May 28,2002

Dr. John Morrall
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB
Room 10235
725 17th Street, NW
Washington, DC 20503

Name of Regulation and Guidance: The Family and Medical Leave Act of I993 & Wage and Hour Opinion Letter FMLA-86 (12/12/96)
*Regulating Agency: Department of Labor, Wage and Hour Division Citation: Code of Federal Regulations 29 CFR part 825 (1/6/95) and Wage **Hour** Opinion Letter, FMLA-86 (12/12/96)*
Authority: The Family and Medical Leave Act of 1993 (5 USC 6381 et seq. & 29 USC 2601 et seq.)

Dear Dr. Morrall:

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 165,000 individual members, the Society serves the needs of HR professionals by providing the most essential and comprehensive set of resources available. As an influential voice, SHRM is committed to advancing the human resource profession to ensure that HR is an essential and effective partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 120 countries. Visit SHRM Online at www.shrm.org.

I. Summary of SHRM FMLA Nominations

On behalf of SHRM, and in conjunction with your request for nominations for regulatory reform in the "Draft Report to Congress on the Costs and Benefits of Federal Regulations", I would like to nominate the Department of Labor's (DOL) Family and Medical Leave Act (FMLA) of 1993 regulations and interpretations for review and revision. SHRM strongly urges the Office of Management and Budget to designate reform of the Department of Labor's FMLA implementing regulations and associated non-regulatory guidance documents as "high priority" in order to restore the Act's medical leave provisions to the original intent of the law and make its application and implementation less onerous and confusing for employers and employees alike. **SHRM has also submitted a separate nomination that OMB designates the Birth and Adoption Unemployment Compensation (BAA-UC) regulation established in the previous Administration' to be rescinded.**

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[1] June 13,2000 ***Federal** Register*, Volume 65, Number 114 [Page 37209-37227].

The spirit of the law is not well served by complexities which leave employers guessing as to how best comply and which leave employees guessing as to what may be protected in various legal circuits under changing legal interpretations. Neither are the spirit of the law and effective enforcement of its protections well served by "administrivia" which requires employers to divert resources to track FMLA in tiny segments – as small as single minutes. The FMLA is exhibit A of a very well intended law, which has resulted in unnecessary confusion and litigation because of problematic executive branch interpretations and inconsistent non-regulatory guidance. Unfortunately, the Department of Labor's misinterpretations have misconstrued the FMLA to discourage companies from establishing and expanding generous leave policies, including paid leave. In order to facilitate the expansion of paid leave policies, we must address current problems with the FMLA which are actually serving as a disincentive for companies to offer or expand paid leave benefits.

11. SHRM's Historic Involvement with FMLA Technical Corrections

As the leading association of the human resources profession, SHRM and its members are vitally concerned with the proper application of the FMLA. SHRM has long recognized its special responsibility to support and encourage compliance with the FMLA. The FMLA recordkeeping and notification requirements have historically been of great concern to SHRM members, since they are charged with implementing the FMLA in large and small companies across the nation. SHRM commends the Office of Management and Budget for welcomes opportunities for this kind of involvement since our members have experienced numerous difficulties in their good faith efforts to comply with FMLA record keeping and notification requirements. To that end, SHRM founded the FMLA Technical Corrections Coalition (www.workingforthefuture.org) which is a diverse, broad-based nonpartisan group of approximately 300 leading companies and associations. Members of the Coalition are fully committed to complying with both the spirit and the letter of the FMLA and strongly believe that employers should provide policies and programs to accommodate the individual work-life needs of their employees. At the same time, the Coalition believes that the FMLA and the corresponding federal regulations should be revised to protect those **employees** that Congress **aimed** to assist while streamlining compliance and eliminating administrative problems that have arisen.

111. General Background on FMLA Interpretive Problems

The DOL's final FMLA implementation regulations became effective for private sector employers on April 6, 1995. The FMLA was enacted to allow eligible employees up to twelve (12) weeks of unpaid leave for birth or adoption, or foster care (family leave) or for the "serious health condition of the employee, employee's child, or the employee's spouse (medical leave). The "family" leave part of the FMLA has not been problematic in the workplace. However, because of vague and expansive implementing regulations and non-regulatory guidance by the prior Administration, the "medical" leave component of the FMLA has become increasingly complex to administer.

