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

cc:

Subject: Comments on OMB's Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations

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Dear Mr. Morrall:

Attached are the cover letter and comments from the National Association of Home Builders (NAHB) on OMB's Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations. The original, signed document has been sent'to you by first-class mail. Please freel free to contact me if you have any questions or require additional information.

Bruce Lundegren

<<OIRA Cover Letter.doc>> <<OIRA Comments.2002 Draft Report.doc>>

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GERALD M. HOWARD
EXECUTIVE VICE PRESIDENT
CHIEF EXECUTIVE OFFICER

May 28,2002

BY FIRST CLASS AND ELECTRONIC MAIL
Mr. John Morrall
Office of Information & Regulatory Affairs
Office of Management & Budget
NEOB, Room 10235
725 17th Street, NW
Washington, DC 20503
jmorrall@omb.eop.gov

Re: Comments on OMB's *Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations* - Nominations of Candidates for Regulatory Reform

Dear Mr. Morrall:

On behalf of the more than 205,000 members of the National Association of Home Builders (NAHB), I am pleased to submit these comments on the Office of Management of Budget's (OMB's) *Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations* (Draft Report) that was published in the *Federal Register* on Thursday, March 28, 2002. Our comments respond to OMB's request for public nominations of regulations to reform, revise, or rescind, as discussed in Chapter IV of the Draft Report. Specifically, we are nominating nine (9) individual reform candidates for OMB's review and consideration, as outlined below.

NAHB is a federation of more than 850 state and local home builder associations nationwide. Our members include individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. Over 80 percent of our members are classified as "small businesses" and our members collectively employ over eight million people nationwide. As such, our industry is directly and indirectly impacted by a wide array of regulatory actions across the spectrum of Federal agencies.

NAHB is keenly interested in OMB's Draft Report and the important work OMB's Office of Information and Regulatory Affairs (OIRA) is doing in the area of regulatory reform and information quality. There are three broad issues raised in OMB's Draft Report that are of particular interest to us. First, since so many of our members are small businesses, we are

particularly encouraged that OMB has recognized the need for regulatory reform and paperwork burden reduction for small businesses. We believe this is an important recognition and we applaud OMB's discussion of this issue in the Draft Report. Second, we appreciate OMB's candor about the "limited success" Federal agencies have had in reviewing existing regulations, as they are required to do under both Executive Order 12866 and the Small Business Regulatory Enforcement Fairness Act. We believe these regulatory "lookback" provisions are important and we appreciate OMB's efforts to enforce them, albeit modestly, through the request for public nominations of reform candidates in the Draft Report. Finally, we believe that OMB's new Information Quality Guidelines, discussed in the Draft Report, are extremely important and we that hope Federal agencies will embrace information and data quality as a critical component of their mission. We are encouraged by the initial step OMB has taken in issuing its model guidelines, and we strongly urge OMB to scrutinize the agencies' implementing guidelines to be certain they meet the minimum standards OMB has established. This is a very important issue to us.

In response to OMB's request for public nominations of reform candidates contained in the Draft Report, we have put together a list of nine (9) individual items for OMB's review and consideration. These nominees include both regulatory reform candidates and examples of "problematic" agency guidance, as requested in OMB's Draft Report. Each of the nominations is described in detail in the attached report (in the form requested by OMB). A brief summary of each nominee is provided below.

1. **EPA's Ecoregional Nutrient Criteria Documents.** This is an example of problematic agency guidance. EPA's criteria for nutrients in stormwater runoff are indirectly binding, as states must adopt them into their water quality standards. However, it is difficult to validate EPA's documents because they are not reproducible and are based on questionable scientific assumptions. EPA should withdraw the current documents, suspend the schedule for state implementation, and reopen the development process for public review and comment.

2. **EPA's Stormwater Phase II Regulations.** This rule unjustifiably expands the scope of stormwater regulations from municipal separate storm sewer systems and from construction sites that disturb from one to five acres. EPA's regulation is based on inadequate science and should be withdrawn pending development of an adequate scientific justification for the extension of the rule.

3. **EPA's Guidance on Improving Air Quality Through Land Use Activities.** This is an example of problematic agency guidance that is indirectly binding as a regulation. While EPA is statutorily prohibited from infringing on state and local land use authority, EPA becomes obligated to enforce these standards if they are adopted by states or localities to demonstrate Clean Air Act Compliance. EPA should withdraw the guidance since it is statutorily prohibited from regulating in this area.

4. **EPA's Policy on Water Submetering.** Because of the way EPA has defined the term to "sell" water under the Safe Drinking Water Act, many multifamily property owners who submeter or allocate water costs to tenants become regulated "public water systems"

subject to duplicative permitting, monitoring, and reporting requirements with little or no health benefit. This discourages water submetering and utility allocation, which are both strong tools to encourage water and sewer conservation. EPA should withdraw its current definition of to "sell" water and issue new guidance that minimizes duplicative regulatory burdens and encourages water submetering and utility allocation.

5. **FWS Survey Protocols for Endangered/Threatened Species.** FWS has created several "survey protocols" for species listed under the Endangered Species Act. The survey protocols require private land owners to conduct onerous surveys and to disprove the existence of a species. FWS should withdraw the current survey protocols, revise its current policy, and reissue the protocols only after public notice and comment.

6. **IRS's Low Income Housing Tax Credit Technical Advice Memoranda (TAMs)**. The IRS issued five technical advice memoranda that exclude certain development costs from the low-income housing tax credit (LIHTC) eligible basis. NAHB, along with the tax credit industry, believes that the TAMs: 1) should not apply to the tax credit industry because they are supposed to apply to only the taxpayer being audited, 2) are confusing, incorrect and is inconsistent with long-term industry practice, and 3) take aggressive positions aimed at reducing tax credits requiring the IRS to treat the LIHTC like an unauthorized tax shelter. This has the result of reducing the level of equity financing available for each project and making a large number of affordable housing properties financially infeasible. The IRS should develop official guidance in order to clarify what is included in tax credit eligible basis.

7. **IRS's Mortgage Revenue Bond Purchase Price Limits.** IRS should update the purchase price limits for home purchasers through state housing finance agency programs using mortgage revenue bonds. These limits have not been updated since 1994, although housing prices have risen dramatically, The IRS and HUD have had problems in compiling the house price data needed to establish safe harbor limits. IRS should take the interim step of increasing the current limit by 30 percent, pending a more formal regulatory or legislative solution.

8. **OSHA's Multi-Employer Citation Policy.** OSHA exceeds their statutory authority through enforcement of the current Multi-Employer Citation, which impermissibly extends liability for OSHA compliance beyond the employer-employee relationship. **OSHA's** policy also acts as a substantive regulation that has never been promulgated through notice and comment rulemaking. **OSHA** should immediately withdraw this policy pending the receipt of additional statutory authority and formal rulemaking proceedings.

9. **OSHA's Lead In Construction Standard.** This is an example of a regulation in need of reform or revision. OSHA issued this standard in 1993 as an interim final rule pursuant to their statutory obligation. However, this standard applies to all residential remodeling activities, even though lead-based paint was banned from residential structures after 1977. OSHA should immediately exempt from this standard work conducted in residential properties built after 1977. In addition, OSHA should reopen the rulemaking

to consider recent available exposure data for residential remodeling activities and to consider the impact of this standard on small entities.

Thank you for the opportunity to submit these nominations for regulatory reform for your review and consideration. We look forward to your Final Report to Congress and we pledge to work constructively with both OMB and the agencies implement these changes and improve the quality and effectiveness of Federal regulatory system. Please feel free to call either Michael Luzier, Senior Staff Vice President for Regulatory Affairs, at (202) 266-8335 or Bruce Lundegren, Regulatory Counsel, at (202) 266-8305 if you have any questions or require additional information.

