” and process for notifying employees when they first request FMLA leave. As the Coalition stated in its comments in response to the RFI, in many cases an employer does not have sufficient notice to determine whether an FMLA designation is appropriate within two days of an employee’s requesting FMLA leave. Therefore, the proposal recognizes that until an employer receives the

appropriate medical or other information back from an employee to make a determination of FMLA qualifying status, it is not appropriate to even provisionally designate FMLA leave. The Coalition does not object to the prototype eligibility notice form beyond what is discussed below.

Time-Frame For Providing Eligibility Notice. The Coalition supports DOL's proposal to extend the amount of time an employer has to provide this notice from two to five business days. The Coalition believes, however, that the proposal could be improved by allowing 10 days, as opposed to five, to provide the eligibility notice. In many cases, those responsible for sending out the eligibility notice are not notified of the employee's need for leave for several days. The FMLA administrator then has to review payroll and leave records to determine if the employee is an eligible employee and still has leave available in the relevant 12-month period. This process can be extremely time-consuming, especially if intermittent leave has been used and if multiple employees are taking leave at the same time. As such, the Coalition suggests that providing a 10-day time-frame, as opposed to a five-day time-frame, is more reasonable.

Notification of Ineligibility. The Coalition also strongly believes that the proposed new requirement that employers notify employees when they are not eligible should be eliminated. Specifically, the proposal states that an employer must notify the employee whether he or she has met the eligibility requirements for leave, and whether the employee still has any portion of his or her FMLA leave entitlement remaining in the applicable 12-month period. If the employee is not eligible or has already used his or her full leave entitlement, the employer must indicate the reasons why the employee is not eligible or has no FMLA leave remaining.

This proposed requirement is not consistent with the statute itself, which only covers eligible employees entitled to leave. See, *Ragsdale v. Wolverine World Wide, Inc.* 535 U.S. 81 (2002). The practical import of this requirement is that any time any employee requests leave that involves any type of medical issue, the employer would be required to send out paperwork indicating that the employee is not eligible or not entitled to leave. Thus, this requirement would impose a significant additional paperwork burden on employers that relates to employees not even covered by the FMLA in such circumstances. As such, DOL should only require employers to provide an explanation of ineligibility when an employee requests that information.

Notification Related to Terms and Conditions of Paid Leave Policy. Similarly, the requirement that an employer notify an employee of the terms and conditions of the employer's paid leave policy should not be required on the eligibility notice, as long as the employer has clearly communicated the policy to the employees in an employee handbook, posting or other communication distributed to employees. The practical reality is that most employees are familiar with the terms and conditions of the employer's paid leave policy, and to require that the terms and conditions be stated on the eligibility notice is simply an unnecessary paperwork burden. Alternatively, the proposal should clarify that if a copy of the employer's paid leave policy is sent along with the eligibility notice, such a practice is sufficient to meet this new requirement.

Designation Notice. The Coalition also supports the proposed requirement to provide a designation notice only after the employer receives information from the employee to determine

whether leave qualifies under the FMLA. The Coalition does not object to the prototype form. The Coalition also supports the proposed requirement that an employer notify the employee within five business days if leave is designated as FMLA leave. However, the Coalition suggests that to eliminate unnecessary confusion, DOL clarify in the final rule that the employer must mail out the designation notice within five business days. Otherwise, it is unclear whether the employee must actually receive such notice within that time frame.

Frequency of Notification. The Coalition also suggests that the DOL eliminate from the final rule the proposed requirement that when the amount of leave needed is unknown (*e.g.*, intermittent leave for a chronic serious health condition), the employer must inform the employee every 30 days whether leave has been designated and protected under the FMLA, and advise the employee as to the amount so designated, if the employee took leave during that 30-day period. Such a requirement will require employers to constantly monitor and communicate with numerous, if not hundreds, of employees who take intermittent FMLA leave. This requirement is therefore unduly burdensome. Rather, DOL should amend this requirement to indicate that such information should be shared with employees only upon request and no more frequently than every 30 days.

Designation of FMLA Leave (825.301)

Introduction. The Coalition generally supports DOL's proposal related to employer designation requirements and the remedy provision for failing to designate FMLA leave. Specifically, the Coalition agrees that employers should be allowed to retroactively designate FMLA leave absent a showing of individualized harm; that employers and employees should be able to mutually agree to retroactively designate FMLA leave; and that the penalty for not designating FMLA leave in a timely fashion should be based on an individualized showing of harm, consistent with the general statutory scheme for FMLA violations. The Coalition believes that this interpretation is consistent with the statute and the Supreme Court's interpretation thereof in *Ragsdale*.

The Coalition believes, however, that this regulatory section could be improved by making clear at what point an employer's obligations are triggered to make follow-up inquiries, as well as what follow-up questions may be asked. Employers are routinely concerned that asking follow-up questions could expose them to liability under the Americans with Disabilities Act's medical inquiry provisions. Thus, having bright-line guidance as to what questions are appropriate will help facilitate the process to ensure that those who are entitled to FMLA receive protections through improved communications. The Coalition also believes it is appropriate to cross-reference this section to 825.302 and 825.303 (employee notice obligations for foreseeable and unforeseeable leave) so that employers and employees are assured that these regulatory sections have consistent interpretations.

Employee Notice Requirements (825.302 and 825.303)

Call-In Procedures. The Coalition strongly supports DOL’s proposal to require employees to follow an employer’s standard call-in procedures when requesting FMLA leave. Employees receiving FMLA leave should not receive preferential treatment by eliminating such requirements. DOL’s proposal does not, however, require employees to follow the timing requirements of employer’s call-in procedures, but rather indicates the employee must call in as “soon as practicable.” While the Coalition strongly supports DOL’s proposal to modify its definition of “as soon as practicable” so that an employee may not wait two full business days to call-in, the proposal still leaves ambiguity as to what meets this standard and leaves room for abuse. As the Coalition previously reported to the DOL, when unforeseen leave is used, in many cases co-workers bear the burden of such call-ins, since in many cases, employers do not have enough time to adequately staff for the employee absences and still run their operations if the co-worker is allowed to be out from work. In other cases, the co-worker must bear the burden of performing their own job and that of the employee on FMLA leave because of the lack of notice provided. As such, the Coalition suggests that the proposal should be improved, to benefit both employers and employees, by requiring employees to follow the timing associated with standard call-in procedures, unless extraordinary circumstances exist.

What Constitutes Sufficient Information to Trigger an Employer’s FMLA Obligations. The Coalition believes that DOL’s proposal to retain the rule in §825.302(c) and § 825.303(b) that an employee need not assert his or her rights under the FMLA, or even mention the FMLA, to put the employer on notice of his or her need for leave should be modified in the final rule to require that such a specific statement (i.e., need for “FMLA” leave) be made to trigger an employer’s obligations, as long as sufficient information of an employee’s obligations are communicated to employees in advance. The proposal clarifies the standard as to what constitutes sufficient information from an employee to trigger the employer’s obligations to consider whether FMLA leave is at issue. This clarification still leaves room for uncertainty on the part of employers as to whether their obligations are triggered, while at the same time, imposing a reasonable obligation on employees to understand what they need to communicate to trigger the process. Specifically, under the proposal, “sufficient” information must include the following: (1) that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities); (2) the anticipated duration of the absence; and (3) whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment². However, if employees are charged with understanding that they need to communicate this information, it would seem equally appropriate, and improve the communication process, to require employees to specifically request FMLA leave. Since the general notice as proposed will contain information for employees to understand what they need to communicate, there is no reason why an employee can’t be charged with this obligation. Given the Coalition’s proposed revision stated above, the Coalition similarly believes that a specific request for “FMLA” leave should be required once the employee has already begun to utilize FMLA leave.

² The Coalition also strongly supports DOL’s proposed clarification that when an employee simply reports that they are sick, an employer’s obligations under the FMLA are not triggered.

