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VIA FAX AND U.S. MAIL

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

Re: Request for Information on the Family and Medical Leave Act of 1993

Dear Mr. Brennan:

The Association of Corporate Counsel ("ACC"), through its Labor and Employment Law Committee ("Committee"), is pleased to provide information in response to the Department of Labor's request for information concerning the Family and Medical Leave Act of 1993, which was published in the Federal Register December 1, 2006.[1]

By way of background, the ACC is the only global bar association exclusively serving the professional objectives and goals of in-house counsel to corporations and other private sector organizations. Since its founding in 1982, ACC has grown to represent more than 20,000 individual in-house counsel members who work in more than 6,000 business entities in the United States, Canada, Europe, Central/South America and China. The Employment and Labor Law Committee is one of the largest of ACC's committees, with approximately 4,000 attorney members, many of who are responsible for the employment-law function of the employers that must comply with the Family and Medical Leave Act of 1993 ("FMLA"). The Committee believes our comments provide the Department of Labor (sometimes "the Department") with the unique perspective of

[1] These comments are submitted exclusively on behalf of the Employment and Labor Committee of ACC and do not reflect the views and opinions of either the individual signatories of this letter or the business entities for whom they work.

in-house employment counsel for employers regarding fundamental issues concerning the Department's administration of the Act and implementing regulations.

For purposes of responding to the Department's Request for Information, the Committee has decided to limit it comments to those areas that ACC members have identified as most challenging to comply with and for which the effects are most problematic in the workplace. Specifically, discussed below are issues related to: unscheduled intermittent leave and attendance; releasing claims; communications between employers and employees; medical certification and return to work; employer enhanced leaves; and, the definition of serious health condition.

1. Unscheduled Intermittent Leave and Attendance

Unscheduled intermittent leave has created undue burdens on employers and opportunities for certain employees to abuse the FMLA process. To the extent permitted by the statute, the availability of unscheduled intermittent leave should be strictly circumscribed to reduce these impacts.

The FMLA was enacted in part in response to Congressional findings that employees needed job security when a serious health condition prevented them from working for "temporary periods." *See* 29 U.S.C. § 2601(a)(4). The current regulations permit employees to take intermittent leave indefinitely. However, by allowing *unscheduled* intermittent leave, the FMLA has unfortunately created a mechanism enabling some employees to abuse employers' legitimate attendance policies. For example, employees diagnosed with a chronic illness or another conditions that may require intermittent leave, such as migraines or asthma, can be gone at least one day per week, every week of the year, and never exhaust their FMLA leave. This translates into a *protected annual absenteeism rate of over 20%,* an unacceptable rate in any industry. This is an issue for employers of all sizes. Clearly, small employers have difficulty in being required to accommodate this type of unexpected absenteeism. Similarly, larger employers are generally composed of small and medium sized departments that can be significantly and adversely affected by a single employee's repeated and unscheduled absenteeism. Additionally, the unscheduled, intermittent leave of one or more co-workers often significantly affects the morale of other co-workers.

To put the issue of attendance in context, under the Americans with Disabilities Act ("ADA") attendance is generally an essential part of almost any job.[2] Courts have held that employees are not qualified for their positions if they cannot meet the attendance

[2] *See, e.g., Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 (1st Cir. 2006) (citing *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004) ("[T]he district court properly held Mason's physical attendance at the administration center was an essential function of the service coordinator position because the position required supervision and teamwork."); *Hypes on Behalf of Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998); *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir.1995) ("[I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."); *Carr v. Reno,* 23 F.3d 525, 530 (D.C.Cir.1994); *Tyndall v. Nat'l Educ. Centers,* 31 F.3d 209, 213 (4th Cir.1994); ("Except in the

requirements of that position.[3] Indeed, even the Equal Employment Opportunity Commission has recognized that the ADA does not, and should not, supercede employer absenteeism policies that are uniformly applied.[4] Consequently, by permitting an unscheduled intermittent absenteeism rate of over 20%, the current regulations protect employee behavior that the federal courts and the EEOC have concluded is not only *un*reasonable but also inconsistent with the essential needs and expectations of employers. Accordingly, the Department should take this opportunity to address this situation.

