GUIDANT

May 31,2002

Mr. John Morrall
Branch Chief
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10235
725 17th St., NW
Washington DC 20503

Dear Mr. Morrall:

Guidant Corporation commends the Office of Management and Budget's request for comments on the costs and benefits of federal regulations and respectfully recommends that the Family and Medical Leave Act's (FMLA) implementing regulations and associated non-regulatory guidance be reviewed under this request.

Guidant, a manufacturer of medical technology used primarily to treat cardiovascular and vascular diseases, welcomes the opportunity to comment on the FMLA. Guidant is headquartered in Indiana and has manufacturing and research operations in California, Minnesota and Texas, as well as a research facility in the State of Washington. Guidant also manufactures medical technology in Puerto Rico and Ireland. Guidant's life-saving and life-enhancing medical technologies are used to treat persons throughout this nation and around the globe.

Guidant was built and continues to, thrive on an atmosphere of mutual respect, involvement, recognition and reward. We are proud that our entrepreneurial spirit and the excitement it generates among our more than 10,0000 employee-owners has been publicly recognized. For example, 'in three of the last four years, Guidant has been named one of the best places to work in the United States by *Fortune* magazine. Further, in 2002, Guidant was named by *Business Ethics Magazine* to *The 100 Best Corporate Citizens List for 2002.*

Guidant has developed innovative benefit programs and created a culture in which employees, investors and our communities share in our success. **As** a corporation, we recognize the importance of work-life balance. We also recognize that FMLA has meant peace of mind for millions of Americans faced with serious illnesses, childbirth, adoption or placement of foster children. However, its implementation has been characterized by vague, confusing and sometimes conflicting regulations and guidance which do not allow employers to administer the FMLA's requirements with confidence and certainty.

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Our comments focus on three primary issues that exemplify the challenges employers face when administering the FMLA:

- Determination of serious health condition;
- Traclung intermittent leave; and
- Coordination with other leave policies.

Definition of "Serious Health Condition'' 29 C.F.R. 825.114

When the FMLA was enacted the statute covered both leave for the birth or adoption of a child as well as medical leave (for the individual or an immediate family member) for serious health conditions. The Congressional intent was clearly that the term "serious health condition" was not meant to cover short- term illnesses where treatment and recovery are brief and such conditions fall within even modest sick leave policies. Nevertheless, the Department of Labor (DOL) broadly defined what constitutes a serious health condition when it promulgated its definition of serious health condition in its final rule [See 29 C.F.R. 825.114.1 The expansive way in which the regulation was written has been further stretched by non-regulatory guidance, specifically, Employment Standards Administration Wage and Hour Division opinion letters that the DOL has subsequently issued without benefit of public notice and comment. As a result, employers and employees have been left with no discernable guidance on what constitutes a "serious health condition."

On April 7, 1995, the DOL issued Wage and Hour Opinion Letter Number 57 which stated that "the fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications)." Just a year and a half later, on December 12, 1996, DOL issued Opinion Letter Number 86. That opinion letter stated that Wage Hour Opinion Letter 57 expresses an "incorrect view" with respect to the common cold, the flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease etc. and that if "any of these conditions met the regulatory criteria for a serious health condition, e.g. an incapacity of more than three consecutive calendar days and receives continuing treatment e.g. a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA."

In effect, the issuance of this later opinion letter has superceded the regulation itself and has become the standard in enforcement actions and before the courts. If an employee has a three day absence, has been to a doctor and has received a prescription, no matter what the underlying cause the employee is entitled to FMLA leave and all of the rights it confers. Healthcare providers have difficulty distinguishing between chronic conditions requiring treatment and multiple treatments for non-chronic conditions. Multiple treatments for non-chronic conditions are generally not considered serious health conditions whereas chronic conditions requiring ongoing treatment generally are. For

example, Guidant has witnessed conditions identified as "chronic conditions requiring treatment" when the condition isn't chronic, such as acute back pain.

Guidant recommends that DOL rescind Wage and Hour Opinion Letter 86 and restore the meaning of the word "serious" to the health conditions protected by the FMLA. The DOL should also institute rulemaking to determine whether its current regulation defining serious health condition is consistent with the underlying statute.

Intermittent Leave 29 C.F.R. 825.203

The DOL's intermittent leave regulation has also been problematic. Congress drafted the FMLA so that employees could take leave in increments of less than one day (for example for chemotherapy or radiation treatments). Unfortunately, 29 C.F.R. 825.203 provides that leave may be counted "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." Each year Guidant has hundreds of employees who request medical leaves for an hour or less. The task of accounting for and tracking these leaves is a significant administrative burden. This is especially the case when coupled with the broad definition of "serious health condition" which means that employers like Guidant are keeping track of a large number of partial days for serious and non-serious conditions alike. Allowing employers to track intermittent leave in larger increments (such as by the hour or half day) would ease the cost and paperwork burden while ensuring that those employees who need intermittent leave are granted such leave. Redefining what constitutes a serious health condition will also reduce the number of absences and conditions under which an employer must track intermittent leave.