General Rule on Medical Certification (825.305)

Process to Cure Incomplete or Insufficient Certification. The Coalition supports DOL's proposal to define what constitutes an incomplete and insufficient certification. The Coalition also supports DOL's proposal to create a bright-line rule whereby an employee has seven days to cure an incomplete or insufficient certification without losing FMLA protections. In the past, there has been unnecessary confusion as to whether a certification was incomplete or insufficient to trigger the obligation to allow an employee to cure a deficiency. Coalition members routinely report that in the case of chronic conditions, they receive certifications that indicate the frequency or duration of a condition is "undetermined." They also report that DOL investigators have taken the position that if the health care provider has written information in all the blanks of the form, the certification is considered "complete" and the employer's only course of action is to obtain clarification (if the employee provides permission) or to obtain a second opinion. Thus, the proposed change will greatly improve the clarity of the certification process.

Employers have also been unclear as to how long to give an employee to cure such a deficient certification. Employers have frequently struggled with the notion of how many times they have to give an employee an opportunity to "cure" a deficiency, and how long to allow them to provide such a complete certification. This clarification is helpful to alleviate delay and uncertainty in the FMLA approval process, as well as unnecessary administrative burdens associated with repeated follow-up communications related to the certification process. Under the proposal, both employers and employees will understand what their obligations are in the certification process.

What the proposal fails to address, however, is what happens if an employee does not "timely" return a certification form. The proposal mirrors existing regulations, which require that an employee return a medical certification within 15 calendar days "unless it is not practicable under the particular circumstances to do so, despite the employee's diligent good faith efforts." § 825.305(b). Courts have differed greatly as to what constitutes a "good faith effort." See e.g., *Frazier v. Honda of America*, 431 F.3d 563 (6th Cir. 2005), (employer did not violate the FMLA when it terminated an employee one day after the 15-day deadline. In finding that no violation occurred, the court observed that the employee had taken leave in the past [and therefore understood the requirement to timely return the certification], the handbook stated that the certification was to be returned in 15 days, and in other conversations surrounding attendance, he was advised of this requirement), compared with *Toro v. Mastex Industries*, 32 F. Supp. 2d 25 (D. Mass. 1999) (issue of fact as to whether extension should be given where leave was requested for the employee's wife who was having surgery in Colombia, and the wife assured the employee that it was sent). Thus, having a clear rule as to when the certification needs to be returned is essential to eliminate a protracted and uncertain approval process when deadlines are not met.

Both employers and employees should also have guidance as to what notice needs to be given to meet the "good faith standard," and how many times extensions should be granted, for the same reasons that DOL articulated in its proposal for the time-line associated with curing an incomplete or insufficient certification. Having clear-cut standards that both employers and

employees understand serve to protect employees and allow employers to comply with their FMLA obligations in a reasonable manner.

For these same reasons, DOL should define what constitutes extraordinary circumstances, or at least provide examples, so needless litigation does not occur as to whether the time-line for submitting certifications has expired.

Content of Medical Certification (825.306)

Changes to Content of Medical Certification Form. The Coalition strongly supports the elimination of a checkbox for the health care provider to certify that a serious health condition exists. In the past, Coalition member experience has revealed that DOL investigators have taken the position that if a box was checked by the health care provider, the employee had a serious health condition. Similarly, those charged with FMLA administration also were confused as to whether the certification was sufficient if a box was checked by the health care provider, but the medical facts provided did not necessarily establish that a serious health condition existed. By eliminating the checkbox, a determination of whether FMLA coverage is appropriate will be based entirely on the medical facts provided, without having the employee's health care provider make a legal determination as to whether a serious health condition exists.

The Coalition also supports DOL outlining what specific information should be provided as medical facts to support a sufficient certification, including symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or other regimen of continuing treatment. However, the Coalition notes that both the proposed regulation and proposed certification form state that such information "may" be provided as opposed to "must" be provided. Coalition members report that health care providers routinely provide the minimum amount of information necessary to complete the "blank" on the certification form, leaving FMLA administrators with insufficient information to make an accurate assessment as to whether FMLA coverage should be provided. While DOL's proposal makes clear that it is the employee's obligation to provide a sufficient certification, making the itemization of medical facts optional as opposed to mandatory will likely result in the same issues that arise under the current FMLA certification process, and lead to unnecessary delay and administrative burden in the FMLA approval process. As such, the Coalition suggests that it be mandatory that a health care provider supply information on the itemized subcategories of medical facts outlined by DOL to determine if a serious health condition exists.

Similarly, the Coalition believes that unnecessary confusion, delay and administrative burdens could be eliminated if DOL makes clear on the prototype certification form and in the proposed rule that terms specified such as "lifetime, unknown or indeterminate" duration are not, as opposed to may not be sufficient on their own to establish FMLA coverage. While it may be the case that a condition may be of an unknown or permanent duration, the health care provider should be required to at least specify what the estimated or expected duration will be. Most importantly, the regulation and certification form should have more emphasis on the duration and frequency of chronic conditions which could cause the employee to be unavailable for work, which may be of an unknown or permanent duration, but have episodes and duration of episodes

with more defined time frames. While the form contains such questions, more emphasis should be given to these questions, and the regulation should state that if information related to the estimated duration and frequency is not provided in the case of chronic, permanent, or long-term conditions, such a certification will not be considered sufficient to substantiate FMLA leave.

Authentication, Clarification, and Second Opinions (825.307)

Proposed Changes To Authentication and Clarification Process. The Coalition strongly supports DOL’s proposed changes to the authentication and clarification process. The Coalition believes that the current regulatory requirement which requires that contact with the employee’s health care provider take place only with the employee’s permission for purposes of clarification and authentication creates unnecessary delay and expense for employers. And the requirement that the employee give permission before such contact take place does nothing to increase the privacy protections of the employee, since as DOL correctly observes, the employee’s health care provider cannot discuss the employee’s medical condition with an employer without a signed HIPAA release. Thus, the proposed changes—that clarification does not have to go through a health care provider from the employer, and a recognition that clarification may be necessary to ensure sufficient information is provided on the employee’s part—should help ensure that the certification process is more efficient and less burdensome.

Indeed, as the Coalition already shared with DOL in response to its RFI, many Coalition members do not have personnel on staff that qualify as health care providers. Rather, many employers utilize human resources to handle FMLA administration, and smaller employers do not necessarily even have human resource professionals on staff. Therefore, employers have to incur the unnecessary expense of finding a health care provider to make contact with the employee’s provider and educate them on what information the employer needs to be clarified. There is no good reason why such a requirement is needed for purposes of determining whether leave qualifies for the FMLA protections.

The Coalition believes, however, that the proposal’s requirement that such clarification cannot take place until after the employee has been given the opportunity to cure the deficiency in writing should be eliminated. In many cases, employees want to have the assurance that leave will be FMLA protected. Requiring this “curing” process before clarification takes place will simply cause the approval process to be delayed and create inefficiencies. At the very least, the final rule should provide that the employee has the option of having the opportunity to cure before having the clarification process commence, as opposed to having such a process be mandatory.

Proposed Changes Related to the Second Opinion Process. The Coalition strongly supports DOL’s proposal to allow employers to have background medical information used by the employee’s health care provider to issue the initial certification be shared with the second-opinion doctor in connection with the second-opinion process. Under the current regulations, it is unclear whether such information can be shared, and as a result, employees must submit to additional tests and examinations in order for the health care provider to give a legitimate second opinion. In some cases, by the time the second opinion is arranged, the condition no longer

exists and/or is dormant, so there is no way for an accurate second opinion to take place. As such, the proposed change is important to alleviate unnecessary expense. It helps ensure that employees are not subjected to unnecessary tests and it helps maintain the integrity of the second-opinion process.

The Coalition believes the proposal also could be improved by providing a definition as to what constitutes a good-faith doubt as to the validity of the initial medical certification. Coalition members have no guidance as to what constitutes a good-faith belief to commence the second-opinion process. For instance, can employers take into account attendance patterns in deciding whether a second opinion would be helpful? Definition of this standard would help employers better understand their rights and limitations in connection with this process.

Certifications from Foreign Health Care Providers. In its proposal, DOL seeks comment on what special requirements, if any, should apply when employees provide medical certifications from foreign health care providers who do not necessarily have the same qualifications as health care providers in the United States. Coalition members believe that two provisions should be inserted into the final rule that will address this concern. First, the final rule should provide that a certification provided by a foreign health care provider automatically gives an employer the right to get a second opinion. It is not realistic to believe that an employer has the time or capabilities to determine if the foreign health care provider's credentials are legitimate. Therefore, adding such a requirement would achieve the balance necessary between protecting an employee's right to FMLA leave, while still safeguarding employers' rights to obtain a medical certification from a qualified health care provider in this process. Second, an employer should be able to have the medical records that are relevant to the certification provided to a health care provider of the employer's choice in the United States, as a check to determine if, in fact, a second opinion is warranted. These records must also be provided in English. Again, adding such a requirement will simply help to maintain the balance between employer and employee rights in the certification process.