Most employers can usually accommodate intermittent leave that is scheduled in advance or which occurs regularly since most can usually plan around an employee's anticipated absences. For example, if an employee notifies his employer that he must attend physical therapy two times a week for ten weeks, an employer can normally plan the work in anticipation of these absences without a significant burden. Similarly, if an employee has a continuous unscheduled leave that lasts over a period of time (e.g. out for six weeks after emergency bypass surgery), the employer can usually accommodate such leaves by hiring temporary help or otherwise adjusting schedules and workloads over time to accommodate the leave.

By contrast, for leave that is taken in small increments and without notice, it is virtually impossible for an employer to plan effectively for such leaves. The leave is generally not long enough to justify the hiring of temporary help or even allowing an employer to get such help in place since such leaves often last just a day or even an hour or less. Indeed, in a manufacturing environment it is often impossible to obtain a replacement on short order because of safety training requirements. By the time the replacement/temporary worker could be trained to perform the position safely, the employee using unscheduled intermittent leave has returned to work. That an employer may know in advance that an employee suffers from a serious health condition, which will likely result in the use of unscheduled intermittent absences does not relieve any burden. Only a relatively unique employer with an unusual business structure might be able to 'reassign' such an employee to a non-exempt position at a comparable rate of pay and duties where irregular and unpredictable attendance might somehow be economically accommodated or tolerated.

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unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise.")); *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir.1998) ("An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA.").

[3] *See, e.g.. E.E.O.C. v. Yellow Freight System, Inc.*, 253 F.3d 943, 949 (7th Cir. 2001); *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996); *Tyndall v. National Educ. Centers, Inc.*, 31 F.3d 209 (4th Cir. 1994); *Ross v. Kraft Foods North America, Inc.*, 347 F.Supp.2d 200 (E.D.Pa.2004); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994).

[4] Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act, Equal Employment Opportunity Commission, § 7.10, at VII-10 (Jan. 26, 1992).

As noted by the Department in the Request for Information, *see* 71 Fed. Reg. at 69507, other employees must usually cover for an employee who is taking FMLA leave. As a result, the employee's unexpected absence places a strain on an employer's established production goals and/or service quality levels, forcing the employer to either modify such goals or ask its other employees to take on additional tasks to fill the gaps left by employees who unexpectedly do not show up for work. When using other staff to fill the gaps, unplanned overtime can be a significant cost to the employer, and for the employees filling the gaps, it creates an inequity in providing work/family balance. This is most problematic for employers who depend on a certain volume of employees to show up for work each day, such as in manufacturing facilities, retail stores, and call center environments.

Employees are not required to get each absence approved. Moreover, the text of the existing regulations ambiguously suggests that even requesting health care practitioner confirmation for each *use* of intermittent leave due to a previously certified serious health condition may be prohibited. As such, it is relatively easy for employees to use the FMLA as a way to avoid an employer's attendance policy when they are late or absent from work, regardless of whether the absence is necessarily due to their serious health condition or the serious health condition has incapacitated them during that absence. Employers must take the employee at good faith that he/she was absent due to an FMLA-qualifying event. Since this type of employee may never run out of FMLA leave, the employer is left to apply different attendance standards to such employees. This can be particularly frustrating when the timing of the absences suggest that the employee could be absent for other reasons; for example, when there is a history of absences on Mondays and Fridays, before or after holidays, when mandatory overtime is scheduled, or on days that have particularly nice weather. These types of absences create significant morale problems for other employees who are left to wonder whether they are being asked to pick up the slack for a co-worker who may be abusing the system.[5] It can also encourage other employees to follow suit.[6]

Employers, who have to require other employees to cover for the missing employee or change job assignments for work coverage, must incur increased unplanned overtime costs or pay differentials while probably still paying the absent employee. Additionally, grossly inequitable disciplinary actions may arise. An employee who is absent intermittently but fails to provide a certification of a serious health condition may be

[5] An ACC member reports, as an example, an employee working the IT Help Desk who has received medical certification for a year of intermittent leave for various medical appointments and/or treatments. This employee regularly fails to inform his supervisor of his appointment schedule (sometimes 3 or 4 in a week), schedules appointments for late morning or mid-afternoon (arrive late/ leave early), cancels or reschedules without notifying the supervisor or adds appointments without notice. This same employee has requested work schedule changes because of day-care difficulties.

