Protect Family Leave

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Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3510
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Comments in Response to the Department of Labor's Notice of Proposed Rulemaking, RIN 1215-AB76, RIN 1235-AA03, 77 Fed. Reg. 8960 (February 15, 2012)

By electronic submission: www. regulations.gov

Dear Ms. Ziegler:

Thank you for the opportunity to submit these comments in response the Department of Labor's (DOL or Department) February 15, 2012 Notice of Proposed Rulemaking (NPRM) proposing changes to the Family and Medical Leave Act ("FMLA") regulations. The National Coalition to Protect Family Leave ("the Coalition") is a broad-based, non-partisan group of organizations, companies and associations dedicated to protecting the integrity of FMLA. The Coalition supports public policy that will: (i) strengthen the FMLA to ensure FMLA leave is available to those employees Congress intended to cover, and (ii) end the misuse of family and medical leave that threatens the integrity of this important law.

Coalition members recognize the challenges employees face in balancing work and family demands and their desire to feel secure in their jobs, should they need to be absent for family or medical issues. The Coalition is committed to upholding the balance between employee and employer needs that Congress recognized when it enacted the FMLA.[1]

Most of the proposed changes in the NPRM were necessitated as a result of legislative changes to the FMLA by the National Defense Authorization Act for Fiscal Year 2010 (NDAA) and the Airline Flight Crew Technical Corrections Act (AFCTCA). Both the NDAA and AFCTCA were enacted after DOL's most recent changes to the regulations in 2008 (the 2008 Rule). The NDAA made revisions broadening and clarifying the Family Military provisions of the FMLA, and the AFCTCA changed the eligibility requirements for flight crew employees, many of whom were not previously able to meet the 1250 hours worked requirement of the FMLA.

[1] See 29 U.S.C. 2601 (b)(3).

These comments do not address the entire NPRM and focus only on those sections that would:

- Make changes concerning the calculation of certain types of FMLA leave;
- Implement the military leave provisions of the FMLA made by the National Defense Authorization Act for Fiscal Year 2010;
- Reorganize certain sections of the regulations to enhance clarity; and
- Remove the FMLA forms from the regulations.

The Coalition believes DOL's proposed changes to tracking intermittent leave are not well supported and recommends this proposed change be withdrawn. This proposed revision is unnecessary and not driven by the recent legislative amendments. Similarly, the proposed change to the "physically impossible" exception is not related to the recent legislation and would be impractical and unnecessarily burdensome for employers to implement. The Coalition also believes current regulations provide sufficient descriptions of exigency leave and that no more are needed. Finally, the Coalition does not support removing the forms from the regulatory structure. Much of how employers comply with the FMLA flows through specific forms and allowing them to be modified without the benefit and protections of the rulemaking process would make them subject to changes that might be ill conceived, or have significant implications for employers.

Further explanation and our detailed comments are set forth below.

Increments of FMLA intermittent leave or reduced schedule leave, Section 825.205[2]

The Department proposes several changes to the current regulations on increments of FMLA leave. These changes address the AFCTCA, which was enacted after the 2008 regulations were adopted, and address how FMLA leave usage is to be counted for all employees. NPRM, p. 8974. The Coalition's comments address the second issue.

Current Regulation. The current regulation defines the minimum increment of FMLA leave to be used when taken intermittently or on a reduced schedule as "an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour." 825.205(a)(1). The current regulation also permits different increments of leave to be applied at different times of the shift and contains a section addressing how leave is handled where an employee's job does not permit him/her to come to work or leave work mid-shift (known as physical impossibility). In that situation, an employee is charged for FMLA leave for an entire shift of day of work, even if the employee only needed a portion of the day. 825.205(a)(2).

Proposed Changes. The NPRM proposes several changes to 825.205(a) falling into two basic areas—revisions and clarifications on how the increments of leave are to be calculated, and

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[2] All references to the FMLA regulations are to 29 C.F.R. Section 825.

proposed changes to the physical impossibility section of the regulation. Alternatively, the Department proposes to eliminate the physical impossibility section of the regulations. NPRM, p. 8974-8975. For the reasons set forth below, the Coalition disagrees with these proposed changes.