Sincerely,

/Signed/

Gerald M. Howard
Executive Vice President
and Chief Executive Officer

National Association of Home Builders

Comments to OMB on the Draft 2002 Annual Report to Congress on the Costs and Benefits of Federal Regulations

Nominations of Candidates for Regulatory Reform

May 28,2002

Table of Contents

EPA's Ecoregional Nutrient Criteria Documents

EPA's Stormwater Phase II Regulations

EPA's Guidance on Improving Air Quality Through Land Use Activities

EPA's Policy on Water Submetering

FWS's Survey Protocols for Endangered/Threatened Species

IRS's Low Income Housing Tax Credit Technical Advice Memoranda

IRS's Mortgage Revenue Bond Purchase Price Limits

OSHA's Multi-Employer Worksite Citation Policy

OSHA's Lead in Construction Standard

Issue: EPA's Ecoregional Nutrient Criteria Documents

Regulating Agency (including any sub-agency): Environmental Protection Agency (EPA)

Citation (e.g., Federal Register): EPA has published a total of 26 Ecoregional Nutrient Criteria Documents in two separate publications. They include:

1. Ambient Water Quality Criteria Recommendations, Lake and Reservoirs in Nutrient Ecoregion 11, VI, VII, VIII, IX, XI, XII, XIII; and Ambient Water Quality Criteria Recommendations, Rivers and Streams in Nutrient Ecoregion II, III, VI, VII, IX, XI, XII, XIV, 66 *Federal Register* 1671-1674, January 9, 2001;

2. Ambient Water Quality Criteria Recommendations, Lake and Reservoirs in Nutrient Ecoregion 111, IV, V, XIV; and Ambient Water Quality Criteria Recommendations, Rivers and Streams in Nutrient Ecoregion I, IV, V, VIII, X, 67 *Federal Register* 9269-9270, February 28, 2002

Authority (Statute or Legislative Rule): Section 303 and 304 of the Clean Water Act

Description of the Problem (Harmful impact and on whom?): This is an example of problematic agency guidance, as described by OMB in their draft report to Congress on the Costs and Benefits of Federal Regulations (draft Report to Congress). In particular, EPA's guidelines violate the new reproducibility standard contained in OMB new Information Quality Guidelines and are based upon a questionable scientific approach.

The United States Environmental Protection Agency (EPA) published the availability of 17 Ecoregional Nutrient Criteria Documents in the *Federal Register* on January 9, 2001, and another nine Ecoregional Nutrient Criteria Documents in the *Federal Register* on February 28, 2002. Each document presents recommended criteria for causal parameters (total phosphorus and total nitrogen) and response variables (chlorophyll and some for some form of turbidity).

These criteria are referred to as Section 304(a) criteria, because they were developed by EPA under Section 304(a)(1) of the Clean Water Act (CWA), which directs EPA to publish recommended criteria for water quality accurately reflecting the latest scientific knowledge, and under Section 304(b)(2) of the CWA, which directs EPA to develop and publish information on the factors necessary to "restore and maintain the chemical, physical and biological integrity of the Nation's waters, including the protection and propagation of shellfish, fish and wildlife, the protection of recreational activities in and on the water, and the measurement and classification of water quality." Section 304(a) criteria are required to be based solely on data and scientific judgments, and do not have to take into consideration the economic impacts or the technological feasibility of meeting any specific level of water quality in ambient water. However, because EPA has utilized a flawed scientific approach, they may be imposing unnecessary economic burdens and establishing criteria that are technically infeasible.

The recommended criteria are not regulations and do not represent legally binding recommendations to the States and Tribes. However, when EPA publishes criteria, the States and Tribes are given a schedule for adoption of the criteria into their water quality standards. In

this case, the deadline for States and Tribes to incorporate the nutrient criteria into their water quality standards is 2004. In those instances where such action has not been taken by a State or Tribe, EPA has the authority to promulgate water quality standards for them as authorized under Section 303(c) of the Clean Water Act.

Because the criteria are not regulations, EPA did not ask for public comment on the criteria documents themselves. Instead, EPA issued a notice of availability of the nutrient criteria documents on January 9, 2001, along with a statement that EPA would accept any scientific information received within 90 days of the publication of the notice.

Proposed Solution (Both the fix and the procedure to fix it): EPA should withdraw the 26 Ecoregional Nutrient Criteria Documents (contained in the two separate *Federal* ***Register*** publications), subject the Documents to an open public review process, and suspend the schedule for States and Tribes to adopt water quality standards for nutrients until further notice. There are two primary reasons for this action.

First, under OMB's new Information Quality Guidelines, EPA has disseminated information that violates both the "transparency" and "reproducibility" standards that must be met for "influential" information. For example, The raw data from which the summaries were developed was compiled within a database that was not available to the public, and once it was made available (nearly 9 months later), there was not enough detail about EPA's methodology to reproduce their results. The I7 Ecoregional Nutrient Criteria Documents describe the process through which numerical criteria were developed for total phosphorus, total nitrogen, chlorophyll a, and for turbidity or transparency (Secchi depth) and presents a series of tables in which data are summarized on a seasonal basis for an entire ecoregion and the associated subecoregions.

This issue was raised in both written comments and in statements made during public meetings held by EPA and in private meetings with EPA. EPA finally released a Nutrient Database in September 2001, more than nine months after disseminating the 17 Ecoregional Nutrient Criteria Documents. The Nutrient Database contains "converted legacy STORET data, NASQAN and NAWQA data, and other relevant nutrient data from universities and states/tribes." It is unclear whether or not the database contains only the information that was used to develop the nutrient criteria. In addition, the data reduction methods described in the criteria documents do not give sufficient detail for the public to understand exactly how data from the sources listed above were manipulated to get the summary statistics presented in the documents. In other words, the data reduction methods are not "transparent" to those who wish to reproduce the numerical criteria presented in the documents. To date, attempts by NAHB to reproduce the numerical nutrient criteria using the data in the Nutrient Database have not been successful.

Second, the scientific approach taken by EPA in the development of the 17 Ecoregional Nutrient Criteria is questionable, largely because the approach is solely a statistical approach that fails to link the numerical criteria to in-stream effects and designated uses. Unless this link is made, the criteria have questionable value in "restoring the chemical, physical and biological integrity of the Nation's waters." EPA would have benefited from an open public comment process for these documents.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.) If States use the numerical nutrient levels that **EPA** has developed to establish Water Quality Standards, storm water dischargers may be required to use a higher level of technology than those Best Management Practices (BMPs) currently being used to control the water quality of the storm water discharge. Unfortunately, there are limited data upon which to estimate how much it would cost to incorporate "water quality" Best Management Practices to "treat" storm water runoff from a home building site. However, one study, *The Economics of Stormwater BMPs in the Mid-Atlantic Region,* completed by the Center for Watershed Protection (www.cwp.org) examined the real cost of storm water controls to improve water quality and provides insight into these costs. Based on the information and assumptions in this study, NAHB estimates that BMPs of the type necessary to meet nutrient criteria would increase water quality expenses an average $800 to $1,000 per home. The homes' final sales price will be a multiple of these estimates because of carrying costs and other costs that are proportionate to the sales price, such as selling costs.