[6] As noted by the DOL in its request for information, some research has suggested that as more workers take unscheduled FMLA leave, the likelihood that the remaining workers will take FMLA leave increases. See 71 FR 69514 footnote 31. At one of our member organization's facilities, there were 922 requests for FMLA leave during a 12-month period, 90% of which were requests for intermittent leave. This facility employed 944 workers.

disciplined –even terminated- by failing to maintain regular and predictable attendance while the employee with a certification for a nebulous condition will not be.

It is also challenging for employers to track unscheduled intermittent leave effectively. Since such leave can be taken at any time and in increments as short as the employer's payroll system will allow, it is difficult and time consuming for an employer to monitor and track whether any particular absence or late arrival is FMLA-related or not. For employees with chronic conditions, or who have a family members with a chronic condition, if they simply call in sick (or call in that their family member is sick), there is no way for an employer to know if that absence is related to the FMLA-related serious health condition or an unrelated illness or other reason altogether. Employers are left exposed to the risk of either accidentally over-counting leave that is not FMLA-related towards the employee's FMLA entitlement, or inadvertently failing to count the leave as FMLA leave if the employee fails to properly inform the employer of the reason for the absence. Yet under the current Regulations, even where the non-recording of an FMLA-related leave is attributed to the employee's failure to provide information, the employer will be held responsible for any inaccuracies in the calculation of FMLA leave entitlements.

Where unscheduled intermittent leave is allowed, some restrictions should be imposed to help reduce the potential for abuse.[7] Most intermittent leaves are certified by the health care provider for relatively long periods of time, anywhere from 3 months to an entire year, or in some cases indefinitely, and usually do not require the employee to be seen by a health care provider for extended periods of time. Unscheduled intermittent leave for a single serious health condition should not be allowed to continue indefinitely and some reasonable restriction should be imposed. For example, the regulations could state that a leave for a single serious health condition cannot extend beyond a 12-week period. Once the 12-week period passes, if an employee continues to suffer from the same serious health condition, they could reapply for a new FMLA leave, at which point a new certification would be required and a new eligibility determination would be made. We believe this would be helpful. Other restrictions that could be considered include imposing a maximum period of time over which the unscheduled leave must occur (e.g. 6 months), or an amount of FMLA leave that can be taken on an unscheduled, intermittent basis (e.g. 3 of the 12 weeks). The FMLA was created to address temporary leaves and not the long-term effects of illnesses, so some reasonable restriction on the time limit during which FMLA leave for a single condition can be taken is appropriate. If the employee suffers from a condition, which is covered by another statute, such as the ADA,

[7] While the statute and regulations currently allow transferring an employee to another role temporarily, this will not resolve the issue caused by unscheduled intermittent leave. First, this is currently not allowed for unforeseeable leaves that are not based on planned medical treatment. See 29 U.S.C. § 2612(b)(2). Even if it were allowed, it is not a viable option to address the problem of unscheduled leave because virtually every position requires employees to show up to work with some regularity. This is particularly true in manufacturing, retail or customer service industries where production quotas or service level qualities must be met. Further, due to other restraints imposed by collective bargaining agreements, state law and the ADA, transferring an employee to another role can be quite challenging.

these statutes and regulations are better suited to address longer-term accommodations of this particular group than the FMLA.

Other restrictions would also help to curb abuse. These include:

- allowing employers to ask for a recertification of the serious health condition every 30 days even when the duration for the leave provided is longer than 30 days; and,
- allowing employers to ask for a second opinion for any recertification.

Finally, the regulations should make it clear that the health care provider cannot describe the duration of the leave needed as "indefinite" and that if he/she does not provide a specific estimated duration, an employer may deny FMLA leave until such information is provided. If such information is not provided in a timely manner, it should be clear that an employer could take action under its existing attendance policies.