Employer Experience with Unplanned Intermittent FMLA Leave. Unplanned intermittent leave for chronic serious health conditions continues to be a significant problem for many employers. In fact, in its comments submitted in 2008, the Coalition noted that the Department recognized unplanned intermittent leave is a considerable issue for employers. This subject was addressed in detail in the June 2007 Report from the Department in response to the Request for Information ("RFI") published in December 2006. The RFI had requested the public assist the Department by furnishing information about their experiences with FMLA and commenting on the effectiveness of the then-current FMLA regulations. The response was significant—more than 15,000 comments were received. Among the primary concerns expressed by employers in response to the RFI was an employer's ability to manage business operations and attendance control, particularly when unscheduled, intermittent leave is taken for chronic serious health conditions. The Department noted the overwhelming majority of the comments included three issues, and one of them was employer frustration about difficulties in maintaining necessary staffing levels and controlling attendance problems as a result of unscheduled intermittent leave. *See* Foreword from Victoria A. Lipnic, June 2007, to the Report on the public comments on the RFI, 72 Fed. Reg. 33550 (June 28, 2007).

History of Current Rule on Minimum Increments. As noted above, current 825.205(a) defines the minimum increment of FMLA leave to be used when taken intermittently or on a reduced schedule as "an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour." This was a change made as part of the adjustments to the regulations in 2008. The version of the regulations in place from 1995 until the 2008 changes (then at 825.203(d)) provided, "An employer may limit leave increments to the shortest period of time that the employer's *payroll system* (emphasis added) uses to account for absences or use of leave, provided it is one hour or less." Due to the inclusion of the words "payroll system," many employers were under the impression that the 1995 regulations required them to permit FMLA leave to be taken in very small increments, such as one-tenth of an hour or six minutes.[3]

The Coalition made a number of suggestions in its comments to the proposed changes in 2008 regarding the increments of intermittent leave, suggesting two hour or half day increments, or changing the increment only when the employee failed to give a minimum number of days notice.[4] The Coalition also proposed that if the Department was unwilling to make those changes, the regulation should be changed to say employers could always track in increments of at least one hour.

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[3] Commentary to the 2008 Rule states this was not the Department's intention; however, a decision was made to change the language to resolve the apparent confusion. ("The final regulation eliminates the confusing and inconsistent references to either payroll systems or recordkeeping systems and eliminates the term 'absences' to further lessen any confusion and focuses on 'use of leave.'") 73 Fed. Reg. 67976 (November 17, 2008).

[4] A copy of this section of the Coalition's 2008 comments is attached.

When considering the 2008 Rule, the Department noted, once again, extensive comments were received from employer groups expressing concerns about the size of the increments of intermittent leave that may be taken, especially when the leave was not foreseeable. Employers argued it was difficult to manage their workforce needs when employees were permitted to take very small amounts of FMLA leave when they had policies for the use of other forms of leave in larger increments, especially when others had to fill in for those who were absent or tardy. *See* 73 Fed. Reg. Vol. 67975 (November 17, 2008).[5]

There were a number of reasons why the Coalition made these proposals in 2008 and why it continues to believe the approach taken in the 2008 regulations is proper. In addition to creating opportunities for inappropriate use, it is administratively burdensome for employers to track FMLA in small increments. Indeed, tracking FMLA taken on an intermittent or reduced work schedule basis is already a cumbersome process. For example, in addition to the rules on increments of leave, there are special rules for:

- employees who work a variable schedule, 825.205(b);
- employees whose schedules have been changed on a permanent or long term basis (for reasons other than FMLA and prior to the notice of need for FMLA leave), 825.205(b) (2);
- employees whose schedules vary from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would have worked absent FMLA leave (in which case a weekly average of hours scheduled over the 12 months prior to the beginning of the leave period applies), 825.205(b)(3); and
- employees who would ordinarily be required to work overtime, 825.205(c).

Furthermore, there are additional rules for the optional or compulsory substitution of paid leave accrued under an employer's policy with unpaid FMLA leave. *See* 825.207. Specifically, 825.207(a) was amended by the 2008 regulations to permit an employer to apply any "procedural rules" of its paid leave policy in connection with the use of unpaid FMLA leave. If an employee does not comply with the additional requirements in an employer's paid leave plan, the employee is not entitled to substitute accrued paid leave but remains entitled to take unpaid FMLA leave.

