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To: John F. Morrall III/OMB/EOP@EOP

cc: "Mcdowell, Marian E (Sbc-Msi)" <mrn7564@sbc.com>
Subject: Comments in Response to OMB's "Draft Report to Congress on the C osts and Benefits of Federal Regulations" ;

TO: Mr. John Morrall

Attached please find the comments of SBC Communications Inc, in response to the request for comments on the OMB's "Draft Report to Congress on the Costs and Benefits of Federal Regulations" ;
FR Doc. 02-7257, as printed in Part II of the Federal Register, March 28, 2002, Volume 67, NO,. 60.

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<< SBC Comments to OMB re FMLA Reform 5-28-02.doc.doc >>

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- SBC Comments to OMB re FMLA Reform 5-28-02.doc.doc

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May 28,2002

Mr. John Morrall
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Office of Management and Budget
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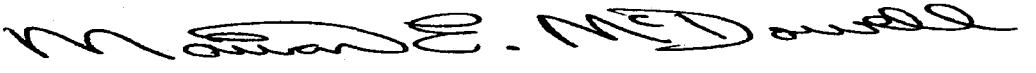
Washington, D.C. 20505

Mr. Morrall:

Attached please find the comments of SBC Communications Inc. in response to the Notice and Request for Comments on the Office of Management and Budget's "Draft Report to Congress on the Costs and Benefits of Federal Regulations", FR Doc. 02-7257, as printed in Part II of the Federal Register, March 28,2002, Volume 67, No. 60.

If you have any questions regarding this filing, please contact me at 202-326-8861.

Sincerely,



Marian E. McDowell

Attachment

SBC Communications Inc.
Statement in Support of FMLA Reform

SBC Communications Inc. supports the original intent of the Family and Medical Leave Act to protect employees against unfair treatment by employers due to absences related to caring for ill or injured family members. Further, SBC believes employees who are ill or injured should also be protected when they cannot work. This is evident by the fact that SBC has both disability plans that provide benefits to employees when they cannot work and numerous formal leaves of absence that enable employees to take time away from work to care for a family member.

However, since the passage of the Family and Medical Leave Act in 1993 (FMLA or Act), and the promulgation of rules and regulations applicable to the Act, the administration of the Act's requirements has proved extremely difficult due to vagueness and potential misinterpretation. This is not a minor issue for SBC. In 2001 alone SBC processed 152,157 requests for FMLA time. The processing of 150,000 plus cases a year is not only a gargantuan administrative task, but also a costly one. To solely process and review 150,000 plus requests SBC required a staff of 21 case managers and five full-time administrative assistants, and this does not include the staff required in each department for FMLA administration and force management. Given the large impact of the FMLA on our business, SBC is keenly interested in ensuring that the implementing regulations permit the most efficient and effective administration of the Act's requirements.

It is time for policymakers to go back and assess the repercussions of a law that was instituted almost ten years ago, and to evaluate whether the needs of both employers and employees are being met. While the Act's purpose is very clear, the Act itself leaves too much to interpretation. SBC believes that the FMLA's original intent has been lost, and as a result the Act is being implemented in a way that is pitting the needs of business against the needs of the family. Passage of the FMLA was intended and expected to benefit employers as well as their employees. The reality is that the Act, as interpreted by the Department of Labor (DOL), has presented an obstacle for employers in the form of cumbersome administration, broad interpretation, and an often diminished workforce leading to losses in productivity. Employers, employees, attorneys and the DOL interpret sections of the Act differently. This is evident in the number of calls SBC receives on a daily basis from employees or labor groups regarding disagreement over the Act's language with regard to eligibility, time constraints, and particularly what constitutes a "serious health condition." Unfortunately, many of these disagreements have resulted in an adversarial relationship between employee and employer -- the exact opposite of what the Act was intended to do. SBC strongly believes that clarifying the FMLA's essential language is the first step toward restoring the original intent of balancing the needs of employees with those of employers.

Serious Health Condition

One such example is how "serious health condition" is defined. By revising the definition of "serious health condition" SBC believes that many of the disagreements that are currently commonplace can be lessened, if not eliminated. The inconsistencies relating to a "serious health condition" have presented major administrative and legal quandaries for SBC. For example, one of the difficulties our case managers face is deciding whether a condition or illness falls under the definition of a "serious health condition" and the subsequent need for clarification. In is clear from the legislative history of the Act that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, and headaches other than migraines are examples of conditions that do not qualify for FMLA leave. However, the DOL's regulations can be interpreted to include these types of illnesses. The Department of Labor's current regulations are extremely expansive, defining the term "serious health condition" as including, among other things, any absence of more that three days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor's visit, or a prescription, or a referral to a physical therapist). Such a broad definition potentially mandates FMLA leave where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve. The regulations also define as a "serious health condition" any absence for a chronic health problem, such as arthritis, asthma, diabetes, etc., even if the employee does not see a doctor for that absence and is absent for less than three days. What employers need is a list of serious health conditions that are protected by the Act in addition to a revised definition of "serious health condition." Setting clearer parameters in regards to the definition of "serious health condition" will benefit employers and employees by eliminating some of the confusion and frustration resulting from current regulations.