IV. **An Extensive Public Record, Numerous Practical Examples and Surveys ALL Document the Costs of FMLA Misapplications and the Benefits of Interpretive Corrections**

A solid public record for FMLA interpretive corrections has been established. SHRM members have testified in six hearings before Congress which documented the costs of the Department of Labor's FMLA misapplications and the benefits to interpretive corrections:

1. Senate Subcommittee on Children and Families, Committee on Labor and Human Resources (May 9, 1996, Senate Report No. 104-503)
2. House Subcommittee on Oversight and Investigations Hearing (June 10, 1997 House Hearing Report No. 105-44)
3. Subcommittee on Children and Families, Committee on Health Education, Labor and Pensions (July 14, 1999, Senate Report No. 106-156)
4. House Subcommittee on Human Resources, Committee on Ways and Means (March 9,2000, House Report No. 106-114)
5. Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs (February 15 2000, House Report No. 106-171)
6. Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs (April 11,2002, Report Pending)

To illustrate the complexities of the FMLA compliance process, "Chart A: Business Process Outline Related to the Administration and Paperwork Requirements for FMLA Compliance" presented by SHRM Member Kenneth A. Buback during the April 11,2002 hearing is attached (Attachment #1).

In the recent U.S. Supreme Court decision, *Ragsdale v. Wolverine Worldwide Inc.*, the Court invalidated one aspect of the FMLA implementing regulations based on its inconsistency with Congress' intent. Consequently, the DOL has the opportunity to review this issue and make necessary regulatory corrections. While the *Ragsdale* decision provides the opportunity for the DOL to make changes specifically relating to that decision, we would also encourage the Department to consider a number of other FMLA regulations that have expanded the Act beyond what Congress intended. I have enclosed for your review an analysis by the law firm Spencer Fane Britt & Browne, which submitted the amicus brief on our behalf in the *Ragsdale* case (Attachment #2). The analysis highlights the cases where the validity of the FMLA regulations has been challenged in the federal courts. As of March 20,2002, the validity of eleven DOL FMLA regulations has been challenged in 58 court cases.

Unfortunately, the greatest cost of the FMLA interpretive problems is to employees themselves. Two Department of Labor studies as well as the Society for Human Resource Management Surveys have all confirmed that by far the most prevalent method that employers use to cover work during FMLA leaves is to assign it temporarily to other co-workers. With the FMLA interpretations requiring little or no notice, employers have responded by requiring unscheduled overtime that is frequently unwelcome to coworkers.

Even a survey conducted by the prior Administration's DOL confirmed FMLA implementation problems, The DOL report found that the share of covered establishments reporting that it was somewhat easy or very easy to comply with the FMLA declined 21.5% from 1995 to 2000.[2]

The SHRM® 2000 FMLA Survey (Attachment # 3) found that organizations clearly want to follow and support the spirit and intent of the FMLA, and in some cases they go beyond the FMLA, but appear to find obstacles in doing so. As a result, human resources professionals are calling for more clarification and education on such issues as overall compliance, managing intermittent use of leave, determining serious health condition coverage, and communicating with care providers and physicians.

Given the SHRM survey's focus, the consistencies with previous research and the direct human resources responsibilities of the participants, the survey provides substantive, relevant data calling for a review of FMLA recordkeeping and notification requirements.

The Act's implementing regulations and interpretations have left most human resources professionals struggling with management of intermittent leave, communications with physicians and often difficult determinations as to whether a "serious health condition'' exists within the meaning of the FMLA.

V. Specific Nominations for FMLA Reform and Recommendations

Specific nominations for FMLA reform and SHRM's recommendation for reform for each item follow:

A. Serious Health Condition Interpretations and Non-Regulatory Guidance Have Been Problematic

1. Description of Problem:

In passing the FMLA, Congress stated that the term "serious health condition'' is not intended to cover short-term conditions for which treatment and recovery are very brief, recognizing that "it is expected that such conditions will fall within the most modest sick leave policies."[3] The DOL's current regulations are extremely expansive, defining the term "serious health condition'' as including, among other things, any absence of more that three (3) days in which the employee sees any health care provider and receives any type of continuing treatment (including a second doctor 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

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2 Balancing the Needs of Families and Employers Family and Medical Leave Surveys, U.S. Department of Labor, 2000 Update, released January 2001.