Recertification (825.308)

Second and Third Opinions on Recertification. Coalition members strongly believe that under the final rule, employers should be able to obtain second and third opinions in connection with recertifications. No statutory prohibition exists with regard to such requests, and simply because the statute addresses this issue in the context of the initial certification does not mean Congress meant to prohibit such a process from being utilized in the recertification process. As the Coalition already shared with DOL in response to its RFI, Coalition members report that on many occasions, an employer does not have any reason to doubt the initial certification. It is only when circumstances change, leave is extended, or a questionable pattern of leave occurs that an employer may have reason to doubt the validity of the initial certification and therefore need the opportunity to obtain a second opinion. At that point, if an employer has requested a recertification, it is too late for an employer to challenge the validity of continued FMLA leave. Permitting second and third opinions or recertification will provide substantial benefits to both employers and employees. Employers will not have to incur the unnecessary expense of obtaining second and third opinions based on a doubtful initial certification unless a pattern of

misuse in fact develops. Employers who have no reason to initially doubt a certification will not lose the opportunity to challenge the certification at a later date. Employees also will benefit since they will not have to go for second and third opinions if they do not misuse FMLA leave, even if their original medical certification creates doubt as to the validity of the need for leave.

The Coalition does not believe hardships will result from permitting such a process to occur. While the Coalition appreciates that DOL may be concerned that employers will send employees for second and third opinions more frequently as the result of such a change, as discussed above, this change could result in employees going for second and third opinions less frequently. Moreover, the cost associated with the second- and third-opinion process does not permit employers to utilize such a process unless the validity of FMLA leave is clearly in question. Finally, the existing safeguards—that second and third opinions may only be obtained if an employer has reason to doubt the validity of the need for leave—also protect employees from having employers arbitrarily sending employees for second and third opinions.

The Coalition does not believe that the DOL’s proposed clarification that second and third opinions can be obtained each new leave year solves the concerns discussed above. If a pattern of misuse begins at the start of the leave year, an employer will have to allow potential misuse to continue for months before being able to obtain a second opinion. Such a result does not achieve the balance between employer and employee rights required by the statute. See, 29 U.S.C. § 2601(b)(3).

Fitness for Duty Certifications (Section 825.310)

Fitness for Duty for Intermittent Leave. Under the ADA, employers may request a fitness-for-duty certification when job-related and consistent with business necessity. See, *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (“Enforcement Guidance on Disability Related Inquiries”)*, at Question and Answer Number 5. If an employee is taking intermittent leave for a serious health condition, it may be appropriate to obtain a fitness-for-duty certification to ensure the employee can safely perform his or her job well before the 30-day time frame expires, as stated in the proposal. For example, if an employee takes FMLA leave for chronic back problems, it may be questionable whether the next day the employee should be lifting heavy boxes. Thus, the fitness-for-duty request is to make sure the employee is safely able to resume work. DOL should permit certifications in such circumstances, as long as the request is job-related and consistent with business necessity in accordance with the ADA’s standard. This change will eliminate conflict between the FMLA and ADA and will not force employers to compromise the safety of employees in order to comply with the FMLA’s regulatory requirements. This change will also be consistent with the proposed regulatory language in section 825.306 which states that “[i]f an employee’s serious health condition [is] also a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.”

Moreover, permitting employers to utilize these procedures would not pose additional costs to employees. In many cases, employers want fitness-for-duty examinations to be

conducted by health care providers of their choice. Therefore, if an employee does not want to go to his or her own health care provider to get certification that the employee is fit-for-duty, employers generally can and will make health care providers available to conduct such examinations at their expense.

Fitness for Duty Upon Return from a Block of Leave. The Coalition supports DOL's proposal to permit employers to obtain more than a simple statement of an employee's ability to return to work following FMLA leave, and instead obtain certification that the employee can perform each of the essential functions of his or her job. The Coalition, believes, however, that the proposal could be improved by permitting an employer to obtain a fitness-for-duty examination before returning an employee to work, and/or clarification and/or a second opinion from a health care provider of the employer's choice if the employer has a reasonable basis to question the employee's ability to return to work.

The prohibition against clarifications without the employee's permission and prohibition on second and third opinions on fitness-for-duty certifications also are problematic from a safety perspective and conflict with the fitness-for-duty assessment permitted by the ADA. See, *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* ("Enforcement Guidance on Disability Related Inquiries"), at Question and Answer Number 17. Indeed, several courts have addressed these conflicting statutory rules and have reached different conclusions. See, *Albert v. Runyon*, 6 F. Supp. 2d 57 (D. Mass. 1998) (finding that employer could not request a fitness-for-duty exam for an employee returning from FMLA leave in light of the FMLA's return-to-work provisions, but rather, only when "post-reinstatement behavior provides the employer a reason for doing so"); *Underhill v. Willamina Lumber Co.*, C. No. 98-630-AS, 1999, U.S. Dist. LEXIS 9722 (D. Or. June 17, 1999) (same). But see, *Porter v. Alumoweld Co., Inc.*, 125 F.3d 243 (4th Cir. 1997) (finding that an employer was permitted to have an employee submit to medical exam upon return to work under its right to do so under the ADA, despite the FMLA's return-to-work provisions).

The main reason why employers are interested in obtaining a fitness-for-duty certification when an employee is on leave for a medical reason is to ensure that the employee can safely return to his or her job. Employers worry if they do not obtain such information, employees may reinjure themselves and/or compromise the safety of co-workers. In addition to the welfare of the employees, employers are also concerned about the impact such accidents can have on their workers' compensation costs, and other liability exposures. For example, an employee may be certified for 12 weeks of FMLA leave because of a condition that renders the employee completely incapacitated. When the employee's paid disability runs out and the employee does not qualify for long-term disability, the employee suddenly is able to return to work without any restrictions. In such cases, the employer may be justifiably concerned whether the employee is in fact safely able to perform the essential functions of his or her job.

Thus, the inability of an employer to question the statement provided by the employee's health care provider, even if essential functions are specifically addressed regarding whether the employee can return to work, and lack of opportunity to challenge such a statement, create risk for everyone involved. Again, consistent with ADA standards, an employer should be able to

ask for information that ensures the health care provider is aware of what the employee must do at work before allowing the employee to return.³ The employer should not have to wait to observe “post reinstatement behavior,” and perhaps risk an injury to the employee or others, before doing so. Thus, if such information is not definitive, an employer should not have to return the employee to his or her position until that issue is resolved. Employers also should be able to challenge certifications obtained from the employee’s health care provider who in some cases will provide such statements simply upon the employee’s request.

Regulatory Issues Raised by the Military Family Leave Amendments to the FMLA

The Coalition commends the Department for moving quickly to solicit input on how to implement the new Military Family Leave Amendments (MFLA) to the Family and Medical Leave Act (FMLA). The Department’s summary of issues is thought-provoking and resolution of them will facilitate employer and employee compliance with the new MFLA requirements.

The Coalition believes that employers as a whole are very supportive of the dedicated men and women who currently serve or have served in the Armed Forces, the Reserves, and the National Guard. Likewise, we believe employers are very compassionate toward employees who have family members called to active duty and may need time off work to address urgent matters occasioned by such a call to active duty, or to care for a loved one injured in the course of fulfilling his or her military duties. Many employers have been providing leave and other accommodations voluntarily well before enactment of H.R. 4986.

The Department should, to the extent reasonably possible, adopt regulations that are simple, based on commonly used terms, and explained with examples. Most employers and employees are simply not familiar with military vocabulary or the military work environment and will benefit from having key terms explained and illustrated.

In the following comments, the Coalition sometimes refers to leave required by the MFLA as “MFLA leave.” In most cases, we refer to leave under the existing FMLA regulations as “FMLA leave” or “regular FMLA leave” to avoid confusion. With respect to MFLA leave, we have used the term “exigency leave” to refer to leave related to a servicemember’s call to active duty that results in an urgent need for an employee to take leave. We have used the term “caregiver leave” to refer to servicemember family leave to care for a covered servicemember who is injured while on active duty.