> **Recommendation: The Committee recommends that the Department revise the regulation to address the fact that as currently written, the regulations permit intermittent leave to be taken, at an absenteeism rate of over 20%, in perpetuity without an employee ever exhausting their FMLA leave entitlement. This can be done by considering the following:**
>
> **a. permit employers to require re-certification of any health condition supporting intermittent leave every 12 calendar weeks regardless of whether the employee utilized such leave for any day or hour during that period; and/or**
> **b. limit to a reasonable period, such as six months, the time period in which unscheduled intermittent leave can be used from the onset of a single serious health condition. After such time, the employee and employer should examine whether the employee needs to take a longer period of leave to regulate or resolve the cause of intermittent leave; and/or**
> **c. allow employers to require employees to provide medical certification that their utilization of unscheduled intermittent leave was in fact due to the FMLA certified condition.**

2. Releasing claims

Employees should have the right to negotiate a settlement of their FMLA claims without the involvement of the Department or the courts. In drafting the statute, Congress did not indicate that settlement of FMLA claims should be restricted. Despite this silence, the Department issued regulations at 29 C.F.R. § 825.220(d) that state, "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."

The regulation has led to a split among the Courts of Appeals concerning its application. Recognizing a strong public policy in favor of the right to contract and the settlement of

disputes, the Court of Appeals for the Fifth Circuit, in *Faris v. Williams*, 332 F.3d 316 (5th Cir. 2003), held that the regulation applied to prospective waivers only. In contrast, applying what it described as a "plain reading" of the regulation, the Fourth Circuit, in *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), held that the regulation barred all private settlements of FMLA claims.

This regulation is flawed for two reasons. First, employees are harmed because employers are less likely to try and correct FMLA administration mistakes or more serious violations by settling FMLA claims. Employers are reluctant to settle employment-related disputes that may include FMLA claims without getting a waiver of FMLA claims for fear that they will settle the claim only to be sued, possibly by plaintiff's counsel who is motivated by the attorney's fees provision in the Act. With this possibility, the incentive for employers to settle claims is greatly reduced. As a result, employees are less likely to be able to quickly and efficiently resolve any FMLA disputes and may have to engage in lengthy and stressful litigation.

Second, public policy favors private settlement of claims. As evidenced in numerous areas, including the push for alternative dispute resolution, the federal district courts favor private resolution of claims before they reach the overburdened judiciary. Further, there is no rational justification for the regulation to counter the public policy in favor of settlement of claims. If the Department fears that employees are unaware of their rights that they may be waiving, employers could be required to advise employees to seek legal counsel (similar to the requirement under the Older Workers Benefit Protection Act). If the Department is concerned about employees waiving future or prospective claims, they should revise the regulation's language to allow for waiver of retrospective claims only.

> **<u>Recommendation</u>: The Committee believes that the regulation should be amended to make clear that it applies to a prospective waiver of rights only.**

3. <u>Communication Between Employers and Their Employees</u>

a. Adequacy of Employee Notice

The FMLA requires employees to provide thirty days' notice to employers of their intention to take foreseeable leave for reasons covered by the Act. 29 U.S.C. §§ 2612(e). The DOL regulations also require employees to give employers notice of unforeseeable leave as soon as practicable, absent extraordinary circumstances. 29 C.F.R. § 825.303. While an employee need not mention the FMLA in the leave request, the notice requirement is not satisfied simply by the employee requesting leave. The employee must provide a basis for the employer to conclude that the requested leave is covered by the FMLA. *See, e.g., Woods v. Daimler-Chrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005); *Aubuchon v. Knauf Fiberglass,* 359 F.3d 950, 952 (7th Cir. 2004). As previously noted, if an employer guesses wrong, it is liable under the current regulations for additional leave time and violation of the statute.

Nevertheless, the DOL regulations appear somewhat inconsistent with this rule. As one court has observed:

> Some of the regulations that the Department of Labor has issued suggest that merely by demanding leave, the employee triggers a duty on the part of the employer to determine whether the requested leave is covered by the FMLA. See 29 C.F.R. §§ 825.302(c), 303(b). That is an extreme position . . . [which has been] rejected, rightly in our view, by [numerous federal courts of appeals].[8]

ACC members agree that employees should be required to do more than simply request leave to trigger the FMLA.