While the Coalition continues to believe half-day minimum increments are appropriate in some circumstances, the 2008 amendments to the regulations applied a more realistic approach than the 1995 regulations by allowing employers to require leave to be taken in a minimum increment of one hour. The amendments also provided some protection to employers where employees who had been certified to take intermittent FMLA leave for chronic conditions sought

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[5] See also Society for Human Resource Management ("SHRM") "Survey Report on FMLA and its Impact on Organizations" (July 2007). As part of its key findings, SHRM found one of the most difficult FMLA-related activities identified by the responding organizations was tracking and administering intermittent FMLA leave. (*Id.* at p. 7). SHRM also learned that 4 of 10 Human Resources professionals reported approving FMLA leave requests they believed were not legitimate. *Id.*

to take FMLA for what often appeared to be routine tardiness or reasons unrelated to their chronic conditions. Allowing the employer to require leave to be taken in a minimum increment lessened the opportunities for misuse of intermittent leave and created less administrative burden. Employers already have limited ways to combat inappropriate use of FMLA. The current regulations (with limited exception, *see* 825.312(f)) do not permit an employer to require a fitness for duty certification or other documentation to support unplanned intermittent leave once the employee has submitted a certification. While the certification is supposed to indicate the frequency (i.e., how often) and the duration (i.e., how long), most certifications contain general guidelines, such as two to four times per month in durations of 1 to 2 days. It is also fairly typical for a health care provider to provide a recertification for an employee whose absences exceed the expected frequency and duration.[6]

These problems are increased when multiple employees are certified to take intermittent leave for chronic conditions. Because the regulations do not permit employers to require a health care provider note for intermittent absences, once the employee has been certified, employers essentially have no choice but to accept the employee's explanation that an FMLA-qualifying condition caused the tardiness. Yet allowing employees to use FMLA in small increments essentially undermines employer policies on tardiness. The current regulation at least provides some tools for the employer to manage this sort of FMLA misuse.

The Coalition's Position on the Proposed Change to Minimum Increments Rule. In its Commentary to the 2008 Rule, the Department specifically recognized an employer's right to "maintain a policy that leave may only be taken in a one hour increment during the first hour of a shift (i.e., a policy intended to discourage tardy arrivals)." 73 Fed. Reg. 67976 (November 17, 2008). The Department now proposes to re-insert language to 825.205(a)(1) stating that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave. In the explanatory comment to this change, the Department states it is necessary to add back this language to emphasize the statutory requirement that an employee's FMLA entitlement not be reduced beyond the amount of leave actually taken in accounting for leave taken on an intermittent or reduced schedule basis, 29 U.S.C. §2612(b)(1).[7] This would effectively eliminate the current right of an employer, for example, to require the use of one hour of FMLA for an employee who is late to work at the

[6] In this regard, the Department should make clear that an employer is permitted to rely on the certification of a health care provider ("HCP") as to frequency and duration of absences, and an employer may require and rely upon a recertification supporting any absences that exceed such frequency and duration. For example, in a recent matter for a large manufacturing company, an employee's HCP refused to increase the frequency and duration of an employee's leave, resulting in termination under a no fault attendance program. When presented to the Department, however, the initial reaction of the Investigator was the HCP certification was simply an estimate and variations from it did not justify adverse action. Ultimately, the Department accepted the employer's position and dismissed the FMLA complaint. *See* U.S. Department of Labor FMLA Complaint, September 1, 2011, Kansas City, Kansas (no case number assigned).

[7] The Legislative History of the FMLA suggests that the sponsors did not anticipate that FMLA would be taken in such small amounts, particularly for incapacity as opposed to for treatment. *See* Senate Report, P.L. 103-3, p. 27 ("Thus an employee who takes 4 hours leave for a medical treatment has utilized only 4 hours of the 12 weeks of leave to which an employee is entitled.")

beginning of the shift. Examples given by the Department in its explanation of the proposed change make it clear that the only way this could occur is if the employee wants to substitute paid leave. NPRM, p. 8974.

The experience of Coalition members with the original intermittent leave requirements demonstrates they facilitated improper use of this type of leave. Not only does this undermine employer attendance policies, but many other employees were disadvantaged by those who were able to use this approach for non-FMLA purposes. Employees are known to confide in each other and when this misuse is discussed, employees who have had to cover, or whose schedules were affected, developed the impression the employer policies had no meaning. Thus the original system contributed to morale problems due to inappropriate use of these leave policies.

The Coalition disagrees with this proposed change. Absent a showing the current language has somehow resulted in harm to affected employees, the language should not be amended from its current form. While the Coalition supports and agrees employees should not be able to take more FMLA leave than needed, allowing time off in increments of less than an hour is taking this concept to an extreme creating unnecessary burdens for employers. Employers should retain the flexibility to allow employees to use FMLA in increments smaller than one hour, if it is appropriate to the employer's business needs. Employers also should be permitted to require use of a greater increment to discourage improper use of FMLA leave and thereby help maintain predictability in the workplace.