³ Employers also should be allowed to delay the employee’s return to work pending receipt of a second opinion if the employer has a reasonable basis to believe that the employee may not be able to safely return to work and perform all the essential functions of the job. This clarification is needed in light of at least one court decision that held otherwise. See *Hoge v. Honda*, 384 F.3d 238 (6th Cir. 2004). While an employee cannot be made to take more leave than needed under the FMLA, the absence necessary to determine an employee’s fitness-for-duty should be treated as any other absence taken by an employee pending the results of a fitness-for-duty exam obtained under the ADA.

Exigency Leave

Definition of “Active Duty.” The term “active duty” has relevance in the MFLA primarily with respect to exigency leave. At least with respect to exigency leave, the term “active duty” is defined in the MFLA as “a call or order to active duty under a provision of law referred to in” 10 U.S.C. § 101(a)(13)(B). Under 10 U.S.C. § 101(a)(13)(B), there are seven specific federal statutes listed under which the President of the United States has the right to call certain military units or members to active duty. They include retired members of the Regular Armed Forces, Reservists, Ready Reservists, Selected Reservists, Individual Ready Reservists, Reservists On Active Duty Pursuant to a Special Call to Active Duty, State National Guard, and State Militias. In one very limited situation, the Regular Armed Forces can be assigned to duty for state-related emergencies.

The Department has indicated that it intends to cross-reference 10 U.S.C. § 101(a)(13)(B) in the final MFLA regulations. However, we strongly recommend that the Department include more than a mere “incorporation by reference.” Without a full explanation of “active duty,” both employees and employers will have serious difficulty ascertaining their respective rights and obligations under the MFLA.

Most employers are not familiar with statutory references, and it is unreasonable to expect an employer to read 10 U.S.C. § 101(a)(13)(B) and easily locate the seven specific federal statutes referenced therein, let alone understand or appreciate what they mean. Second, most employers are not familiar with military jargon and will find it difficult to understand exactly who can be called to active duty. Third, the Department already believes that employees may not be as aware of their rights under the FMLA as they should be, so it is logical to assume that they will know even less about MFLA leave because it is new. Fourth, the Department already believes employers should be doing more to make employees aware of their FMLA rights, proposes to impose more notice requirements on employers under the FMLA, and the FMLA regulations already require employers to provide “responsive” answers to employees’ questions about leave rights and obligations. If employers are expected to comply with the MFLA, provide adequate notices to employees about it, and provide responsive answers to questions from employees, then they need more guidance and explanation of what calls to active duty give rise to MFLA leave.

With respect to such guidance and explanation, we recommend that the Department:

1. Explain the types of servicemembers and units that can be called to active duty and the general circumstances under which such calls to active duty can occur. We do not believe a substantial amount of detail is necessary, but enough so that both employers and employees have a good sense of who can be called to active duty and under what circumstances.

2. Clarify that a call to active duty can generally be made *only to units and members of the reserve components* (Armed Forces Reserve, National Guard, Ready Reserve, and Selected Reserve) or to certain retired members of the Regular Armed Forces, but not generally to members of the Regular Armed Forces already on active duty. Such a clarification is necessary to avoid confusion and to ensure that employers and employees understand that

exigency leave is generally not available to family members of those already serving on active duty in the Regular Armed Forces. This is consistent with the statutory language which references 10 U.S.C. § 101(a)(13)(B).

3. Clarify that a call to active duty is a *Federal* call to active duty as opposed to a *State* call to active duty of a State's own National Guard or state militia. This clarification is necessary to avoid confusion about potential calls to active duty by a State (or Governor of a State) of its own militia (National Guard) for state-related purposes that is not a call to duty by the President under one of the listed federal statutes. State calls to active duty (unless under order of the President of the United States pursuant to such a federal statute) are not covered by the MFLA.

Definition of "Contingency Operation." The term "Contingency Operation" has relevance in the MFLA with respect to exigency leave only (and not caregiver leave). The MFLA states that it has the same meaning as used in 10 U.S.C. § 101(a)(13).

The Department has indicated that it intends to include the definition of "contingency operation" in the MFLA regulations as it appears in 10 U.S.C. § 101(a)(13) and to cross-reference it. However, we strongly recommend that the Department include more than a mere "incorporation by reference." Without a full explanation of "contingency operation," it will be burdensome for both employees and employers to ascertain their respective rights and obligations under the MFLA.

With respect to such guidance and explanation, we recommend that the Department explain the types of operations that are contingent in nature. We do not believe a substantial amount of detail is necessary, but enough so that both employers and employees have a good sense of what a contingency operation is and is not. It may be sufficient to indicate that a military operation generally qualifies as a "contingency operation" if: (a) the United States has determined military action is necessary due to hostilities against an enemy or opposing military force; (b) war is declared by or against the United States; or (c) a national emergency is declared by the President of the United States.

Therefore, the DOL should clarify that exigency leave is only available when three criteria are met: (a) the servicemember must normally be a member of a reserve component (as opposed to a member of the Regular Armed Forces); (b) the servicemember must be called to active duty; and (c) the active duty must be to support a contingency operation (as opposed to any other operation). It would be helpful to also give examples of the types of non-contingent operations to which a reserve member could be called to active duty (such as State-specific duty not under a call to duty by the Federal government, etc.).

Definition of "Qualifying Exigency." One of the more critical MFLA provisions is the one requiring appropriate definition of the term "qualifying exigency." The Coalition believes there are three factors that must be taken into account in crafting an appropriate definition: (1) causation; (2) non-medical nature of the need; and (3) urgency of the need. We believe that a situation should qualify as an "exigency" only if it meets certain requirements regarding all three of these factors. Each of these factors is discussed below.

1. Causation. The Department has asked for comments on the “degree of nexus” required to demonstrate that the exigency arises out of the servicemember’s active duty deployment or status. We believe the word “causation” more accurately describes the required relationship between the need for leave and the military service. We also believe the term “causation” is more consistent with the intent and legislative history of the MFLA than the term “nexus.” The legislative history cited in the proposed rule makes it clear that the need for exigency leave has to be “*directly caused*” by the servicemember’s call to or service on active duty. Representative Jason Altmire’s statement refers to needs “*directly arising*” from deployment and extended deployment. Representative Tom Udall referred to needs “*related directly*” to deployment. Representative George Miller stated that such needs “*arise as a result of*” deployment.

Therefore, exigency leave should be limited to needs *directly caused* by the military service itself and should specifically exclude routine, everyday life occurrences arising in the ordinary course of living or by common happenstance, chance, or accident. Exigency leave should not be available for occurrences commonly faced by employees in general who do not have a family member in the military.

The Coalition is also concerned that allowing exigency leave for routine, everyday occurrences will subject employers to internal complaints and claims of discrimination from other employees who believe they should also be allowed to take leave for such occurrences. The Coalition encourages the Department to pursue a narrow definition. “Qualifying exigency” has the potential to be very broad and employers could be at the mercy of employees seeking leave for many reasons that would be questionable. The tighter the definition, the more employees and employers will know what is permissible.

Although we do not believe the MFLA was intended to be used as a substitute for dealing with commonplace challenges of everyday living, we also recognize that there may be limited exceptions in extraordinary circumstances. For example, if a male Reservist has a working spouse, and if the Reservist was the actual child-care provider of their children immediately before being called to active duty, then the need to make alternative child care arrangements would appear to directly arise from the Reservist’s call to active duty. However, once the employee has made alternative child-care arrangements, then any time sought to make new arrangements due to a day-care provider quitting or other change in circumstances, should be considered a challenge of everyday living caused by normal life circumstances, and not caused by the military service.

2. Non-Medical Nature of the Need. The Coalition believes that exigency leave was intended for non-medical situations. Our position is based on the fact that FMLA leave is already available for the serious health conditions of family members, the fact that the legislative testimony quoted in the NPRM does not include any mention of medical situations as reasons for exigency leave, and the fact that section 103 of the MFLA only permits medical certifications for caregiver leave and for FMLA leave due to the serious health condition of the employee or a qualifying family member. The Coalition believes that if Congress had intended exigency leave

to be based on medical needs, it certainly would have specifically permitted and mentioned it in section 103.