> **<u>Recommendation</u>: The DOL should revise its regulations to conform to the above case law, by making clear that an employee's notice to the employer must go beyond merely requesting leave and must provide a basis for the employer to conclude that the requested leave is covered by the FMLA.**

b. Employee Failure to Provide Notice

ACC members report concern that employees frequently fail to notify their employers that they are requesting or taking FMLA leave. Most frequently this occurs with respect to unforeseeable leave; not only is there no advance notice, there is often no notice at all. In other instances employees might call someone, but they fail to follow established procedures for calling in absences, which results in the appropriate people in the organization not receiving adequate notice of the employee's leave.

When employees take leave without notice, it creates havoc with ACC members' business operations. It is typically very difficult to properly staff and schedule work without advance notice. In some operations and work processes, work is impeded or precluded altogether when one member of a team takes leave without notice. Employee morale is often impacted, as the absent employee's co-workers are forced to perform his or her work in addition to their own. Employers face significant losses due to productivity declines and additional overtime pay costs. Given the substantial impact of employees taking leave without notice, it is imperative that employees provide the required notice thirty days in advance (in the case of foreseeable leave) or as soon as practicable (when the leave is unforeseeable).[9]

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[8] *Aubuchon*, 359 F.3d at 953.

[9] The "as soon as practicable" standard recognizes that in extraordinary circumstances, such as when an employee is unconscious, the employee may be unable to provide notice. Unfortunately, in some cases the courts have misapplied this exception or have made pronouncements that appear to broaden it beyond reason. *See, e.g., Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir. 2003) ("It is not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem").

Numerous federal courts of appeals have held that an employer can deny FMLA leave in the absence of the required employee notice.[10] As one court has observed, "[c]onditioning the right to take FMLA leave on the employee's giving the required notice to his employer is the quid pro quo for the employer's partial surrender of control over his work force." *Aubuchon,* 359 F.3d at 951-52. Another court underscored that "[e]mployees who fail to comply with legitimate reporting requirements set by their employers are not entitled to reinstatement." *Woods*, 409 F.3d at 991.

Nevertheless, the DOL regulations do not expressly recognize that an employer may deny FMLA leave in the absence of the required notice from the employee. For example, §825.304 of the regulations is entitled "What recourse do employers have if employees fail to provide the required notice?" The provision simply discusses an employer's right to *delay* an employee's leave in the absence of notice, rather than clearly stating that in the absence of the required employee notice to the employer, the employer need not provide FMLA leave and is free to terminate the employee for unexcused absenteeism consistent with its own policies.

The regulations also do not clearly allow an employer to deny FMLA leave when an employee fails to follow the company's established procedures for reporting absences. On one hand, the regulations state that an employer can require employees to comply with their usual and customary notice requirements for requesting leave. *See* 29 C.F.R. § 825.302(d). However, the regulations also state that an employee's failure to follow such procedures is not grounds for an employer to deny or delay leave. *Id*. If an employer cannot deny or delay leave on this basis, that effectively gives employees authorization to ignore an employer's notice policies.

Employers create policies for reporting absences for an important business reason – to ensure that the people in an organization who are responsible for staffing learn of absences in an efficient and effective manner. This is particularly important in industries where an employer relies on a certain number of employees to show up to work each day (e.g. manufacturing facility or call center). By not following these procedures, an employee further exacerbates the problem that employers face when an employee does not show up for work because it delays the time that relevant decision-makers can learn of and react to an employee's absence. In some cases, the decision-maker is left completely unaware that an employee has called in to report an FMLA-qualifying absence until after they take disciplinary action against the employee, which is disruptive to both the employee and the employer. It is unnecessary and unfair to allow employees on FMLA leave to choose whether they will follow established company notification policies. Accordingly, the Department should amend the regulations to allow employers to insist that employees follow their usual and customary notification policies absent extenuating circumstances and to allow employers to take appropriate disciplinary action should employees fail to follow such policies.

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[10] *See, e.g., Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008-09 (7th Cir. 2001); *Bailey v. Amsted Industries Inc.*, 172 F.3d 1041, 1046 (8th Cir. 1999); *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 523 (6th Cir. 1998).

Recommendation: The DOL should clarify the regulations to reflect current case law, so that employees have a clearer understanding of the importance of providing the required notice, and to make clear that an employee may be subject to an employer's disciplinary process for failure to provide timely notice or to comply with the employer's written notification policy.

c. Employer Notice

The DOL's FMLA regulations provide that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). The Supreme Court invalidated this provision as too "extreme" in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). As the Court observed, "[t]he penalty is unconnected to any prejudice the employee might have suffered from the employer's lapse." *Id*. at 88. The regulations should be revised to reflect the Supreme Court's decision.