NAHB estimates that for every $1,000 increase in home prices, about 400,000 households fail to qualify to purchase a home and 20,000 home sales are lost per year. Furthermore, **an** increase in raw land prices results in a larger increase in the final sales price of a home because of carrying costs and other costs that are typically proportionate to the underlying land costs. Hence, an increase of $1,000 per lot will translate into $1,200 to $2,000 increase in home prices, which will cause 480,000 to 800,000 households to fail to qualify to purchase a home **and** will reduce annual housing sales by 24,000 to 40,000 units.

Issue: EPA's Stonnwater Phase II Regulations

Regulating Agency (including any sub-agency): U.S. Environmental Protection Agency

Citation (e.g., Federal Register): National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges (referred to the Storm Water Phase II Regulations), **64** *Federal Register* 68722-*6885* 1, December ***6,*** 1999

Authority (Statute or Legislative Rule): Clean Water Act, Section 402 (p)(5)

Description of the Problem (Harmful impact and on whom?): The justification of the regulation is based upon inadequate science.

The Storm Water Phase II regulations are required under Section 402(p)(5) of the Clean Water Act, which required EPA in consultation with the States to issue regulations for the designation of additional storm water discharges to protect water quality.

The United States Environmental Protection Agency (EPA) published the final rule of the Storm Water Phase II regulations in the *Federal Register* on December 8, 1999. The new regulation expanded the existing National Pollutant Discharge Elimination System storm water Phase I to address storm water discharges from small Municipal Separate Storm Sewer Systems and construction sites that disturb one to five acres. Storm water discharges from construction sites disturbing between one and five acres will have to have a permit no later than February 2003.

Instead of presenting convincing data upon which to justify the one-acre threshold for the Storm Water Phase II regulations, EPA makes assertions that are based upon "their beliefs" as is shown below.

> "EPA *believes* that the water quality impact from small construction sites is as high or higher than the impact from larger sits on a per acre basis. The concentration of pollutants in the runoff from smaller sites ***is*** *similar* to the concentrations in the runoff from **larger** sites." ***(Federal Register,*** December **8,** 1999, **p.** 68730; emphasis added.)

EPA's "beliefs" are based upon two studies, neither of which is national in scope. Further, both of the studies were funded by EPA and designed to support pre-determined conclusions. For example, the first small construction site study, generated in 1997 by Colorado State University associate professor Lee H. MacDonald, is unabashedly presented as a "Technical Justification for Regulating Construction Sites 1-5 Acres in Size." This unpublished, non-peer-reviewed, 23-page paper submitted to EPA concludes that small construction sites "can be" a significant source of water quality impairment. This is clearly not a conclusive scientific finding upon which to base a significant EPA regulation.

The second small construction site study used by EPA to justify regulating construction sites was conducted under a grant from EPA to the Dane County, Wisconsin Land Conservation Department, in cooperation with the USGS. This study was conducted by EPA "To confirm its belief that sediment yields from small construction sites are as high as or higher than the 20 to

150 tons/acre/year measured from larger sites." (*Federal Register*, December 8, 1999, p. 68730) EPA's own words illustrate the bias of the Dane County study. That is, they laid out their findings before they even conducted the study. In addition, the final report of this critical study appeared in final form as a four-page **U.S.** Geological Survey Fact Sheet in August 2000, a full eight months after publication of the final Phase II Rule.

Proposed Solution (Both the fix and the procedure to fix it): Phase II stormwater regulations should be rescinded until such time as EPA can provide adequate scientific justification for the regulation.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.) According to EPA, the estimated rule costs range from $847.6 million to $981.3 million annually. EPA also estimated that the rule would add $2,143 to a one-acre construction site; $5,535 to a three-acre site; and $9,646 to a five-acre site. NAHB's data show that the average lot size is 1/3 of an acre; thus based on EPA's data, the cost of a home would increase by a minimum of $620 based on 1998 dollars. NAHB estimates that for every $1,000 increase in home prices, about 400,000 households fail to qualify to purchase a home and 20,000 home sales are lost per year. Furthermore, an increase in raw land prices results in a larger increase in the final sales price of a home because of carrying costs and other costs that are typically proportionate to the underlying land costs. Hence, an increase of $1,000 per lot will translate into $1,200 to $2,000 increase in home prices, which will cause 480,000 to 800,000 households to fail to qualify to purchase a home and will reduce annual housing sales by 24,000 to 40,000 units.

Issue: EPA Guidance on Improving Air Quality Through Land Use Activities

Regulating Agency (including any sub-agency): Environmental Protection Agency (EPA), Office of Air & Radiation, Office of Transportation & Air Quality

Citation (e.g., Federal Register): EPA Publication 420-R-01-001, Improving Air Quality Through Land Use Activities. (This document is available on the EPA website at: http://www.epa.gov/otaq/transp/landguid.htm.

Authority (Statute or Legislative Rule): Section 131 (42 U.S.C.A. $7431) of the Clean Air Act.

Description of the Problem (Harmful impact and on whom?): EPA states in the Executive Summary of their policy document that it does not violate the prohibition on infringement of local governments land use authority:

> *This guidance document is a non-regulatory interpretation and clarification of EPA's policies and practices relating to treatment of land use activities and is consistent with Section 131 (42 U.S.C.A. $7431) of the Clean Air Act.*

NAHB disagrees with EPA's interpretation of Congress' strict prohibition on infringement of local land use authority. NAHB views EPA's guidance policy on land use as de facto regulation since it enables states to adopt restrictions on local land use in order to receive federal air quality credits from EPA needed to demonstrate compliance with the CAA. Further, NAHB is concerned that if a state adopted regulatory restrictions on land use under their state implementation plan (SIP), as allowed under EPA's guidance, those land use restrictions would be federally enforceable as required under the CAA. NAHB believes EPA lacks any authority under the CAA to issue a regulation or guidance that guidance creates a regulatory mechanism that could infringe or transfer authority over local land use authority from local governments to state or the federal government. The Act states this prohibition under 42 U.S.C.A. $7413

> *Nothing in this Act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use.*

This is an example of problematic agency guidance, as described by OMB in their draft report to Congress on the Costs and Benefits of Federal Regulations (draft Report to Congress). EPA has issued this guidance without statutory authority and without subjecting it to the notice and comment requirements of the Administrative Procedures Act. The issuance of this guidance is more akin to an agency rulemaking because the documents are likely to affect the substantive legal rights and obligations of the entities who are likely to be impacted by the implementation of the guidance. OMB rightly points out in its draft report to Congress that improperly issued agency guidance can be particularly problematic, especially where the guidance acts like a regulation, but has not gone through notice and comment rulemaking because. As OMB states, this can "undermine the lawfulness, quality, fairness, and political accountability of agency policymaking." We believe that EPA's Guidance on Improving Air Quality Through Land Use Activities meets this description of problematic agency guidance.

In this instance, EPA's guidance describes the various ways states or local governments can place controls on local land use to receive Federal air quality credits, which are needed to demonstrate compliance with the Clean Air Act. EPA's land use guidance assumes that land use controls will deliver regional air quality benefits. The agency's assumptions are based in large part on models of regional driving habits that purport to show that people in suburban areas drive more than those living in urban areas, and that this causes significantly greater air pollution. However, the Federal government's own data, collected by the Federal Highway Administration *(National Personal Transportation Survey*, U.S. Department of Transportation) demonstrates that suburban residents do not drive not significantly more than urban residents. Furthermore, because of urban traffic congestion, urban areas actually generate more air pollution than suburban areas. Depending on the types of land use control adopted by a state or local government (e.g., urban growth boundaries or building moratoria), the economic impact of EPA's guidance could be significant. For example, if a land use control adopted under EPA policy was to limit the issuing of building permits for single family homes their would be a direct impact on our members.