3. Urgency of the Need. The term “exigency” commonly means an urgency, a situation calling for immediate attention, or a pressing need. Accordingly, the Coalition believes that exigency leave should only be available if two criteria are met regarding the urgency of the need: (a) it must be a “critical” or “immediately necessary” matter; and (b) there must be no other reasonable alternatives available to address the need, short of taking exigency leave.

In all cases, the Department should include a requirement that employees who would otherwise be eligible for exigency leave must make a good-faith effort to take care of deployment-related needs during non-work hours to the extent reasonably possible, and in a manner that will minimize disruption to employer operations. For consistency purposes, we suggest language similar to the language regarding the submission of medical certifications that requires an employee to make “diligent, good-faith efforts.”

For example, if the servicemember has 30 days’ advance notice of deployment, the servicemember and his or her family members may have adequate non-work time to attend to certain needs (such as adding or changing beneficiaries on insurance policies, adding co-signators to bank accounts, making alternative child-care arrangements, etc.). However, a servicemember who only receives 48 hours’ advance notice of deployment will probably not have adequate time to make alternate arrangements to transport his or her children to school (assuming he/she was the parent responsible for that activity), and the servicemember’s spouse may need a temporary period of time to transport the children and to make alternative transportation arrangements. On the other hand, if such a spouse needs time to make alternative transportation arrangements for the children, the need may initially be “immediately necessary,” but within a reasonable period of time, the spouse should be able to make alternative arrangements (just like any other parent who sometimes faces similar issues), and should not be able to take exigency leave indefinitely.

With regard to whether other reasonable alternatives are available to address the need, we believe the important considerations include limitations on when the need can be reasonably addressed and who is in the best position to or is necessary to address the need (the servicemember and/or the eligible employee). If a need can only be fulfilled during an eligible employee’s work hours, and if the eligible employee is necessary to its fulfillment, exigency leave may be necessary.

For example, if a servicemember wishes to add an eligible employee to a bank account or safety deposit box, the bank normally requires the signatures of both, and the bank may not be open to accomplish this task except during the eligible employee’s normal working hours. Therefore, there would be no reasonable alternative to accomplish this task unless the employee takes exigency leave. On the other hand, if the servicemember needs to sign forms at the post office to have mail forwarded to a different address, only the servicemember can address such a need (as his/her signature is necessary). There would be no need for an eligible employee to take exigency leave simply to accompany the servicemember to the post office to effect an address change. If the servicemember and a spouse wish to meet with an attorney to prepare wills, and if

they both need an explanation about how it will operate or have questions about guardianship of their children should something happen to both of them, they both are necessary participants, and the attorney may only be able to meet with them during the employee's work hours. Also by way of example, if a working spouse would like to participate in officially sponsored military support sessions for the spouses of servicemembers called to active duty, and if such sessions are only offered during the spouse's normal work hours, the spouse should be eligible for exigency leave.

Examples of Needs Qualifying For and Not Qualifying For Exigency Leave. We encourage the Department to include a comprehensive list of needs that generally will qualify for exigency leave. If the regulations only cover the permitted types of exigency leave in a general or vague way, employers and employees will expend needless energy (and attorney's fees) debating interpretation of the regulations. As mentioned in the preceding discussion, a situation should not qualify as an "exigency" unless it meets certain requirements regarding causation, non-medical nature of the need, and urgency of the need.

The following needs might be directly caused by "the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty)" and meet all other criteria for MFLA, but still should be subject to an overriding case-by-case determination by the employer:

- (1) arranging for alternative child care if the servicemember was the actual person caring for the child on a part-time or full-time basis;
- (2) arranging for transportation of children to and/or from school or day care if the servicemember was the actual person responsible for such transportation and it would be reasonably inconvenient for the employee to assume that responsibility;
- (3) attending official ceremonies, briefings and support sessions for family members sponsored by the military;
- (4) transporting or accompanying the servicemember to the point of departure upon deployment and/or attending the servicemember's farewell at the point of departure;
- (5) greeting the servicemember upon return from active duty at the point of arrival and/or transporting or accompanying the servicemember from the point of arrival to home;
- (6) arranging for the preparation of and executing important legal documents (such as, but not limited to, last will and testament, living trust, financial and health care powers of attorney, safety deposit box, beneficiary designations on financial accounts and insurance plans/policies, signatory authorizations on bank accounts, change of address on mail delivery so that bills and other important communications are forwarded to the appropriate person);

(7) making arrangements to move or sell household goods and vehicles and/or sell/sublet the servicemember's home (if the servicemember does not intend to maintain his or her current residence while on military duty, or if the employee's spouse can no longer afford to retain them or remain in the residence);

(8) attending to military, legal, personal affairs reasonably caused by the missing status or prisoner of war status of a servicemember or reasonably caused by the death of the servicemember (such as attending the arrival of the body, making funeral arrangements, attending related military ceremonies, attending the funeral and burial, attending to home or personal matters of a critical nature, and a reasonable bereavement period based on the employee's relationship to the servicemember).

Timing of Employee Notice

The MFLA requirements for exigency leave only require notice if the need for leave is foreseeable. The language almost implies that no notice at all is required if exigency leave is unforeseeable. We believe the Department should apply the same principles of foreseeability as described in the proposed regulations for notifying an employer about taking medical leave in sections 825.302 and 825.303.

We hope employees would notify their employers as soon as reasonable and practical when the employee learns that the servicemember has been called to active duty. The employee may or may not thereafter request exigency leave, but at least the employer could then make inquiries about the employee's plans for any time off, start planning to cover the employee's workload if exigency leave may be a possibility, resolve as early as possible any misunderstandings or dispute about whether the need for exigency leave is a qualifying need, and increase the employee's awareness of exigency leave. However, such notice of a call to active duty and any preliminary discussions about the employee's opportunity to take exigency leave should not be considered notice of a need for such leave. The employee should still be required to provide notice when the actual need for leave becomes known.

Content of Employee Notice

The Coalition believes that any request for exigency leave should include sufficient information regarding causation, nature of the need for leave, and urgency of the need for leave (which we consider to be essential requirements, as discussed earlier). As a practical matter, we believe it would make sense for the Department to develop a prototype "request for leave of absence" form that includes the required elements for leave, whether it is regular FMLA leave or MFLA leave. We believe that most employers will in the future, and upon finalization of the regulations, require employees to request leave in writing as part of their usual and customary leave procedures (except in true emergency situations where it is physically impossible to do so).

A prototype leave of absence request form would promote the Department's goal of ensuring that employers are adequately notifying employees of their rights. It would contain the basic information important for an employee to know about what might qualify as exigency leave and needed for the employer to determine if the leave might be for a qualifying reason. It would also help eliminate disputes about what the employee told or did not tell the employer orally, especially when a need for exigency leave might have to be processed on a relatively short time frame.

Frequency of Employee Notice

Unlike regular FMLA leave for a single serious health condition, MFLA exigency leave could conceivably be for a wide variety of qualifying purposes. For example, an employee may need exigency leave to add his or her name to a servicemember's bank account, or to arrange for alternative child care, or to attend a pre-deployment family briefing. Therefore, the employee should be required to request exigency leave for each different purpose. Employees should not be able to make a "blanket" request for exigency leave. Otherwise, an employer will not be able to adequately plan its staffing needs or determine appropriate documentation to verify the need for leave. In addition, employees would be able to take exigency leave on a totally unscheduled basis, even if it is for planned or scheduled activities where advance notice could have been given to the employer.

Certification of Need for Leave

The Department has asked for comments on a number of issues related to certification of the need for exigency leave. Many of the issues overlap, and the Coalition has generally addressed all of the issues in the discussion below.