Recommendation: The DOL should revise its regulations to delete this provision and make clear that an employer's failure to timely designate an employee's leave as FMLA leave does not increase the statutory use period.

4. Medical Certification and Return to Work

A significant concern related to the medical certification process is the requirement that the employee's health care provider only be contacted by the employer's health care provider. This requirement causes delay and expense in processing leave requests. Employers without on-site medical personnel may be forced to hire providers for this limited purpose or return incomplete certifications to the employee, causing further delay and employee frustration. This could be avoided by direct contact as occurs with other types of leave. Moreover, the employer's staff members - often its Human Resources employees - are usually more knowledgeable about the specific job requirements and other information that may be relevant or helpful to the employee's health care provider in making his/her assessment.

Similarly, the Department should revise the physician certification form. The current form is confusing and often results in incomplete or vague responses by health care providers that are insufficient to assess the employee's eligibility for leave or the timing of the leave. This is especially problematic for intermittent leave, particularly unscheduled chronic or episodic intermittent leave. In fact, the current regulation allows for more specific inquiries than appear on the current form (*See* 29 CFR 825.306). Also, questions on the form could be stated more directly to provide clearer information to employers. This would prevent confusion and further delay as typically occurs when employees are sent back to their doctor for more information. More precise information would result in timely approvals and assist in workforce planning and reduce morale

problems that often occur when co-workers are asked to assume additional duties at the last minute.

For example, the following specific inquiries could be included:

> For intermittent or reduced schedule leave for treatment of a serious health condition, please provide the following: (1) the actual or estimated dates of treatment, if known:_____(2) The estimated number of treatments: _____(3) The estimated interval between treatments:_____(4) The estimated period of recovery for each treatment: _____.
> For intermittent or reduced schedule leave that will be episodic, please indicate: (1) How frequently are the episodes of incapacity from work likely to occur? _____ (2) How long will each episode of incapacity likely last? _____.

Given the amount of information the employer must present to employees under current FMLA regulations, and the need to communicate with health care providers, § 825.303 should be revised. Even with the ability to preliminarily designate the leave as FMLA, two days is insufficient. [11]

The time period should be extended to a minimum of five working days to allow appropriate time to gather the relevant information.

With regard to re-certification, an employer should be allowed to obtain a second opinion on the original certification or on any re-certification any time the facts warrant. Employers' ability to manage FMLA use is largely limited to obtaining clear and reliable medical information. If the facts suggest use of FMLA leave inconsistent with the certification - or even if the employer wants to periodically confirm that the absence is necessary - it should be allowed to obtain a second opinion or re-certification.

Also, absent limited exceptions, the current regulation states that if the "minimum duration of the period of incapacity" as stated on the original certification is more than 30 days, the employer "may not request re-certification until that minimum duration has passed." Increasingly, employers receive certifications for intermittent FMLA leave for a period of one year, thus effectively depriving them of the opportunity for re-certification. Undoubtedly, this is not what Congress intended and should be corrected in the regulation. (*See*: Intermittent Leave certification discussion, infra.)

Finally, the current regulations prohibit an employer from requiring an employee to undergo a return to work physical conducted by the employer's physician, unless a labor contract, or state or local law permits such a physical. This prohibition should be

[11] Generally notice of a need for leave comes first to a line supervisor, who either reports this to a local HR department or corporate department, who in turn needs to coordinate with the employee, management, payroll, medical services, etc. Two days is clearly inadequate!

removed from the regulations. An employee's physician cannot be as familiar with the demands of the workplace, or the health and safety risks posed by the workplace, as an employer's medical provider. This prohibition raises safety concerns and the possibility of OSHA violations. The regulations already permit employer-given return to work physicals under certain circumstances. There is no reason for the provisions of a federal law such as the FMLA to vary from jurisdiction to jurisdiction, particularly where such variance puts employees' health and safety at risk. So long as the employer regularly requires such a physical for all employees returning to work, regardless of whether the return is from FMLA leave, the regulations should permit an employer to require an employee returning from an FMLA to undergo a return to work physical.