Under EPA's guidance, individual states may adopt land use controls to demonstrate compliance with the Clean Air Act. NAHB believes this is particularly problematic for two reasons. First, EPA will be compelled to enforce land use controls adopted by states by virtue of states placing these under their State Implementation Plans (SIPs) under the Clean Air Act despite Congress' clear prohibition on EPA or the states from removing authority over land use from local governments (see **42** U.S.C.A. §7431). Second, states desperate for air quality credits under the Clean Air Act might adopt land use controls without understanding the science relating land use to air quality. NAHB does not believe that "credible" science exists to demonstrate the link between these land use restrictions and air quality, and the public has been deprived the opportunity participate in the development of this policy or the opportunity to contrary information, consider possible alternatives, assess unintended consequences, and to judge the objectivity, quality, and reliability of the information used to develop **EPA's** guidance.

Proposed Solution (Both the fix and the procedure to fix it): Since EPA has no statutory authority to issue this guidance (and is indeed prohibited by statute from regulating in this area), they should take one of the following three actions. First **(and** most preferably), EPA should immediately withdraw the guidance from publication and seek statutory authority from Congress develop regulations in this area. This will allow Congress to fully consider the potential impacts of issuing guidance in this area and to fulfill their critical role in agency oversight. In the alternative, EPA should withdraw the guidance from publication and seek public comment on whether they have the statutory authority to issue guidance in this area. This will allow the public, and especially the small entities likely to be impacted by the guidance, the opportunity to comment on and influence the development of EPA policy in this area. Finally, at a minimum, EPA should withdraw the guidance from publication and publish it for notice and comment in its current form. This will at least allow the public to comment on the guidance and assess the potential impact of the guidance and provide input on its potential impacts.

It should also be noted that under EPA's current Public Participation Policy, the agency is committed to seeking maximum public involvement in the development of all significant policy

decisions and other actions likely to have a significant impact on the public. EPA has failed to meet these goals in the development and issuance of this guidance.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.): The economic impact on the home building industry will vary depending on the local land use controls adopted by states under EPA's guidance policy. If restrictions on future residential development are adopted under this policy the costs to the home building industry would be in the tens of billions of dollars. For example, currently there are one hundred and seven nonattainment areas under the CAA. According to **EPA,** the number of nonattainment areas are predicted to double over the next three years due to implementation of the new ozone and particulate matter standards. Beyond the sheer number of nonattainment areas it is important to point out each nonattainment area typically includes several counties. Atlanta's nonattainment area, for example, includes over fifteen counties, which under EPA's guidance could adopt different land use restrictions. This would have a massive impact on small business home builders and housing affordability. To get an idea of the potential economic impact on residential home buildersalone under this EPA guidance policy in 2001 Atlanta metropolitan area issued **48,430** single family building permits. That same year the median sales price for a single family home in Atlanta was $150,000. That means in Atlanta alone approximately $7.2 billion dollars of commerce could be impacted.

Issue: EPA's Policy on Water Submetering

Regulating Agency (including any sub-agency): U.S. Environmental Protection Agency (EPA), Office of Ground Water and Drinking Water

Citation (e.g., Federal Register): EPA has issued two memoranda establishing their policy on this subject:

1. Memorandum on Submetering Water Systems, Cynthia C. Dougherty, Director, Office of Ground Water and Drinking Water, to Water Division Directors, Regions I-X, March 13, 1999.
2. Memorandum on Submetering & Consecutive Water Systems, Beverly H. Banister, Acting Director, Water Management Division, EPA Region IV, June 1, 2000.

Authority (Statute or Legislative Rule): Section 1411 of the Safe Drinking Water Act, 42 U.S.C. 300f-300j-26. The relevant sections provides that:

> **Sec. 300g. [SDWA §1411]**
>
> **Coverage**
> Subject to sections 3OOg-4 and 3OOg-5 of this title, national primary drinking water regulations under this part shall apply to each public water system in each State; except that such regulations shall not apply to a public water system -
>
> > (1) which consist only of distribution and storage facilities (and does not have any collection and treatment facilities);
> > **(2)** which obtains all of its water from, but is not owned or operated by, a public water system to which such regulations apply;
> > (3) which does not sell water to any person; and
> > (4) which is not a carrier which conveys passengers in interstate commerce.

In addition, **Section 1401** of the Safe Drinking Water Act defines a "public water system":

> (4) The term "public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (A) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (B) any collection or pretreatment storage facility not under such control which are used primarily in connection with such system.

Description of the Problem (Harmful impact and on whom?): This is an example of problematic agency guidance, issued in the form of two policy guidance memoranda from EPA headquarters and EPA Region IV. EPA's memoranda says that multifamily property owners who submeter or separately bill their tenants for water are "selling" water under the Safe Drinking Water Act (SDWA). Under EPA's definition, these multifamily property owners become "public water systems"(PWS) subject to Federal drinking water regulation (if they install

15 or more submeters or have 25 or more tenants). We believe this is an incorrect interpretation of the **SDWA** and leads to unnecessary, burdensome, and duplicative regulation with little or no public health benefits. In addition, **EPA's** policy discourages water submetering and water utility allocation, both of which are proven tools for reducing water usage and promoting water conservation. This is particularly problematic at a time when water resources are becoming more scarce and sewer systems are being stretched to capacity.

Water submetering is a process where individual water meters are placed on each tenant units, usually after the master meter, so that individual tenants can be billed directly for the water they use. This differs from the traditional approach where water costs were included in a tenant's rent. The problem with the traditional approach is that there is no economic incentive for tenant's to conserve water or report water leaks. The billing process in a submetered system is conducted by the property owners or a billing company, who now commonly use wireless transmitters to report water volume use and to generate bills. Another billing method some properties use is known as a "ratio utility billing system" (or RUBS). Under RUBS, a mathematical formula (based on things like the number of faucets in a unit or the numbers of tenants residing in the unit) is used to calculate the amount of water to be allocated to each tenant unit. It is important to note that these multifamily properties do not collect, store, or treat the water that goes to their tenants in any way. They are simply allowing finished water from the parent water company to flow to tenants residing in their buildings. These multifamily owners have no ability to control the quality of the water they receive from the parent water company, and the parent companies are already subject to stringent water quality permitting, monitoring, and reporting requirements. In fact, **EPA** does not assert that submetering or using RUBS negatively affects water quality. Their policy is based solely on their interpretation of the statutory term to "sell" water under the SDWA.

Under the SDWA, program authority for drinking water is generally delegated by **EPA** to the states. In fact, some 49 states currently have delegated authority to run their drinking water programs. **EPA's** memoranda defining the term to "sell" water under the **SDWA** gives states some flexibility to modify permitting, monitoring, and reporting criteria, but does not allow the states to exempt multifamily properties outright. This has led to a severe controversy between **EPA** and several states in **EPA** Region IV. For example, Georgia and North Carolina have both passed legislation stating that multifamily **properties** who submeter are not "selling" water and are therefore exempt from the definition of a "public water system." This puts these states in direct conflict with **EPA's** policy memoranda and creates confusion about what multifamily property owners who submeter or use RUBS are required to do.