<u>The Coalition's Position on the Proposed Change to Physically Impossible Exception</u>. The current language of 825.205(a)(2) is as follows:

> Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed 'clean room' during a certain period of time, <u>the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.</u> 825.205(a)(2) (emphasis added).

The Department proposes to make some changes to the "physically impossible" exception in 825.205(a)(2) by adding the caveat that an employer must show "no equivalent position is available" where an employee is unable to commence work or end work mid-way through a shift, such as where a flight attendant or railroad conductor is scheduled to work on an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room." The Department also seeks to add language limiting the period of physical impossibility "to the period during which the employer is unable to permit the employee to work at the same or an equivalent position." The Department states in the NPRM "thus for example, if it was physically possible to restore a flight crew employee to another flight, the employer would be required to do so." NPRM, p. 8975. The Department indicated alternatively, it was considering deleting the physical impossibility provision in its entirety.

The proposed requirements impose an additional and unnecessary burden on employers not supported by the statute. In the limited circumstances where the nature of an employee's job

does not permit the employee to arrive late or leave early, the employee should be required to take the entire shift as an FMLA leave. The employer should not be tasked with an additional requirement to show no equivalent position exists or that it is not "physically possible" (a very high standard) for an employee to be restored to some other position.

For the above reasons, the Coalition believes the current language of 825.205(a) should not change. Employers should retain the right to designate the entire period an employee is absent due to inability to be at work on time or for the entire shift as FMLA leave, and the Department should not delete this important provision.

Eligible Employee, Section 825.110

Current Regulation. The current regulation provides that "Pursuant to USERRA [the Uniformed Services Employment and Reemployment Rights Act], an employee returning from fulfilling his or her National Guard or Reserve Military obligation shall be credited with the hours of service that would have been performed *but for* the period of military service in determining whether the employee worked the 1250 hours of service."

Proposed Changes. The Department proposes to change subsection (c)(3), presently (c)(2), to reflect an employee returning from *any service* protected by USERRA shall be credited with the hours of service that would have been performed but for the period of military service in determining an employee's eligibility for FMLA. The current regulation, 825.110(c) (2), limits this entitlement to an employee returning from fulfilling National Guard or Reserve military obligations.

The Coalition's Position. The Coalition supports this change and notes this aligns with the USERRA regulations. Under USERRA, "a reemployed service member would be eligible for leave under the Family and Medical Leave Act . . . if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements." 20 C.F.R. §1002.210.

Leave Because of a Qualifying Exigency, Section 825.126

The FMLA military leave provisions entitle eligible employees with covered family members to take two special types of leave – military caregiver leave and qualifying exigency leave. Qualifying exigency leave allows an eligible employee whose parent, child or spouse is called up for active duty in a foreign country to take FMLA leave for certain exigencies related to the call-up of their family member. Qualifying exigencies naturally encompass a wide range of activities associated with a servicemember's deployment, such as attending to legal, financial, family, child care, school and other matters. Before the Amendments to the FMLA in 2009, exigency leave was only available to family members of Reserve and National Guard members, and not the Regular Armed Forces, and there was no requirement that the call to active duty be for service in a foreign country.

Section 825.126(a)--Reasons for taking exigency leave.

Current Regulation. Currently, 825.126(a) provides an eligible employee may take FMLA leave for one or more of the following qualifying exigencies: (1) short notice deployment; (2) military events and related activities; (3) child care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities.

Proposed Changes. The Department has not proposed any changes to this regulation, but has invited comment on whether additional qualifying circumstances should be added beyond the eight currently listed, particularly because this leave is available to eligible employees with covered family members in the Regular Armed Forces, following the 2009 Amendments to the FMLA.

The Coalition's Position. The Coalition believes the current statutory language accommodates the necessary coverage by providing twelve weeks of leave is available "because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces." 29 U.S.C. §2612(a)(1)(E). In addition, the current regulations include a broad array of definitions of exigency.

Based on feedback from Coalition members, relatively few employees have requested leave for qualifying exigencies. Furthermore, in those situations where requests have been made, the current regulations adequately provide leave for the necessary situations and fulfill the statutory requirements.