Recommendation: Revise the regulations to:

a. revise the medical certification form;
b. extend the time period for employers to make eligibility assessments to five days;
c. permit direct contact between the employer and the employee's health care provider similar to the interactive process under the ADA;
d. permit a request for recertification every thirty days regardless of the duration stated in the original certification;
e. permit an employer to obtain a second opinion on a recertification; and,
f. to make clear that employers, for safety and health reasons, may require employees returning from FMLA leave to pass employer-provided return to work physicals.

5. **Employer-Enhanced Leaves**

Many employers generously provide benefits and protections beyond the requirements of the FMLA. This can manifest itself in various forms, such as extending the time that an employee may be excused from work, providing leave before the employee meets eligibility requirements, or providing leaves for family members not covered under the FMLA. In addition, some municipalities require employers to provide the benefits and protections of the FMLA to family members who are not covered by the FMLA, such as registered domestic partners or expanded definition of families in a number of states. For employers who choose to be more generous, or who are required to do so, the employer is not currently able to deduct that time from an employee's allotment of FMLA time under the regulations. It seems fundamentally unfair that by being more generous to employees, those employees get more FMLA leave than employees who meet the eligibility requirements of the FMLA. For example, an employee who is given time off to care for a domestic partner gets twice the amount of FMLA leave available because they have 12 weeks for care of their "ineligible" family members, of which the time cannot be deducted under the FMLA, and 12 weeks for care of themselves or "allowable" family members under the FMLA, of which the time may be deducted from the 12 week allotment. Based on this inherent unfairness, we request that the DOL clarify that if an employer provides benefits exceeding those required under the FMLA, that it be able to

count the time against the 12-week FMLA allotment as well. This will hopefully encourage employers to be generous with the types of leave they allow in a way that will best meet the needs of their employees.

Finally, employers who offer generous sick leave or other paid absence programs, or who are subject to varying state law requirements for paid leave, are particularly hurt by frequent use of unscheduled intermittent leave because, in addition to the productivity and morale issues described above, those employers often pay employees for such absences. For example, many employers offer leave that extends beyond the 12 weeks of the FMLA. At least one court case, *Santosuosso v. NovaCare Rehabilitation*, 2006 WL 3408226 (D.N.J. 2006), suggests that the protections of the FMLA, including job reinstatement, may extend beyond the 12 weeks of FMLA leave. We request clarification that this interpretation goes beyond the intent and meaning of the FMLA and that its protections only extend as far as the 12 weeks.

In addition, where an employer provides leave more generous than required under the FMLA, the employer should be permitted to treat the absences of its employees who otherwise qualify for exemption under the Fair Labor Standards Act as unpaid without risking the employee's qualification for exemption.

> **Recommendation: The Committee believes that the regulations should make clear that where employers provide policies or absence from duty benefits in excess of FMLA rights, and employees request protected leave under those policies, that the use of such leave be included in when determining the leave entitlement of an employee, and that such expansion, if on a reduced pay or unpaid basis, does not threaten the employee's qualification for FLSA exemption. However, the Committee also requests that the DOL make it clear that the protections of the FMLA should not extend beyond the 12 weeks set forth in the law, even if an employer generously offers leave extending beyond the 12 week requirement.**

6. Serious Health Condition

The Department should revise the regulations to ensure that only employees who truly have "serious health conditions" are protected by the FMLA. In this regard, the regulatory definition of "continuing treatment by a health care provider," as set forth in 29 C.F.R. § 825.114, should be revised. First, section (a)(2)(i)(B) should be eliminated. It should not be a "serious health condition" when an employee sees the doctor once and is simply given a prescription for antibiotics or pain reliever. A single doctor's visit with some follow up does not warrant protection by federal law. If this section is not eliminated altogether, at a minimum the Department should limit the definition of "regimen of continuing treatment" in section (b) to exclude nominal treatments such as prescribing medicine. The current definition unintentionally encourages employees to seek medical care and obtain prescriptions for conditions that otherwise would not

necessitate such treatment. This incentive is clear when employees know that they cannot be disciplined for an absence so long as their health care provider prescribes an antibiotic or prescription pain medicine.