There is no dispute that water submetering promotes water conservation and should be encouraged as a matter of public policy. In fact, EPA's own website provides the following information to demonstrate how effective water submetering can be:

> **Submetering**
>
> In a New York City apartment building not using submeters, average daily water use ranged from 375 to **425** gallons per apartment per day. ***An*** apartment building in Washington, DC, that did use submetering was found to use from 90 to 160 gallons per apartment per day (Rathnau, 1991). **(http://www.epa.gov/OW/you/submeter.html.**

Similar conservation benefits from submetering and RUBS have been found in other studies as well. For example, a study by Koplow and Lownie' found that water use was reduced by 18-39 percent using submetering and 6-27 percent using RUBS. Those are substantial environmental benefits and should be promoted by EPA policies. Submetering of other utilities, such as gas and electric services, have been widely used for many years and the conservation benefits of billing tenants directly for these services is beyond controversy. These practices also allow tenants to control their costs by paying only for the utilities they use, not for what others use.

The problem with EPA's definition of the term to "sell" water under the SDWA stems from its misinterpretation of Congress' intent in defining public water systems under the SDWA. EPA's memoranda reference two items in the House Committee Report as the basis for their interpretation. The first states that:

> The Committee agrees with the letter received from the Environmental Protection Agency, provided in the Appendix, that the current statutory language provides States with the flexibility to avoid duplication of compliance activities. Further, the Committee encourages EPA to review its guidance on such matters to prevent duplicative or unnecessary regulations that do not further its public health and which could inhibit other goals which reduce the volume of finished water needed. House Committee Report on H.R. 3604 Report 104-632 Part I.

The other section of the House Report states that:

> Congress intends the primary drinking water regulations to apply to housing developments, motels, restaurants, trailer parks, and other business serving the public ***if the business in question maintains its own well or water supply and sell water."*** (emphasis added)

We believe these passages demonstrate that Congress sought two primary things. First, they wanted to be sure that states were given flexibility to avoid duplicative regulatory requirements. Second, they only sought to regulate entities that "maintains its own wells or water supplies" under the purview of the regulations. We believe that EPA has incorrectly focused on the "selling" aspect of this language when they should be focused on whether or not the entity maintains it own well or water supply. It is clear that multifamily properties that simply submeter or use RUBS are not maintaining a well or water supply.

Finally, it should be stressed that the multifamily properties we believe should be exempt from the definition of a "public water system" are those that submeter or use RUBS to allocate water costs to their tenants. These multifamily properties do not store, treat, or handle the water in any way and they have no ability to influence the quality of the water they receive from the parent water company. In addition, the parent water companies are already regulated and subject to stringent water quality permitting, monitoring, and reporting requirements. We are not suggesting that other entities, such as large campuses or installations that do maintain more water storage and treatment facilities should be subject to the same exemptions.

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[1] *Submetering, RUBS, and Water Conservation, Doug Koplow* and Alexi Lowni, Industrial Economics, Inc., 1999

Proposed Solution (Both the fix and the procedure to fix it):

EPA should revise its definition of the term to "sell" water under the SDWA so that multifamily property owners who submeter or use RUBS to separately bill their tenants for water are exempt from the definition of a PWS . We believe this is consistent with a correct reading of Congress' language contained in the SDWA. EPA's policy should focus on whether an entity "maintains its own wells or water supply," and not on whether it simply generates a tenant's bill for water. The key issue for EPA should be whether there are health risks associated with submetering or RUBS that necessitate governmental regulation. We are not aware that EPA is claiming any added health **risks** from the mere placement of a submeter or the generation of a tenant's bill, and promoting water submetering and utility allocation in multifamily properties is a valuable tool to encourage water and sewer conservation.

Since EPA issued its policy in the form of a guidance memorandum, they could simply issue new guidance establishing their new definition of the term to "sell" water under the SDWA. In the alternative, EPA should engage in public notice and comment on how to encourage water and sewer conservation, what impact submetering and utility allocation are likely to have, whether there are legitimate health concerns with these practices, and how regulatory burdens can be minimized. Finally, given the current controversy between EPA and several states on this issue, EPA should directly engage the states in this issue.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.): EPA's current definition of the term to "sell" water under the SDWA provides a disincentive to multifamily property owners to utilize water submetering and RUBS because EPA's policy treats these property owners as "public water systems" and brings them under the purview of Federal regulations. This subjects these property owners to permitting, reporting, and recordkeeping requirements despite the fact that they do not store, handle, or treat the water in any way, nor do they have the ability to control the quality of water they receive from the parent water company. We believe EPA's policy is misguided and should be changed to include a multifamily exemption. There are currently some 15 million multifamily properties in this country housing nearly 35 million residents. To date, only a small percent of these multifamily properties utilize water submetering and RUBS. Since studies show that potential water conservation from **water** submetering **and** RUBS can be as high **as** 25 to 40 percent, the potential environmental benefits are sizable. EPA's current policy imposes unnecessary, duplicative, and costly mandates on property owners and should be changed.

Issue: FWS's Survey Protocols for Endangered/Threatened Species

Regulating Agency (including any sub-agency): Fish and Wildlife Service (FWS), Department of Interior

Citation (e.g., Federal Register): The following publications are the subject of this issue:

1. *Bog Turtle Survey Protocol, Bog Turtle Recovery Plan,* dated May 15,2001. Issued by Region 5 FWS Office and Pennsylvania Field Office of FWS.

2. *Karst Feature Survey Protocols,* dated May 15,2000, *Terrestrial Karst Invertebrate Survey Protocols,* dated May 15,2000, and *FWS Recommendations for Karst Preserve Design,* dated May 18,2000. Issued by Region 2 FWS Office and Texas Field Office of FWS.

3. ***Quino*** *Checkerspot Butterfly Protocol,* dated January 25 **,** 1999. Issued by Region 1 FWS Office and California Field Office of FWS.

Authority (Statute or Legislative Rule): None in the Endangered Species Act.

Description of the Problem (Harmful impact and on whom?): FWS has recently created several "survey protocols" for species listed under the Endangered Species Act (ESA). One of the most contested survey protocols is for the Quino checkerspot butterfly. Other species with similar protocols include the karst invertebrates (cave bugs) in Texas, and the bog turtle in the northeast.

A survey protocol is a document requiring private landowners to conduct several surveys of their property for listed species or potential habitat of listed species. The requirements are extremely onerous and require a landowner to "disprove" the existence of a listed species by conducting these surveys on their property numerous times. In many cases the failure to find a species is not considered proof that it does not exist on the property, and the landowner can still be regulated under the ESA.

For example, the survey protocol for bog turtles requires that anytime wetlands are found in or adjacent to the project area, and those wetlands are **not** known to be bog turtle habitat but do contain certain vegetation, and direct or indirect effects to the wetland cannot be avoided, a bog turtle survey must be conducted. If the survey reveals that potential habitat exists, the landowner is required to either avoid all impacts to the wetland, or hire specialists (approved by FWS) to survey for bog turtles.

Surveys for bog turtles are only allowed during a short period of time (April 15 – June 15), with a minimum of **4** surveys per wetland to be conducted. Additionally, the amount of time spent conducting the surveys must be 3 to ***6*** person-hours per acre of wetland, per visit. With these restrictions, a landowner with 20 acres of wetland, spread over 3 separate sites, would be required to hire someone to conduct a minimum of ***36*** hours of survey within a two month period, while ensuring that the surveys are conducted at proper intervals as required by the protocol.

Even after all of these onerous requirements are met by the landowner at great expense of money and time, there are no limits set on how many times a landowner may be required to go through this process to "disprove" the existence of any bog turtles on the property. The guidelines merely state that "additional surveys" may be required if no bog turtles are found, but the property contains the type of habitat typical to those species. This could stretch the survey period to over a year or more.