3 HR REP. NO. 103-8, at p. 40 (1993).

health problem, such as arthritis, asthma, or diabetes, even if the employee does not see a doctor for that absence and is absent for fewer than three days.

Most of the leaves taken under the FMLA have been for employees' own illnesses, most of which were previously covered under sick leave and/or paid time off policies. The DOL has been inconsistent and somewhat vague in its opinion letters, leaving employers and workers guessing as to what the DOL and the Courts will deem to be "serious." The following excerpts from DOL opinions highlight the difficulty human resource professionals face:

- April 7, 1995 DOL opinion letter No. 57 said 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)." (Attachment #4.)

- December 12, 1996 DOL opinion letter No. 86 then said letter No. 57 "expresses an incorrect view," that, in fact, with respect to "the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.," 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 that also involves qualifying treatment (continuing treatment by a health care provider), "then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for 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." (Attachment #5).

Inclusion of all these various absences in the definition of "serious health condition" has inadvertently changed the FMLA statute into a national sick leave policy — something that Congress specifically wanted to avoid.[4] Confusion over the definition of "serious health condition" has a ripple effect on many other aspects of the FMLA's medical leave administration, for example, use of intermittent leave and tracking issues.

When read with the other interpretations, the very expansive definition of "serious health condition" suggests that any time an employee has missed work for three **(3)** days and reports feeling ill, the employer (e.g., the manager) must inquire as to whether the employee's condition is one that would make them eligible for FMLA. As a result, managers are left trying to determine whether an employee who does not come to work

[4] The Family and Medical Leave Act of 1993, Public Law 103-3, Sec. 403 states: "ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES. Nothing in this Act shall be construed to discourage employers from **adopting** or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

for three (3) or more days because of illness is entitled to FMLA protection. More often than not, even the minor ailments entitle an employee to FMLA coverage.

These serious health condition interpretive problems have placed one of the worst of all factors into companies' decision-making processes regarding the application of their leave policies -- growing legal uncertainties. Unfortunately, this has had a chilling effect on the expansion of paid leave policies.

We would all like to see private sector employers expand paid leave policies for their workers. However, in order to facilitate the expansion of paid leave policies, we must first address current problems with the FMLA's regulations and interpretations that are actually serving as a disincentive for companies to offer or expand paid leave benefits.

2. SHRM Recommendation:

SHRM urges the Administration to restore the regulatory definition of "serious health condition" to reflect serious conditions as intended by Congress in the Act's legislative history and to rescind the December 12, 1996 DOL opinion letter No. **86** (12/12/96). Correcting the FMLA serious health condition regulatory definition and non-regulatory guidance interpretations are critical since these problems are having a ripple effect on many aspects of FMLA administration.

B. Intermittent Leave Tracking is Very Difficult

1. Description of Problem:

The issue of intermittent leave continues to be extremely difficult for human resources professionals. The SHRM® 2000 FMLA Survey found that a strong majority of our profession believes that a reasonable modification (e.g., ½ day increments) would help them more effectively administer the Act.

Three-quarters (76%) of respondents stated they would find compliance easier if the DOL allowed FMLA leave to be offered and tracked in ½ day segments rather **than** by minutes. Moreover, respondents were asked if their organization had automated tracking of intermittent FMLA leave. Less than one-fifth (17%) of respondents indicated that their organizations have automated the tracking of intermittent leave.

2. SHRM Recommendation:

SHRM recommends that the Administration minimize the unnecessarily convoluted tracking and administrative burdens ("administrivia") while maintaining the original intent of the law, by permitting employers to require employees to take "intermittent" leave (FMLA leave taken in separate blocks of time due to a single qualifying reason) in increments of up to one-half of a work day.

C. Medical Certification Needs to Be Clarified

Description of Problem:

The Certification of Health Care Provider form (WH-380) may be used to certify a serious health condition under the FMLA. Due to the limits imposed by the Department of Labor's regulations, the employer's health care provider cannot contact the employee's health care provider unless the employee grants the employer permission. Nor can the employer's health care provider obtain the usual documentary support for a disability determination. These limitations either lead the employer to deny FMLA coverage due to lack of sufficient certification or to grant FMLA coverage despite the lack of sufficient factual support just to avoid a dispute.