1. Content. We believe there are two major components of the certification requirement. There must be confirmation that the servicemember's military service is of the type covered by exigency leave. This confirmation would only need to be provided once for each deployment. There must also be verification that the need for exigency rises to the level of a "qualifying" exigency. This verification would need to be provided for each purpose for which exigency leave is requested and could involve multiple certifications if the employee wishes to use exigency leave for multiple purposes. Each of these components is discussed below.

a. Confirmation of Qualifying Servicemember Military Duty. We recommend that the employee be required to provide written documentation confirming the following data elements: (a) the servicemember is a member of a reserve component; (b) the servicemember has been called to active duty by the Federal government; (c) the call to active duty is in support of a contingency operation; and (d) the date the servicemember is required to report to active duty. In most cases, this might simply be a copy of the servicemember's orders, providing it contains all of the above-referenced information. In other cases, supplemental documentation may be required, such as a copy of the servicemember's military identification card. In some cases, the servicemember might not receive written orders in sufficient time for a family member to

produce a copy of it to the employer, because the call to duty may be made on an emergency basis with very little advance notice.

We anticipate that it might be difficult for any employer (and even the servicemember) to ascertain if the call to duty is actually for a contingency operation. In some cases, the servicemember only knows where to report for deployment or where the military duty will be served. In some cases, the servicemember may be called to special operations that are extremely confidential and the servicemember may be prohibited from disclosing information about it.

In light of the above, the Coalition believes that an employee should be required to provide such written documentation as is reasonably available or becomes reasonably available before exigency leave is taken to confirm the data elements listed above. The employee should be required to produce it as soon as reasonable and practical. If physical impossibility prevents the employee from producing it before leave is taken, the employee should be required to produce it after the fact as soon as reasonable and practical. If military laws prevent the servicemember from sharing some of the data elements with the employee, the employee should be required to produce a statement from an authorized representative of the military that the data element cannot be verified due to legal restrictions on the servicemember's ability to disclose the information.

b. Verification of "Qualifying" Exigency. We recommend that the employer be permitted to request documentation supporting the employee's request for leave, unless there are extraordinary or extenuating circumstances, or documentation does not exist.

2. Source. In all cases, an employee should be required to provide written documentation from an independent and reliable source if such a source is available. In no event should an employee or servicemember be required to provide a statement or affidavit as a certification unless there is absolutely no other alternative method of certification available.

3. Complete and Sufficient. The Coalition believes that any certification must be complete and sufficient. If it is not complete and sufficient, the employee should have some reasonable opportunity to cure the deficiencies, but we are concerned about the potential inadequacy of time available to do so, in light of the fact that exigencies by their very nature are of an urgent or critical nature. Therefore, employers should have the right to either provide a reasonable cure period or make inquiries of information sources to obtain missing or insufficient information, and obtain clarification of information without a cure period or after a cure period has expired. It would be to the advantage of both the employee and the employer to have this flexibility, and the employee might appreciate the employer's assistance when the employee may have more important matters on his or her mind.

4. Deadline for Submitting. An employee should be required to submit the certification within a reasonable time frame under the circumstances. Ideally, an employee should produce the documentation as quickly as possible, and we would like to suggest an outside deadline of anywhere from five workdays to 15 calendar days, so that it echoes the five-day period employers have to issue eligibility and designation notices or the 15-day period employees have to produce medical certifications for FMLA leave.

Caregiver Leave

Definition of “Covered Servicemember.” The term “Covered Servicemember” has relevance in the FMLA with respect to caregiver leave only (and not exigency leave). The term is defined in the MFLA as a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. The MFLA also includes two related definitions. One is for the phrase “serious injury or illness,” which means one incurred in the line of duty on active duty in the Armed Forces that may render the individual unfit to perform the duties of his or her office, grade, rank, or rating. The other is “outpatient status,” which means the servicemember is assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

In light of the above three definitions, it is our belief that the servicemember has to have incurred an injury/illness that includes all of the following components: (1) is line-of-duty-related; (2) is active-duty-related; (3) is incurred while serving in or on behalf of the Armed Forces; (4) is still under active treatment or monitoring or is otherwise on the temporary disability list (5) is rendered medically unfit to perform all military-related duties he/she would otherwise be expected to perform; and (6) is serious in nature. Each of these components is discussed below.

We also believe that certain concepts from state worker’s compensation laws (e.g., “maximum medical improvement” or “MMI,” “temporary and total” disability, etc.) may provide guidance on many of the above components. We recommend that worker’s compensation concepts and vocabulary be incorporated to the extent possible because employers and employees already have a general understanding of them.

1. Line-of-Duty-Related. We believe it is important to further define the term “line of duty,” as it is a military concept with which most employers are not familiar. We do not believe it should include any injury/illness incurred while on leave from the military, while on weekend furlough, shore leave, or off-duty time. In addition, we believe it is important to require that the injury/illness be “caused” by active duty.

2. Active-Duty-Related. The term “active duty” as defined in the MFLA, conflicts with the use of term “active duty” as used in the definition of “serious injury or illness.” The definition of “active duty” is actually limited to National Guard or Reserve members called to active duty, as discussed earlier in our comments on exigency leave. But in the context of caregiver leave, Congress obviously did not intend to limit caregiver leave to only those in the National Guard or Reserve.

The best response to address this oversight is a technical correction to the MFLA. We also believe the Department needs to reconcile the wording conflict in the regulations.

3. In the Armed Forces. The definition of “serious injury or illness” indicates that it must be incurred “on active duty in the Armed Forces.” This suggests that the servicemember must be on active duty, either in the Regular Armed Forces, or in the case of National Guard or Reserve members, serving on behalf of the Regular Armed Forces under a call to active duty under one of the statutory provisions cited in 10 U.S.C. § 101(a)(13)(b). We do not believe that caregiver leave was intended to cover injuries/illnesses incurred by National Guard or Reserve members who have not actually been called to active duty by the Federal government. For example, if a State has a state-related emergency and the National Guard is called to duty by the Governor of the State, this would not be a call to active duty to serve as a surrogate for the Regular Armed Forces. Instead, the National Guard members would merely be operating as a State militia and not as part of the Regular Armed Forces. We believe Congress’ intent was to cover injuries/illnesses that were incurred by a member of the Regular Armed Forces or by a National Guard or Reserve member on active duty under a call to active duty pursuant to 10 U.S.C. § 101(a)(13)(b).

4. Active Treatment and Maximum Medical Improvement Not Yet Reached. The MFLA definitions also strongly imply that caregiver leave is not available unless the covered servicemember requires current medical care or ongoing medical monitoring and has not reached maximum medical improvement (MMI). As to the first element, the definition of “covered servicemember” specifies that such medical care could take the form of currently active treatment or therapy, ongoing recuperation/recovery, outpatient monitoring, or mere inclusion on the military’s temporary disability retired list. This strongly suggests that active treatment or relatively active monitoring is required.

More importantly, it also suggests that the individual has not yet reached MMI. Our interpretation is supported by the language regarding servicemembers on the military’s temporary retired disability list. The word “temporary” implies that the servicemember might recover or that full recovery is still an open question. Once an individual has reached MMI, it means either that the individual has in fact fully recovered (and presumably could return to duty) or the treating medical experts have concluded that no further treatment is likely to result in a full recovery (in which case the individual likely has a permanent disability). At that point, the employee may be able to rely on regular FMLA leave.

5. Temporary and Total Medical Unfitness for Active Duty Responsibilities. Another critical element we believe is required under the definition of “covered servicemember” relates to fitness for duty (or unfitness for duty). The definition of “serious injury or illness” clearly includes a fitness for duty component.

We believe this component requires that unfitness for duty be medically-related and be temporary in nature, meaning one of two things: (1) the individual might fully recover from the injury/illness; or (2) it is unknown if the injury/illness will be temporary or permanent because the servicemember has not yet reached MMI. Our interpretation seems to be supported by mention of the “temporary disability retired list” in the definition of “covered servicemember.”

We also believe it means unfitness for duty must be “total” in nature. In other words, we believe the servicemember must be unable to perform all of the servicemember’s duties. In the

case of a member of the Regular Armed Forces, this would mean inability to perform active duty responsibilities. In the case of a member of the National Guard or Reserves, this would mean inability to perform both active duty responsibilities for or on behalf of the Regular Armed Services *and* his or her customary duties as an inactive member of the National Guard or Reserves. If full-time light duty can be performed, then unfitness for duty would not be “total.”