Most of these survey protocols have been released from FWS in "draft" form, and have not been open to public notice and comment. Although they are "drafts," FWS often implements them as if they were regulations, threatening liability under the ESA if landowners do not comply. The bog turtle survey is one exception because it was released as part of the recovery plan for the species and thus was subject to notice and comment. However, in that case FWS has still begun to implement those requirements although the recovery plan has not been finalized.

These survey protocols violate both the ESA and the Administrative Procedures Act (APA) when they are enforced by FWS without first being subjected to public notice and comment. Additionally, the survey protocols violate the ESA by placing the burden on private landowners to "disprove" that a species exists on their property. The burden of proving a species existence lies with FWS. By restricting habitat modification on land where the FWS cannot establish the existence of a listed species, FWS is violating the ESA and Supreme Court interpretations of the "take" prohibitions of the ESA.

Proposed Solution (Both the fix and the procedure to fix it): The FWS should be required to issue every survey protocol to notice and comment as required under the Administrative Procedures Act. Landowners must be provided the opportunity to comment on procedures that FWS is requiring them to follow on their own property.

Furthermore, the FWS must remove any ambiguity and clarify that such protocols are guidance. The ESA does not provide FWS the authority to force landowners to conduct these surveys to disprove the existence of a species or habitat in order to not be regulated. The FWS can **only** provide these documents **as** guidance to landowners who are seeking assistance on ensuring they are not in **danger** of violating the **ESA** with potential actions.

FWS can amend each protocol to include language expressly stating that these protocols are not regulations or rules, and are therefore, non-binding. FWS must also reaffirm that the protocols are available for voluntary use by landowners in assisting them with avoiding violations of the ESA.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.): Survey protocols often require months, and sometimes years to fully complete to the satisfaction of FWS. In the meantime, the FWS will not provide approval for projects and the builder or developer is forced to sustain an economic loss in the meantime. Also, builders and developers can experience a problem with their other necessary local, state, and federal permits and approvals expiring in the time period that it takes to complete these surveys. The builder or developer must then expend more cost in fees and time spent in order to obtain those permits and approvals again, or have them extended.

Even after all of the onerous requirements of a survey protocol are met at great expense of money and time, there are no limits set on how many times a landowner may be required to go through this process to "disprove" the existence of any species or habitat on the property.

Additionally, FWS often releases a list of "approved" consultants to conduct the surveys. The list of approved consultants is often short and therefore substantial time delays are created in the process due to the backlog of surveys needed and the short time frame when surveys are allowed to be conducted. The consultants and the time delay caused by the requirements of the protocols can cost builders and developers thousands of dollars.

Issue: IRS's Technical Advice Memorandums (TAMs) for Low Income Housing Tax Credit

Regulating Agency (including any sub-agency): Internal Revenue Service (IRS)

Citation (e.g., Federal Register): IRS's Technical Advice Memorandums (TAMs) for Low Income Housing Tax Credit, Numbers: 200043015; 200043016; 200043017; 200044004; and, 200044005, each dated July 14,2000.

Authority (Statute or Legislative Rule): Internal Revenue Code, Section 42

Description of the Problem (Harmful impact and on whom?): IRS should issue clarifying guidance on the question of what is includible in the eligible basis for the low-income housing tax credit under Section 42 of the Internal Revenue Code. On October 27, 2000, the Internal Revenue Service released five Technical Advice Memorandums ("TAMs") that attempt to set forth standards for determining what costs are includible in eligible basis for purposes of calculating the low-income housing tax credit. TAMs are not official guidance, reviewed by the Treasury Department, but merely IRS legal opinions provided to an IRS agent during an audit. However, in the absence of official guidance or regulations, the IRS has requested that the State Housing Finance Agencies ("HFAs") use these TAMs as a basis for issuing tax credits. As a result, the entire low-income housing tax credit industry is negatively impacted by these TAMs because they were not given the opportunity to comment on this unofficial guidance but have been required to follow it, despite the fact that the IRS says TAMs only apply to one taxpayer. In this case, hundreds of taxpayers are negatively impacted by five TAMs that take aggressive positions aimed at reducing the eligible basis which lowers the amount of tax credits or equity financing a project receives. These TAMs have the effect of reducing credits for many projects by 25% or more, reducing the prices paid for the credits and reducing the quality of affordable housing.

Proposed Solution (Both the fix and the procedure to fix it): The issue of impact fees incurred in connection with the construction of residential rental buildings was selected for last year's IRS guidance list and resulted in Internal Revenue Ruling 2002-9 that was published on March 11,2002 clarifying this matter. This type of revenue ruling was issued regarding one of the **TAMs** and is needed for the remaining four issues that are of major concern to the industry. The TAMs are 200043015,200043016,200043017,200044004,200044005. The four remaining issues that need guidance are site preparation costs, reasonable development fees, professional fees relating to basis items and construction financing costs. It is our belief that all of these costs should be incluable in tax credit eligible basis. However, these issues should be addressed through IRS guidance because no IRS regulations, rulings or guidance exists. This would eliminate confusing unofficial guidance and help numerous taxpayers that need IRS direction. NAHB has proposed a legislative solution H.R. 3224 and S. 2006 in Congress which is estimated to cost $520 million over 10 years.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.): The economic result of the positions taken in the TAMs reduce the level of equity financing available for each project making a large number of affordable housing properties financially infeasible. The loss of equity affects properties that serve the lowest income tenants, provide higher levels of service or operate in high costs areas. The TAMs also

have created uncertainty among investors about whether the credits for which they have paid will be realized. The TAMs, therefore, reduce the amount which investors will be willing to contribute per dollar of tax credit. The loss of efficiency hurts both low-income tenants and the Federal taxpayer, by further reducing the amount of housing that can be produced from a given amount of tax credits. Annually, over a thousand developments are allocated tax credits and potentially all of these developments are negatively impacted by the TAMs in the form of less equity, lower tax credit prices and an enormous administrative tax credit compliance burden.

Issue: Mortgage Revenue Bond Purchase Price Limits

Regulating Agency (including any sub-agency): Internal Revenue Service (IRS)

Authority (Statute or Legislative Rule): 26 USC 143(e)

Description of the Problem (Harmful impact and on whom?):

This is a request for the Internal Revenue Service (IRS) to take a regulatory action to update the purchase price limits for homes purchased through state housing finance agency programs using mortgage revenue bonds. As indicated below, these limits have not been updated since 1994, although housing prices have risen dramatically since then.

The mortgage revenue bond (MRB) program, which is administered by state housing finance agencies (HFAs), has played a pivotal role in fueling the rise of the national homeownership rate to an all-time high by providing financing for over two million homes for lower-income first-time homebuyers. However, the purchase price limits permitted under the mortgage revenue bond program have not been updated since 1994, although housing prices have risen dramatically since then. This disparity between MRB purchase price limits and actual home prices prevents lower-income households from finding suitable homes and severely constrains HFAs' abilities to meet their states' homeownership needs.

Backmound and Status

The MRB program provides below-market rate mortgages to first-time homebuyers whose incomes are at or below 115 percent of area median income. Home prices are limited to no more than 90 percent of the average purchase price of the homes within the statistical area in which the home is located. Statistical areas are defined as metropolitan statistical areas and any county or portion of a county that is not within a metropolitan statistical area. The purchase price limit may be as high as 110 percent of average purchase price in predominately low-income and economically distressed targeted areas. The statute specifies separate MRB purchase price limits for new and existing homes. States may issue MRBs and provide mortgages to income-eligible first-time homebuyers relying on the average area purchase price "safe harbor" limitations published by the IRS.