This rule also applies to the certification, or fitness for duty report, that the employer is entitled to upon the employee's return. The regulations state that "a health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired. The employer may not delay the employee's return to work while contact with the health care provider is being made.'' 29 CFR 825.310. For employers whose employees are in safety sensitive positions, these restrictions on contacting the physician are not just burdensome, but can create unnecessary risk to patients and co-workers.

2. SHRM Recommendation:

Problems faced in determining the validity of an employee's FMLA certification need to be addressed by clarifying that sufficient certification under the FMLA must allow employers to verify FMLA leave and an employee's fitness to return in the same way they verify other employee absences for illness, while protecting employee privacy in the process. This will allow employers and health care providers to communicate so that health care providers understand the requirements of the employee's job. This clarification would simply give the employer more information upon which to determine whether or not a leave request qualifies under the FMLA.

D. Request for Leave

1. Description of Problem:

Respondents to the SHRM FMLA Survey stated that on average 60% of employees taking FMLA leave do not schedule the leave in advance. When respondents were asked if they thought that some FMLA requests were not legitimate but had to be granted due to the DOL's regulations/interpretations, 52% responded affirmatively.

Shifting the burden to the employee to request leave be designated as FMLA leave eliminates 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,

and helps eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations which even attorneys have a difficult time deciphering.

2. SHRM Recommendation:

SHRM recommends that the Administration allow employers to plan coverage for employees' absences by requiring employees to apply for FMLA leave as they would apply for any other employer-provided leave.

If the burden is not shifted, the two-day notice requirement is not practical and needs to be expanded.

E. Definition of "Unable to Perform the Functions of the Position"

1. Description of Problem:

An employee is able to take FMLA leave whenever the employee is restricted from performing just one of the job's essential functions (as opposed to situations where the employee is unable to perform the majority of the functions of the employee's position).

2. SHRM Recommendation:

Limit FMLA leave to situations where the employee is unable to perform the majority of the functions of the employee's position, rather than allowing an employee to take FMLA leave whenever the employee is restricted from performing just one of the job's essential functions.

Permit employers to provide "light duty'' or other alternative work to employees who are unable to perform their regular jobs.

F. Perfect Attendance Awards

1. Description of Problem:

The time an employee takes away from work under the Family and Medical Leave Act may not be counted against the employee for the purpose of perfect attendance awards. The FMLA states that "the taking of leave shall not result in the loss of any employment benefit accrued prior to the date of the leave". Employment benefits are defined as "all benefits provided or made available to an employee by an employer". The Department of Labor regulations have interpreted that to mean attendance awards but the benefits contemplated in the law are "group live insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions"—clearly Congress was concerned about the loss or reduction of significant health and welfare benefits.

2. SHRM Recommendation:

Clarify that employers may record FMLA leaves as absences for purposes of perfect attendance awards only.

C. Conclusion

We recommend that the FMLA issues nominated in these comments and documented in six Congressional hearings receive a "high priority" designation for reform in order to address compliance problems and to allow for more effective implementation of FMLA protections. The FMLA administrative and compliance problems confronting employers are enormous. FMLA interpretive corrections would increase the overall net benefits of the FMLA, considering both qualitative and quantitative factors. The FMLA is a good law that has become inadvertently too complex. We urge the Administration to move quickly to make the FMLA a model of effectiveness, rather than a model of administrivia and complexity.

Sincerely,

Deron Zeppelin, PHR
Director, Governmental Affairs

Enclosures:

1. SHRM Member Kenneth **A.** Buback's *Chart A: Business Process Outline Related to the Administration and Paperwork Requirements for FMLA Compliance*
2. Spencer Fane Britt & Browne LLP Survey: *Reported Court Cases in Which the Validity of an FMLA Regulation Has Been Challenged*
3. SHRM® 2000 FMLA Survey
4. DOL Wage and Hour Opinion Letter No. *57* (April 7, 1995)
5. DOL Wage and Hour Opinion Letter No. 86 (December 12, 1996)