Health Care Provider Certification

Does the fact that a healthcare provider checked "yes" to "serious health condition" ovemde the Act's language and above all its intent? Our case managers grapple with these types of issues on a daily basis. Due to limits imposed by the Department of Labor's regulations, an employer can only seek clarification if it employs the services of a healthcare provider, and then only if the employer has the employee's consent. With so many inconsistencies in the Act, the need to seek clarification from the employee'shealthcare provider is very common. The more common the need for clarification, the higher an employer's administrative costs become. SBC spends approximately $8,000 per month on services performed by our medical advisors. Employers should be allowed to verify FMLA leaves the same way they verify other employee absences for illness. Employers should be allowed to communicate directly with employee health care providers.

Employers also have the option of requesting a second opinion, but this can result in a third opinion which can further delay the process and increase administrative costs. In cases where an employee's healthcare provider has chosen to support a request for leave, but whose medical opinion is a far departure from prevailing medical opinions, SBC would like the employer to have the right to question the healthcare provider's rationale with regard to method of treatment and prognosis without having to seek a second opinion.

Intermittent Leave

The liberal use of intermittent "sick time" poses tremendous challenges for our business units in both lost productivity and increased work hours for those who are not absent. Congress drafted the FMLA to allow employees to take leave in less than full day increments. The intent was to address situations when an employee may need to take leave for intermittent treatments, e.g., for chemotherapy or radiation treatments, or other medical appointments. Granting leave for these conditions has not been a significant problem. However, the regulations provide that an employer "may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." Since some employers track in increments of as small as six or eight minutes, the regulations have resulted in a host of problems related to tracking the leave and in maintaining attendance control policies. In many situations, it is difficult to know when the employee will be at work, and in many positions, an employee who has frequent, unpredictable absences can play havoc with the productivity and scheduling of an entire department. SBC supports action that would tighten the regulations on intermittent absences. FMLA time for intermittent leave should be limited to an increment of time not less than one-half work day, instead of the current requirement that allows an employee to take time off in increments as small as an employer's payroll system will allow. By allowing employees to take intermittent time off in increments of as little as 15 minutes, scheduling work shifts is increasingly becoming more challenging for employers. Allowing an employer to require an employee to take intermittent leave in increments of up to one-half of a work day would ease the burden significantly for employers, both in terms of necessary paperwork and with respect to being able to cover efficiently for absent employees.

Request for Leave/Notification

SBC has major concerns enterprise-wide with regard to "proper notification." Perhaps a supervisor's most burdensome task related to FMLA is complying with notification guidelines set forth by the Act. The requirement for an employer to provide notice to an employee of his/her rights to apply for FMLA after every triggering event is a major concern. Under current law, employers are almost forced to provide FMLA eligibility and required notices to an employee anytime the employee is out due to illness, whether it be for a serious health condition or not. The employee need not expressly assert rights under FMLA or even mention FMLA. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by the FMLA, does not need to assert such right either. Employees often call in sick and supervisors are unaware that the mere mention of illness triggers obligations to determine FMLA coverage and to notify the employee of rights and obligations under the Act. This situation has caused great concern among employers because it has opened the door for "infringement of FMLA rights" complaints. We have seen cases in which a supervisor reprimands an employee for absenteeism over the course of a few months only to have the employee come back and state that the absences were for a serious health condition. Employees in this situation have often come back to claim that they had advised their employer that they were sick, and that should have served as sufficient notice for FMLA. SBC would like to see the responsibility of requesting FMLA coverage placed onto the employee. While SBC supports an employee's ability to be protected under the Act, it is extremely difficult for employers to ascertain whether the employee seeks that protection. Shifting the burden to the employee to

request leave be designated as FMLA leave would eliminate the need for the employer to question the employee and pry into the employee's and the employee's family's private matters, as required under current law. Also it would help eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex FMLA regulations which even attorneys have a difficult time understanding.

What Does FMLA Cost SBC?

The cost of FMLA can be measured in several ways; administratively, FMLA is very costly to both the company's FMLA's processing unit, and to each business unit or department. The administrative costs for the company's processing unit alone are over $2,000,000 per year.

In 2001 approximately 1.8 million hours were approved under FMLA by SBC's FMLA processing unit. This figure does not include time taken under SBC's disability plans or Leave of Absence policies. 1.8 million hours of absences equates to approximately 228,655 lost work days. In an effort to attempt to quantitatively measure the cost of an absence SBC has found that it cost the Company approximately $40 million in lost salary for 2001.

The above figures illustrate the estimated quantifiable costs FMLA represents to SBC each year, but there are also other "costs" that are difficult to measure that take a toll on a company's well-being -- the impact that a reduced workforce has on morale in the workplace, increased time and effort necessary for management of unscheduled absences (as well as other "soft" costs), and the cost of lost productivity are not captured in a lost salary figure.

Conclusion

SBC would like to reiterate how strongly we support reform of FMLA regulations. We support reform that will not only ease some of the administrative burdens employers now face, but that will also bring clarity to both employers and employees on their respective responsibilities under the Act. In addition, we believe it important to attempt to lessen the burden on healthcare providers in providing information and clarification as it relates to absences potentially covered under the Act. We also support reform that will help crack down on the abuse of FMLA time as this abuse not only damages the employer in terms of lost productivity, but also damages other employees, both that have legitimate FMLA cases and those that do not take any FMLA time. Above all we support changes that will restore the Act's original intent of balancing the needs of the family with those of the workplace.