The IRS has not issued new price limits since August 1994. The IRS is required to publish "safe harbor" limits each year. The IRS was using data supplied by the U.S. Department of Housing and Urban Development (HUD). The IRS became dissatisfied with the HUD data because it did not include homes financed with government-backed loans, which tend to have lower prices than homes financed with conventional mortgages. Also, the IRS felt the HUD data showed too much year-to-year volatility. HUD initially attempted to correct the data shortcomings, but has since abandoned the effort.

If an **HFA** chooses not to use the IRS's safe harbor purchase price limits, the regulations allow it to use a different limit if the HFA has more accurate and comprehensive data for the statistical area. HFAs that use their own data to determine the average purchase price limits typically obtain an opinion from their bond counsel as to whether they are in compliance with IRS rules.

The HFA may then notify the IRS that it is publishing its own purchase price limits, but no further permission from the IRS is required for the state to publish its own limits. While there has been at least one instance where a state HFA has requested and received private a letter ruling from the IRS, such rulings are not required.

About 30 of the 49 HFAs have established their own limits. Some other HFAs have published limits for only certain areas of their state, because their source of home price data is not comprehensive enough to cover small geographic areas. Other states have been unable to develop this kind of data because of the lack of reliable data sources in their states and because of the expense and time involved in trying to develop and maintain such a database.

Proposed Solution (Both the fix and the procedure to fix it):

NAHB has been working with a coalition of groups (Mortgage Bankers Association of America, National Association of Realtors, National Council of State Housing Agencies) on this issue since 1996. Initially, attempts were made to work with the IRS and HUD to overcome the data issues. The coalition requested assistance from the IRS and HUD to resolve this problem. In April of 1998, a letter was sent to then-Treasury Secretary Robert Rubin asking for the quick release of new housing price limits for the mortgage revenue bond program and offered assistance in working with the IRS and HUD to resolve the data collection methodology issue. Follow-up meetings were conducted, including a large meeting of industry participants and staff from HUD, IRS, and the Federal Housing Finance Board. As time went on, both the IRS and HUD lost staff responsible for conducting the data compilation and analysis, and HUD eventually dismantled the staff team that was used to prepare the data.

Industry groups agreed it was time to turn to a legislative solution to the problem. A precedent for repeal of the purchase price limits had been set when in 1998 Congress repealed the statutory purchase price limit on the homes that can be financed under the Rural Housing Service single-family mortgage guarantee program. Congress recognized that income limits effectively made purchase price limits unnecessary.

H.R.951 and S.677 were introduced on March 8,2001, and April 2,2001, respectively. The bills modify the purchase price limit under the MRB program by giving states the ability to use 90 percent of the average purchase price applicable to the residence or to use 3.5 times the applicable median family income as a price limit. The bills currently have **284** sponsors in the House and **54** in the Senate.

Outlook for passage of the bills this year is uncertain. Because the MRB program is tax-related, the new legislation has to be attached to a tax bill. There are several possible tax vehicles, including several bills that have not yet been introduced -- a new minimum wage bill; the so-called "charitable choice" bill; or a bill to reauthorize the Temporary Assistance to Needy Families (TANF) program. Discussions are underway with one of the co-sponsors of the charitable choice bill about the possibility of including the provisions of H.R. 951 and S. 677 in the bill.

The Joint Committee on Taxation estimates that the purchase price limit change will cost $439 million over ten years, another hurdle to passage of the bill because of the demands on the federal budget to fight the war on terrorism and improve Homeland security.

NAHB strongly supports the MRB program and is committed to obtaining regulatory or legislative changes to prevent out-of-date purchase price limits from restricting the program. We will continue to push for legislative changes that eliminate redundant price limits. However, it is uncertain whether additional tax legislation will be passed in the near future.

On April 25,2002, NAHB met with staff of the Treasury Department and the Internal Revenue Service to urge them to immediately increase the MRB purchase price limits published in 1994 by 30 percent, except for those areas where a state's interim adjustments have increased the purchase price limit more than 30 percent since 1994. We request that they now take this action, as required by law.

NAHB also urged the Treasury/IRS to work with other government agencies, such as HUD and the Federal Housing Finance Board, to gather the data that is needed to conduct an ongoing review of home purchase prices, and for the IRS to make annual adjustments in mortgage revenue bond purchase price limits as required by law.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.):

The NAHB Housing Policy staff is undertaking a study to determine the economic impact of the IRS' inaction with regard to mortgage revenue bond purchase price limits. We will provide this information upon completion.

Issue: OSHA's Multi-Employer Citation Policy

Regulating Agency (including any sub-agency): Occupational Safety and Health Administration (OSHA), U.S. Department of Labor

Citation (e.g., Federal Register): OSHA Directive CPL 2-0.124, Multi-Employer Citation Policy, Effective December 10, 1999.

Authority (Statute or Legislative Rule): OSHA purports to rely on the Occupational Safety and Health Act of 1970 (OSH Act) as the authority to issue this guidance. However, provisions of the OSH Act make it clear that OSHA does not have the statutory authority to issue this guidance.

Description of the Problem (Harmful impact and on whom?): This is an example of problematic agency guidance, as described by OMB in their draft report to Congress on the Costs and Benefits of Federal Regulations. OSHA has issued this guidance without statutory authority and without subjecting it to the notice and comment requirements of the Administrative Procedures Act. The issuance of this guidance is more akin to an agency rulemaking because the documents are likely to affect the substantive legal rights and obligations of the entities who are likely to be impacted by the implementation of the guidance. OMB rightly points out in its draft report to Congress that improperly issued agency guidance can be particularly problematic, especially where the guidance acts like a regulation, but has not gone through notice and comment rulemaking because. As OMB states, this can "undermine the lawfulness, quality, fairness, and political accountability of agency policymaking." We believe that OSHA's Multi-Employer Citation Policy meets this description of problematic agency guidance.

In this instance, OSHA's Multi-Employer Citation Policy allows the agency *to* issue citations to more than one employer, usually both the general contractor and independent subcontractor, for the same condition that violates an OSHA standard. OSHA's policy is based on the theory that the general contractor "controls", or has general supervisory authority over, the work site and is therefore responsible for all violations that occur there. In other words, since the general contractor has the authority to require an independent subcontractor to comply with the building plans and other specifications, the general contractor must also **inspect** for OSHA violations and ensure that an independent subcontractor complies with OSHA standards. This OSHA policy amounts, in effect, to a general duty by the general contractor to "police" the work site.

However, the imposition of this legal obligation by OSHA is beyond the statutory authority of the agency for the following reasons. First, the OSH Act does not impose this duty on a general contractor to ensure an independent subcontractor's compliance with OSHA regulations. The OSH Act itself provides that employers are responsible for the safety of their ***own employees.*** This is clearly spelled out in the OSH Act's general duty clause, which provides that liability under the OSH Act is based on the employer-employee relationship. Section 5, Duties, provides that:

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Based on the legislative history of the OSH Act, Congress made it clear that they intended to make employers responsible for the health and safety of their ***own employees*** only. Thus, the OSH Act imposes a general duty on each employer to furnish a safe workplace to each of his ***own employees,*** and the employer's duty to comply with specific standards is likewise limited to his ***own employees.*** Thus, OSHA has no authority to extend the statutory coverage of the OSH Act beyond the congressional mandate.

Additionally, Congress also made it clear that limiting an employer's liability under the OSH Act to ones ***own*** employees was not an oversight. In at least two other statutes passed around the same time as the OSH Act, Congress specifically extended the liability of the employer beyond the employment relationship. Both the Federal Coal Mine Safety and Health Act of 1969, which does not impose liability on employers but, rather, on mine operators and the National Labor Relations Act, which defines the term employee "shall include any employee, and shall not be limited to the employees of a particular employer unless specifically stated otherwise" demonstrate Congresses specific mandate.