Section 825.126(a)(1)--Short-Notice Deployment. Under the current regulation, a covered employee may take leave "to address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty . . . seven or less calendar days prior to the deployment. Leave for this purpose can be used for a period of seven calendar days beginning on the date of notification." The Department has not proposed any changes to this section, but has requested comment on whether the seven calendar day period remains appropriate for short term deployment exigency leave. Based on feedback from Coalition members, the current seven-day period remains appropriate and the Coalition urges the Department not to make any changes to this section.

Section 825.126(a)(2)--Covered Active Duty or call to Covered Active Duty.

This section defines "covered active duty or call to covered active duty" for purposes of exigency leave eligibility.

Current Regulation. The current regulation defines covered active duty or call to covered active duty with reference to the provisions of Federal law regarding the call of armed forces to military duty referenced in 10 U.S.C. §101(a)(13)(B), commonly referred to as "Title 10" orders to military service.

Proposed Regulation. The Department has proposed using the word "Federal" to describe the covered active duty or call to covered active duty to make clear that only calls to Federal active duty meet the definition of covered active duty. The Department also indicated it intends to retain the cross-reference to Title 10 in the definition of "covered active duty or call to covered active duty," and has invited comment on that reference.

The Coalition's Position. The Coalition believes the reference to Title 10 is appropriate, and the inclusion of the word "Federal" adds further and useful clarity to the types of active duty and calls to active duty covered by the regulation. The Coalition continues to believe, however, more than just incorporation by reference is required.

Title 10 lists seven separate federal statutes under which the President of the United States can call certain military units and members to active duty. Most employers are not familiar with statutory references, and it is unreasonable to expect employers to locate, review and understand Title 10 and the seven federal statutes it lists (which use terms unfamiliar to those outside of the military). Without an explicit definition or description of the covered active duty, the Coalition is concerned employers will be expected to provide employees adequate notice and responsive answers to questions, and employees will have difficulty ascertaining their rights and responsibilities under the regulation.

Section 825.126(b)(6)(ii)—Rest and Recuperation.

Current Regulation. The current regulation provides that eligible employees may take up to five days of Rest and Recuperation (R & R) leave provided to military members.

Proposed Regulation. The Department has proposed to increase the number of days increasing that eligible employees may take to fifteen work/business days for each instance of R & R leave.

The Coalition's Position. As noted in the commentary to the implementation of this portion of the regulations in 2008, there was considerable debate as to whether leave for this reason even fell within the scope of the statute. Nevertheless, the Department concluded that given the importance of fostering strong relationships among military families and the limited opportunities for military members to spend time with their families, it was appropriate to include R & R within the regulatory definition of a qualifying exigency.

Allowing an employee to take 15 days off of work, as the Department has proposed, in most instances, translates to three full 5-day work weeks of leave. Meanwhile, the military's R & R leave programs, like USCENTCOM's referenced in the NPRM,[8] allows service members on unaccompanied deployment up to 15 *calendar* days (excluding travel) of R & R leave—meant to allow the service member two weeks at home. The Coalition believes increasing the amount of R & R leave an eligible employee can take from five to ten days will be consistent with military leave programs and achieve the Department's goal of ensuring covered military family members can spend their R & R leave with their family, while minimizing unnecessary absence in the workplace.

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[8] *See* CENTCOM Reg. 600-21 (Leave & Liberty Program); *see also* Department of Defense Instruction 1327.6, Leave & Liberty Procedures, 16 Jun 09 (Chg 1, 30 Sep 11).

Caregiver Leave, Section 827.127(c)

Military caregiver leave allows eligible employees an expanded period of FMLA leave—up to twenty-six workweeks in a single 12-month period—to care for a covered family member with a service-related serious injury or illness. Most significantly, as directed by the statutory amendments made to the FMLA in 2009 and 2010, the proposed regulations attempt to define what qualifies as a serious illness or injury for both current servicemembers and recent veterans, which has not previously been defined.

Proposed Regulation. The Department has proposed alternative definitions for a qualifying serious illness or injury for covered veterans, entitling a covered employee to caregiver leave.

The Coalition's Position. The Coalition agrees with the Department's proposed definition of a covered veteran who qualifies for the VA's Program of Comprehensive Assistance for Family Caregivers (CAFC) will be deemed to have a qualifying serious injury or illness warranting military caregiver leave. This definition seems to be more practical and in line with the purpose of FMLA caregiver leave, as CAFC eligibility requires: 1) a serious injury that is 2) service related and 3) requires personal care services to perform daily activities and/or supervision or protection because of the injury.