For example, if a member of the Regular Armed Forces can be assigned to light duty consistent with his or her office, grade, rank, or rating, the individual is still capable of serving on active duty, and caregiver leave should not be available for such situations. Likewise, if a National Guard or Reserve member incurs an injury/illness while on call to active duty in a war zone, it may render the servicemember unfit for further active duty of a like nature, but the servicemember might still be fit for duty if returned to normal inactive National Guard or Reserve duty. In the case of a National Guard or Reserve member, the Department should not consider the individual unfit for duty if he/she can perform light duty either while still on active duty or if he/she returns to normal inactive duty status in the National Guard or Reserve, provided the light duty in either situation is consistent with the individual’s office, grade, rank, or rating for that situation.

6. Serious. We believe caregiver leave was intended only for injuries/illnesses that rise to a certain level of seriousness. Like the FMLA, we do not believe caregiver leave should be available for common ailments, routine treatment, conditions that do not require evaluation by a doctor, or incapacity of a short duration.

Medical Certifications

Since the definition of “serious injury or illness” in the MFLA is different than the definition of “serious health condition” in the FMLA, we believe the medical information needed may be different. Therefore, we believe a separate medical certification form is probably necessary. We also believe that the rules requiring a complete and sufficient certification and allowing authentication and clarification should apply.

The Department has asked if it would be appropriate to require employers and employees to rely on determinations made by the Department of Defense, Department of Veterans Affairs, or the military branches of the Armed Forces on the following issues: (a) whether a servicemember has incurred a “serious injury or illness;” (b) whether a serious injury or illness as incurred “in the line of duty while on active duty status in the Armed Forces;” (c) whether a servicemember is “undergoing treatment, recuperation, or therapy” or is “actively receiving medical treatment;” and (d) whether a serious injury or illness “may render a servicemember medically unfit.” The Department has indicated that the military branches may already be issuing requested medical certifications to family members of servicemembers certifying some of these issues.

We are not necessarily opposed to this suggestion, because it seems to be a method that could facilitate the approval of caregiver leave. However, we simply do not know whether the Department of Defense already uses the definitions and terminology found in the MFLA, their

level of familiarity with that terminology, and their ability to issue determinations or certifications on a timely basis. We are reluctant to agree that any such certification by the government would be appropriate unless we are provided a better understanding of the content of the certification and the procedures the government would use to prepare one consistent with MFLA requirements and terminology.

Eligible “Next of Kin”

The Department has raised a number of issues related to the term “next of kin” of a covered servicemember for purpose of caregiver leave. Each of these and other related issues is addressed below.

1. Definition of “Next of Kin.” As the Department has pointed out, the MFLA defines next of kin simply as “nearest blood relative.” Because the Department of Defense (DOD) has considered the appropriate definition of “next of kin” for military purposes, the Coalition agrees that the DOL should adopt DOD’s list, subject to the MFLA restriction that the next of kin be a blood relative. The Coalition contends that referencing DOD’s regulations avoids the consideration of different State law definitions of “next of kin.” The Coalition also agrees that a servicemember’s Committed And Designated Representative (CADRE) should also be recognized as next of kin, subject to DOD rules and the MFLA’s statutory restrictions with respect to blood relatives.

DOL poses several questions about the practical implications of requiring the next of kin be the “nearest blood relative,” including how DOL should handle situations where the nearest blood relative is unavailable or unwilling to care for the servicemember. Such an interpretation of “nearest blood relative” seems overly cramped and could create unnecessary problems, including situations where the lack of available genealogical information would make it overly burdensome, if not impossible, for an employee seeking leave to testify he or she is the “nearest blood relative.” The Coalition feels to fully effectuate the purposes of the MFLA, DOL should adopt a more practical interpretation. The Coalition suggests DOL consider the following: the “nearest blood relative willing and able to care for the injured service member.”

2. Verification. We believe that verification of next of kin should be required. We believe it should most logically be certified by the Department of Defense, as it should have the most reliable information about next of kin already on file or have the most readily available access to data to research or verify next of kin. We do not believe the certification needs to be elaborate. It could be a simple statement verifying the next of kin’s official name, last known contact information, and a statement that the named individual is the covered servicemember’s next of kin, to the best knowledge of the DOD.

If such DOD verification is not available or would be unduly burdensome for the employee to obtain, then an employer should be allowed to require a signed statement that the employee seeking caregiver leave is, to the extent of the employee’s knowledge, the nearest blood relative willing and able to care for the injured servicemember as “next of kin.”

Calculation of Leave Usage

Single 12-Month Period. The MFLA states that the 26 weeks of caregiver leave “shall only be available during a single 12-month period.” It is a one-time opportunity while that employee is employed by that employer, regardless of how many covered servicemembers the employee might have, and regardless of how many different injuries/illnesses any one particular covered servicemember might have.

We strongly believe it is a one-time opportunity because the sentence restricting the leave to a single 12-month period would not have been necessary if it were otherwise. Furthermore, the immediately preceding sentence states that the 26 weeks of caregiver leave may be taken “during *a* 12-month period.” Regular FMLA leave, on the other hand, may be taken “during *any* 12-month period.” The use of the word “*a*” as opposed to “*any*” strongly suggests that Congress intended to differentiate caregiver leave from all other types of FMLA leave regarding its availability.

Applicable 12-Month Period. We believe Congress intended to limit the amount of regular FMLA leave plus the amount of caregiver leave to 26 weeks during a 12-month period, using the employer’s normal 12-month period for FMLA leave. However, it appears possible that Congress did not understand there are four permitted 12-month periods that can be used by an employer in calculating the use of FMLA leave (i.e., calendar, fiscal, rolling backwards, and rolling forward).

Although the language in the MFLA might be interpreted to require a rolling forward 12-month period for caregiver leave, it can also be interpreted to mean the employer’s normal 12-month period. The latter interpretation will actually make calculating leave usage much easier. If the former interpretation is used, calculations of leave usage will potentially be very complex and still subject to some uncertainty. We believe the better interpretation is that Congress meant that an employee would be limited to 26 weeks of both caregiver leave and regular FMLA leave during the employer’s normal 12-month period. The Department needs to clarify what flexibility the employer has to define the leave year.

Leave Qualifying as Both Caregiver Leave and FMLA Leave

As the Department has pointed out, caregiver leave could also qualify in some cases as regular FMLA leave to care for a qualifying family member who has a serious health condition. The Coalition believes that an employee should be the individual who determines if he/she is applying for caregiver leave or regular FMLA leave.

Accordingly, we also believe certain rules need to be adopted to minimize disputes that could arise, as follows:

1. The employee must specifically apply for caregiver leave and should be required to specifically mention “caregiver leave” or that leave is to take care of a “covered servicemember,” or some other similar but specific language, so that an employer knows the employee is referring to caregiver leave. The Coalition believes that employees need to take the responsibility for determining which type of leave (caregiver or other FMLA leave) is in their best interests.

2. Any leave taken after an employee requests caregiver leave for a particular servicemember will be counted as caregiver leave if the time off is to care for that particular servicemember. Employees should not be permitted to change their minds once any caregiver leave is taken (i.e., after 10 intermittent absences of caregiver leave, an employee decides it should be regular FMLA leave instead).

3. An employer should be permitted but not required, with the consent of an employee, to retroactively: (a) change a caregiver leave designation to another applicable FMLA leave designation if doing so would be more favorable to the employee (i.e., to allow the employee to save the caregiver leave for a different 12-month period when it may be needed more); or (b) change an FMLA leave designation to a caregiver leave designation if doing so would be more favorable to the employee (i.e., if an employee has exhausted his or her 12 weeks of FMLA leave, and additional leave is then needed to take care of a covered servicemember). In either case, the employee should be required to timely apply for a change of designation and provide an explanation of why the change is being requested.

Calculation of Leave When Both Caregiver and Other FMLA Leave is Taken

1. Employer’s Normal 12-Month Period. Assuming the 12-month period for calculating the 26 weeks of combined total leave to which an employee is eligible is the employer’s normal 12-month period, the calculation of leave usage would be relatively straightforward. Each time an employee takes any kind of FMLA leave, the employer would first identify how much leave is regular FMLA leave and how much is caregiver leave. If the employee has used at least 12 weeks of regular FMLA leave during the employer’s normal 12-month period, he/she is not entitled to any more unless it also qualifies as caregiver leave. If it does, he/she would be entitled to caregiver leave (perhaps up to another 14 weeks) until the employee has used a combined total of 26 weeks during the employer’s normal 12-month period.