Coordinating with other leave policies

The coordination of FMLA with other leave policies is also troublesome. In the vast majority of cases, employees who are eligible for statutory leave protection under the FMLA also have leave rights derived from one or more other sources. For example, employees' rights to leave may also arise under the Americans with Disabilities Act, state medical leave laws, disability insurance, employer absence programs or workers' compensation. Employer's compliance with all of these laws and policies can pose a significant challenge.

Concern about overlapping leave entitlements may be greatest with respect to state laws that provide leave protection in circumstances not covered by the FMLA. Section 401(b) of the law stipulates that the act does not preempt any provision of any state or local law that provides greater leave rights than the FMLA. Twenty-seven states have passed their own family and medical leave programs, many of which provide more generous protection than FMLA. *(Employee Benefits Journal,* March 2002) Employers are required to determine which leave policy will provide employees in various locations with the greatest protection and administer leave requests accordingly. California, where Guidant employs almost 4,000 persons, exemplifies the intricacies of these overlapping laws. In California, employee leave is regulated by two complex laws, the California

Family Rights Act (CFRA) and the Pregnancy Disability Leave Law (PDLL). In addition to these two laws, California passed a "Kin Care" law in 2000 that requires all California employers to allow employees to use up to half of their accrued sick leave benefits to care for a sick family member.

State leave laws are typically more generous than FMLA in a variety of categories. For instance, some state laws embrace a broader concept of "family" than the federal government does. If the reason for leave is not covered by the FMLA, affected employees would be able to take the leave protected under the state or local law, and retain their full 12 weeks of federal leave entitlement to use in the event of another FMLA-qualifying condition, resulting in undesired "stacking" of leave rights (i.e., consecutive as opposed to concurrent leaves).

Another example of conflicting rules concerns the FMLA's interaction with the ADA. The FMLA and ADA differ in determining which employees are eligible for coverage based on their ability to perform essential job functions. Under the ADA, an employee is entitled to a reasonable accommodation only if it would enable the employee to perform the essential function of the job. If an employee cannot provide a health care provider's certification that he cannot perform essential job functions, an employer may deny FMLA leave for a serious health condition. Also, FMLA leave may not be denied on the grounds that the employee will not improve enough to return to work. Although the employer may terminate the employee when advised that the employee does not intend to return to work or when the FMLA leave ends, **FMLA** leave may not be denied at the outset because the employee is unlikely to return to work.

The statutes also vary in how they address an employer's ability to reassign an employee seeking intermittent leave or a reduced schedule to another position. Under the FMLA, the employer may require the employee to transfer to another job which "better accommodates" the change in work schedule; however, the other job must have equivalent pay and benefits. Under the ADA, the employer cannot require a transfer simply because a different position would "better accommodate" intermittent leave or a reduced schedule, but is required to show an undue hardship in accommodating the employee in his or her current position. In contrast to the FMLA, if there are no reasonable accommodations which would permit the employee to perform his or her essential job functions without creating an undue hardship, then the employer can offer a disabled employee reassignment to a lower paying position, provided there is no equivalent job available which the employee is qualified to perform.

As illustrated above, one of the most challenging aspects of **FMLA** administration is its coordination with other benefit leave laws. Therefore, Guidant recommends that the OMB urge Congress to revisit the pre-emption issue and interaction with the ADA and to provide guidelines for employers to follow.

Conclusion

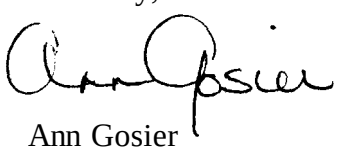
Adoption of these recommendations will help to fulfill the purpose of the FMLA and to alleviate the current interpretive and legal confusion which serves as a disincentive for

companies to offer or expand programs, including paid leave. The DOL's interpretations have especially penalized companies which through generous leave programs have gone beyond the FMLA's requirements. This problem, which manifests itself throughout the DOL's FMLA regulations, was recognized by the Supreme Court when it recently struck down the DOL's notice requirements in *Ragsdale vs. Wolverine Worldwide.* In this case, the Court ruled the DOL exceeded its regulatory authority by specifying an employee's leave doesn't count as FMLA leave unless the employer designates it as such in cases where the employer's leave policy is more generous than FMLA.

Vague, confusing and contradictory regulations and guidance do no allow employers to administer the FMLA's requirements with confidence and certainty. A thorough review of the DOL's FMLA regulations, specifically those regulations that address the definition of a serious health condition, tracking of intermittent leave and coordination of benefit leaves is therefore recommended.

We appreciate the opportunity to provide comment. Should you need any additional information on these comments, please contact Julie Cantor-Weinberg, Manager of Government Affairs or me at (202) 508-0800 or Anne O'Meara, Benefits Compliance Administrator, at (651) 582-4822.

Sincerely,



Ann Gosier
Vice President, Government Affairs