The Coalition also requests that the Department provide as much guidance and specificity to aid employees and employers to properly utilize this expanded military caregiver leave.

Removal of Appendices to the Regulations; Allowing Forms to be Changed Without Rulemaking

Current Regulation. Currently, the FMLA forms are attached to and part of the regulations as Appendices. Appendices A and F are reserved. The remaining appendices are:

- Appendix B, WH-380-E (Certification of Healthcare Provider for Employee's Serious Health Condition) and WH-380-F (Certification of Healthcare Provider for Family Member's Serious Health Condition);
- Appendix C, WH-1420 (Notice to Employees of Rights Under the FMLA);
- Appendix D, WH-381 (Notice of Eligibility and Rights & Responsibilities);
- Appendix E, WH-382 (Designation Notice);
- Appendix G, WH-384 (Certification of Qualifying Exigency for Military Family Leave); and
- Appendix H, WH-385 (Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave).

Proposed Changes. The Department proposes to delete the Appendices to Part 825 from the regulations to "permit the forms to be more expeditiously amended in response to statutory and other changes, as well as suggestions from the public." NPRM, p. 8963. The Department explains that removing the forms from the regulations will streamline the clearance process.

The Coalition's Position. Implementation of the FMLA is a form-centric process. Virtually all of the information necessary and permissible to be obtained in the FMLA-implementation process is exchanged through the forms. Even the slightest tweaks to the forms used in the process can result in significant operational costs as systems must be changed to accommodate the changes. Moreover, when the government updates and revises non-mandatory forms, employers are often faced with uncertainty as they must determine which of the revisions are required by regulations and which are simply recommended. This uncertainty is particularly acute when the employer does not use the government's model form (or elects not to change to the new form).

In its proposal to expedite the paperwork approval process, the Department focuses on the recent statutory amendments (the only such amendments in nearly 20 years), stressing the importance of having flexibility to change the forms to accommodate the statutory revisions. The Department, however, also references the agency would consider revising the forms based on public input. While the sought-after flexibility certainly would be commendable for the few times when there are statutory changes, the Coalition does not support this flexibility in general. Changes to the forms due to reasons other than statutory amendments should be subject to full notice and comment rulemaking. As noted above, even minor changes to forms can have significant economic impact. Moreover, because the notices/forms are such a critical piece of the FMLA approval process, even the smallest proposed changes should get careful consideration. Although putting the forms through the Paperwork Reduction Act procedures would afford some element of review, it is far from the current notice-and-comment rulemaking in terms of public participation and the Departmental efforts to publicize proposed changes.

To ensure greater public participation and reduce the chances of unfair surprise, the Coalition believes that the Department should abandon its proposal and keep the forms in the regulations, subject to notice and comment rulemaking.

Definitions, Section 825.800

Current Regulation. The definitions appear at the end of the regulations in section 825.800.

Proposed Change. The Department proposes to move the definitions to the beginning of the regulations into reserved section 825.102.

The Coalition's Position. The Coalition is in full support of the Department's proposal to make changes to definitions and regulatory references in the definitions to maintain consistency. The Coalition is also in full support of the Department's proposal to move the definitions to section 825.102. The current location of the definitions at the end of the regulations makes them more cumbersome. Moving definitions to the beginning of the regulations will make them more

user friendly and easier to navigate and consistent with many other regulations that affect employers.

Time to Review Changes

In the NPRM, p. 8998, the Department requested comment on its estimate that it would take two hours for the airline industry and one hour for all other industries to review the new rule and determine what revisions need to be made to their employment practices, such as updating company policies and/or timekeeping systems. The Coalition believes that this estimate is far less than the actual time necessary to become familiar with the proposed regulatory changes. Given the already complex nature of FMLA administration, these highly technical changes will require more extensive review, especially for employers in the airline industry, but also for other industries to become familiar with the latest changes.

Conclusion

In closing, the Coalition urges the Department to withdraw its proposed changes to the intermittent leave and physical impossibility portions of the rule and retain the current rules regarding exigency leave. In addition, the Coalition strongly recommends that the Department continue to pursue changes to any FMLA forms using notice and comment rulemaking to ensure public notice and participation. The National Coalition to Protect Family Leave appreciates the effort that has gone into the NPRM process and the opportunity to submit these comments and recommendations regarding the NPRM on the FMLA.

Respectfully submitted,

The National Coalition to Protect Family Leave