Issues Related to Both Exigency Leave And Caregiver Leave

Definition of “Son or Daughter.” The Department has aptly pointed out in the NPRM that the current definition of “son or daughter” in the FMLA (and also in the existing FMLA regulations) is inconsistent with the purpose of exigency leave and caregiver leave under the MFLA. As a general rule, those under the age of 18 cannot serve in the military (with limited exception of those age 17 with parental consent). Ideally, Congress should enact a technical correction to the MFLA on this issue.

However, in the interim or if that does not happen, we believe the regulations should clarify this issue to avoid confusion. Otherwise, portions of the MFLA would be rendered meaningless and employees who have adult sons and daughters in the military would be unable to avail themselves of MFLA leave, contrary to what Congress intended.

Therefore, we recommend that the Department include two different definitions of “son or daughter” in the regulations: (1) one for the purpose of MFLA leave (exigency leave and caregiver leave); and (2) the existing one for all other types of FMLA leave. We propose the following language for the Department’s consideration:

1. The definition of “son or daughter” for MFLA leave could be as simple as “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.” There should be no age parameters included, because they are not necessary. For purposes of exigency leave, the “employee’s son or daughter who is called to active duty” would in most cases be age 18 or over and would automatically have to meet the federal or state statutory requirements for service in the military. For purposes of caregiver leave, an “eligible employee who is the son or daughter of a covered servicemember” could be under age 18 or an adult child age 18 or over.

2. The definition of “son or daughter” should be retained “as is” for all other forms of FMLA leave, including FMLA leave due to the serious health condition of a son or daughter.

Transfer to an Alternative Job. As the Coalition noted in its earlier comments on section 825.204, we believe that an employer should be permitted to temporarily transfer an employee on intermittent or reduced schedule exigency or caregiver leave to an alternative position, regardless of whether the leave is foreseeable or unforeseeable or whether it is scheduled or unscheduled. Employers already encounter numerous problems with employees on regular FMLA intermittent leave who take it on an unforeseeable or unscheduled basis. These problems are exacerbated when the employee holds a critical services job (such as a nurse, police officer, dispatcher, or firefighter), a time-sensitive job (such as a utility worker, telecommunications provider, on-call computer support worker, or call center employee), or an inter-dependent job (such as an assembly line worker, flight attendant, or worker with regular deadlines that must be met for another employee to timely fulfill his or her job duties, such as a proofreader for a publisher who must meet publishing deadlines).

Furthermore, it is possible that an employee could have simultaneous requests or needs for regular FMLA leave and exigency or caregiver leave. It would create an unnecessary dilemma for the employer if it could transfer the employee to an alternative job for one type of leave but not for another. The Coalition believes that employers should have the right to transfer employees on *any* intermittent or reduced schedule (whether regular FMLA or MFLA leave), to ensure appropriate flexibility to meet operating needs and to ensure consistency for all types of leaves.

Due Dates for Certifications of Exigency and Caregiver Leave

We earlier indicated that exigency and caregiver leave should both be supported by appropriate certifications. We do not believe any additional time beyond the normal 15-day period for FMLA certifications should be provided, even if the government is the source of the certification.

At the same time, we are concerned that the government may have difficulty issuing timely certifications. As a result, it is possible that employees could make diligent, good-faith efforts to request certifications, but will have to rely on employer extensions. We suggest that employers be allowed to accept a good faith effort, as evidenced by a record of the request for the certification, in lieu of government certification.

Employer Notices

We offer the Department the following comments about employer notices:

1. General Notice. We are not opposed to incorporating MFLA provisions into the General Notice, as long as it does not confuse employees.
2. Eligibility Notice. We believe the proposed prototype Eligibility Notice can be revised to incorporate MFLA provisions.
3. Designation Notice. To the extent that calculations of caregiver leave will result in complex calculations, it would be preferable to have a separate form or section for any explanation required about how much leave is counted toward regular FMLA leave during the employer's normal FMLA 12-month period, how much leave is counted toward caregiver leave during that 12-month period, and how the two overlap and affect each other.

Conclusion

The National Coalition to Protect Family Leave appreciates the opportunity to submit these comments and recommendations regarding the Notice of Proposed Rulemaking on the FMLA.

Respectfully Submitted,

The National Coalition to Protect Family Leave

Airline Industrial Relations Conference

American Foundry Society

American Hotel & Lodging Association

Arkansas SHRM State Council, Inc.

Association of American Railroads

Associated Builders & Contractors, Inc.

Big Horn Mountain Chapter of the Society for Human Resource Management

Big Sky Society for Human Resource Management Chapter

Capital Region Human Resource Association

Cabarrus Regional Society for Human Resource Management

Central Arkansas Human Resources Association

Chesapeake Human Resources Association

Cleveland Society for Human Resource Management

Colorado Society for Human Resource Management State Council

College and University Professional Association for Human Resources

Dallas Human Resource Management Association, Inc.

Delaware SHRM State Council

East Alabama Society for Human Resource Management

Eastern Iowa Human Resources Association

El Paso Society for Human Resource Management

Enid-SHRM

Garden State Council – SHRM, Inc

Greater Southeast Michigan Society for Human Resource Management

HR Policy Association

HR State Council of New Hampshire

HR Tampa

Human Resources Association of New York

Human Resources Association of Southern New Jersey

Human Resource Association of Southern Maine

Human Resource Association of Broward County

Human Resource Association of the Midlands

Human Resource Association of the National Capital Area

Human Resource Association of North Central Louisiana

Human Resources Management Association - Greater New Orleans Area

Human Resource Management Association of Greater Kansas City, Inc.

Human Resource Management Association of Rhode Island

Human Resource Management Association of West Central Missouri

International Foodservice Distributors Association

Independent Electrical Contractors, Inc.

Indiana State Council of the Society for Human Resource Management

Inland Northwest Society for Human Resource Management

International Franchise Association

International Public Management Association for Human Resources

Kentucky Society for Human Resource Management State Council

Lakeshore Area Human Resources Association

Lane County Oregon Human Resource Association

Louisiana Society for Human Resource Management

Maryland SHRM State Council

Michigan Council of the Society for Human Resource Management

Mid-Michigan Human Resource Association

Mississippi State Council of the Society for Human Resource Management

Missouri State Council of SHRM, Inc.

National Association of Convenience Stores (NACS)

National Association of Manufacturers

National Association of Wholesaler-Distributors

National Business Group on Health

National Multi Housing Council/National Apartment Association

National Newspaper Association

National Public Employer Labor Relations Association

National Retail Federation

National Restaurant Association

National Tooling and Machining Association

Nature Coast Human Resources Society

Nevada State SHRM Council

North American Die Casting Association

North Carolina Society for Human Resource Management State Council

North Central Arkansas Society for Human Resource Management

North Dakota SHRM State Council

Northwest Arkansas Human Resource Association

Oklahoma State Council for Human Resource Management

Pittsburgh Human Resources Association

Printing Industries of America

Quincy Area Society for Human Resource Management

Raleigh-Wake Human Resource Management Association

Retail Industry Leaders Association

Rhode Island State Council for the Society for Human Resource Management

Rock River Human Resource Professional Association

San Antonio Human Resource Management Association

SHRM Alabama State Council, Inc.

SHRM Vermont State Council

Society of Human Resources Professionals

Society for Human Resource Management

Society for Human Resource Management - Columbia

Society for Human Resource Management Maine State Council

Society for Human Resource Management Montana State Council

Society for Human Resource Management Nebraska State Council

Society for Human Resource Management of New Mexico State Council

Society for Human Resource Management Pennsylvania State Council

Society for Human Resource Management Racine and Kenosha Area Chapter

Society for Human Resource Management Snake River Chapter

Society for Human Resource Management Texas State Council

Society for Human Resource Management – Western Connecticut Chapter

Southeast Kansas Human Resources Association

Southside Virginia Society for Human Resource Management

Southern Oklahoma Human Resource Association

Southern Rhode Island Human Resource Council

Sumter Human Resource Management Association

Textile Rental Services Association of America

Tulsa Area Human Resources Association

U.S. Chamber of Commerce

Volunteer Chapter of SHRM

Western Arkansas Human Resources Association

Western Kansas Human Resource Management Association

Williamson County Human Resource Management Association

Winchester Area Society for Human Resource Management