Next, 29 C.F.R. § 825.114(a)(2)(i)(A) should be revised to make clear that "treatment two or more times by a health care provider" does not include a simple follow-up to review the efficacy of previously prescribed medication or to simply review lab results. There should not be a presumption that a serious health condition exists simply because an employee sees a health care provider twice for any reason, or that, at some earlier point in the employee's life, he/she was incapacitated due to the same condition.

In addition, the inclusion in 29 C.F.R. § 825.114(a)(v) of conditions that, if left untreated, could become serious is unnecessary and should be eliminated. Any period of absence needed to receive multiple treatments for a condition that could result in a period of incapacity for more than three days would likely fall under the definition of chronic health condition in section (iii). Indeed, the illnesses listed in the regulation (cancer, arthritis, and kidney disease) would be chronic health conditions. Including this language in section (v) seems duplicative, and could lead to confusion. Allowing leave for any condition that, if left untreated, could result in an absence of more than 3 days would be difficult to manage and renders the qualification of "serious" nearly meaningless. In fact, almost all illnesses that are left untreated can become serious. This does not mean that they should receive the protection of federal law before they actually do become serious.

Finally, the Department should clarify its guidance in section (c) on when conditions such as the common cold, the flu, earaches, upset stomach, minor ulcers, headaches, and routine dental or orthodontia problems could be considered to be serious health conditions. The current regulation indicates that such conditions should not normally be considered serious health conditions. However, there is no clear guidance on when such conditions should be covered by the FMLA. As the Department notes in its request, there have been inconsistent answers on when such conditions should be covered. *See* 71 Fed. Reg. 69506. We believe that such conditions should not be covered merely whenever they meet the threshold of "continuing treatment" set forth in 29 C.F.R. § 825.114(a)(2)(i). Otherwise, in many cases these conditions would be covered by the FMLA. For example, it is not uncommon for someone with the flu to be out of the office for more than 3 days, to have seen their doctor, and to have received a prescription for some type of flu medication. Under the "continuing treatment" definition, they would be covered. The regulation clearly suggests that these conditions should not normally fall within the ambit of the FMLA. To ensure that only the rare instances of such conditions are covered, they should be required to meet some higher threshold, such as requiring inpatient care.

While section (c) currently includes only non-migraine headaches, we believe that migraine headaches should also be included. The Committee recognizes that there are times when a severe migraine headache may rise to the level of a serious health condition. The experience of ACC members, however, is that employees easily obtain

medical certifications even for migraines of low to moderate severity from health care providers or even obtain a certification by misrepresenting, mischaracterizing, or exaggerating a run of the mill headache, if not the existence of a condition. §114(c) should be revised to state that unless complications arise, a migraine would not be considered a serious health condition. Specifically, migraines should be treated in a similar fashion as the flu and common cold as discussed above.

The effect of §§825.114(a)(2)(i)(A) and (B) as currently written is to make a federal case, literally, out of almost every cold, running nose, or minor sprain. As provided in 29 U.S.C. § 2612(a)(1)(D), federal law should protect employees who have, or whose immediate family member has, a *serious* health condition. The definition set forth in the current regulations is in conflict with the intent of the Act because the regulation raises the marginal and inconsequential to the level of "serious".

> **<u>Recommendation</u>: The Committee believes that 29 C.F.R. § 825.114(a)(2)(i)(B) should be deleted in its entirety, or, at a minimum, that the definition of "regimen of continuing treatment" should be narrowed. The Committee also believes that 29 C.F.R. § 825.114(a)(2)(i)(A) should be revised to define the term "treatment" and make clear that "treatment two or more times by a health care provider" does not include a simple follow-up to review the efficacy of previously prescribed medication or to simply review lab results. Finally, the second sentence of 29 C.F.R. § 114(c) should be modified to include migraines and to provide more clarity on when such conditions would be covered by the FMLA.**

We thank the Department for this opportunity to provide information on a well-intentioned law and regulations that ACC members have struggled to comply with, for over a decade, while at the same time managing their businesses and controlling absenteeism. We hope that the Department will take this opportunity to consider seriously whether the FMLA and the implementing regulations are meeting their intended purpose, and to consider also whether they are truly protecting the employees that Congress and the Department sought to protect.

Yours truly,
ASSOCIATION OF CORPORATE COUNSEL

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