Second, OSHA's Multi-Employer Citation Policy impermissibly expands the common law liability of general contractors in violation of the OSH Act. Section 4(b)(4) of the Act, provides that:

> "Nothing in this Act shall be construed . . . to enlarge . . . or affect in any other manner the common law . . . rights, duties or liabilities of employers and employees . . . with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.''

In order to avoid being cited under OSHA's Multi-Employer Citation Policy, a general contractor must engage in activities it would otherwise not be legally required to do, and this impermissibly expands the liability of the general contractor in violation of the OSH Act. This might include being forced to inspect the job site to detect an independent subcontractors' safety violations and must compel independent subcontractors to correct any violations detected, to the point of terminating the independent subcontractor's contract if necessary. OSHA's Multi-Employer Citation Policy also upsets the common law and contractual rights and duties of all the other parties in the construction process.

Conformity with OSHA's Multi-Employer Citation Policy enlarges the general contractor's common law liability. It is well established that a general contractor has no common law duty to oversee the safety of an independent subcontractors' employees. However, if a general contractor assumes responsibility for an independent subcontractors' compliance with OSHA, in

order to avoid citation under OSHA's Multi-Employer Citation Policy, this creates a common law duty of care to employees of an independent subcontractors that the general contractor does not otherwise have. Once the general contractor creates this duty of care, employees of the independent subcontractors are entitled to rely on the general contractor to ensure that their own subcontractor/employer complies with OSHA regulations. Then, if the independent subcontractor does not comply with OSHA regulations and the independent subcontractor's employee is injured as a result, the employee can bring a civil tort action against the general contractor for not fulfilling the duty of care that the general contractor created by assuming responsibility for the independent subcontractor's compliance.

Furthermore, OSHA's Multi-Employer Citation Policy upsets the common law rights and duties of the other parties in the construction process. For instance, in order to avoid citation for an independent subcontractor's violation of an OSHA standard, a general contractor must take whatever action is necessary to compel the subcontractor to correct the violation, even if that means withholding payment or terminating the subcontractor. Since the entire commercial setting is based on a series of intertwined and dependent relationship of independent subcontractors, sureties, supplier, and the like, OSHA's Policy has the effect of tearing apart a whole series of common law and contractual relationships and duties. A general contractor could never project with any certainty what its costs or liabilities might be. This clearly disrupts the common law rights and duties of the other parties in the construction process and violated the provisions of the OSH Act.

Third, OSHA's Multi-Employer Citation Policy has never been promulgated as a formal rule and is therefore unenforceable, null, and void. As indicated above, the OSH Act provides that "each employer shall furnish to each of ***his employees*** employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to ***his employees"*** (emphasis added). However, OSHA's Multi-Employer Citation Policy is being used to hold employers liable for the violations of someone else's employees. Regardless of whether there is any basis in OSHA's statutory authority to adopt such a policy, OSHA's policy is in reality a regulation that can only be effectuated by notice and comment rulemaking under the Administrative Procedure Act (APA). Since OSHA has not engaged in the requisite legal requirements to promulgate a rule, the Multi-Employer Citation Policy is unlawful, null, and void.

OSHA's Multi-Employer Citation Policy was issued as "Compliance Directive CPL 2-0.124" in 1999, and is part of OSHA's Field Inspection Reference Manual (FIRM). The policy and Manual are used by OSHA inspectors to cite general contractors and therefore clearly impacts their substantive legal rights. Because of this, it clearly is intended to have current binding and future effect. This makes it a rule. In addition, it is now well established that OSHA's Manual does not have the force of law.

In addition, OSHA's current Policy is a change from its previous policy, and this change was never been effectuated by notice and comment rulemaking. The reason is that OSHA's current Policy is a change from its previous policy and that change has a substantial impact on those regulated. Where a change in policy -- even an informal, internal policy -- has a substantial impact on regulated employers, such a change can only be effectuated by formal notice and comment rulemaking. Since OSHA has not promulgated its current Multi-Employer Citation

Policy under the notice and comment rulemaking provisions of the APA, that Policy is invalid as a matter of law and cannot be the basis for a citation

Proposed Solution (Both the fix and the procedure to fix it): Since OSHA does not have statutory authority to issue this problematic guidance (and indeed is prohibited by statute from regulating in this area), OSHA should take the following actions. First, OSHA should immediately suspend enforcement of the Multi-Employer Citation Policy and withdraw the guidance from publication. Second, OSHA should seek statutory authority from Congress to adopt such a rule. This will allow Congress to fully consider the potential impacts of issuing guidance in this area and will fulfill their critical role in agency oversight. Third, OSHA should conduct notice and comment on whether or not it has the statutory authority to enforce such a rule. This will allow the public, and especially small businesses likely to be impacted by the rule, the opportunity to comment on the development of such a rule. Lastly, assuming OSHA has the authority adopt and enforce such a rule, the rule should be promulgated in accordance with notice and comment rulemaking under the Administrative Procedures Act. This will at least allow the public to comment on the rule by assessing the potential impacts of a rule and providing input on the costs and benefits of a rule.

Estimate of Economic Impact (Quantified benefit and cost if possible. Qualitative description if needed.): The economic impact to Multi-Employer Citation Policy the construction industry is substantial. If OSHA continues to require general contractors to inspect for **OSHA** violations and ensure that independent subcontractors comply with OSHA standards, it will lead to significant increases in the cost of construction for hiring additional safety personal to perform redundant functions. This cost could be in the millions of dollars, without any added benefits. However, since this policy has not undergone the scrutiny of the regulatory process, including public notice and comment, there are no data as to its specific costs and benefits. Additionally, **OSHA's** enforcement of the Multi-Employer Citation Policy has also led to severe, duplicative penalties for a single violation of an OSHA regulation.
Issue: OSHA's Interim Final Lead in Construction Standard

Regulating Agency (including any sub-agency): Occupational Safety and Health Administration (OSHA), U.S. Department of Labor

Citation (e.g., Federal Register): 29 CFR 1926.62 (originally published at *57 Federal Register* 26627, May 4, 1993

Authority (Statute or Legislative Rule): Title X, Subtitle C, Sections 1031 and 1032, of the Housing and Community Development Act of 1992 (42 U.S.C. 4853) (commonly referred to as the Residential Lead-Based Paint Hazard Reduction Act of the 1992)

Description of the Problem (Harmful impact and on whom?): This is an example of an agency regulation in need of reform or revision, as described by OMB in their draft report to Congress on the Costs and Benefits of Federal Regulations. Title X required OSHA to issue, within 180 days of enactment, a comprehensive standard covering exposures to lead in the construction industry. In 1993, OSHA issued the Interim Final Lead in Construction Standard. We believe that this standard should be revised and **we** are requesting that **OSHA** finalize a permanent standard by reopening the rulemaking and seeking input from the community

impacted by the regulation. This standard was promulgated without fully considering exposure data for specific residential construction and remodeling activities, nor were the impacts to small businesses, specifically residential remodelers and renovators, assessed. Little or no public input was provided during the development of the Lead in Construction Standard.

OSHA's Lead in Construction Standard is problematic to the residential construction industry for the following reasons. First, the Lead in Construction Standard applies to residential structures where no lead-based paint exists. The Consumer Product Safety Commission banned the use of lead-based paint in homes in 1977, which means that there is no lead-based paint in homes and apartments built after 1978. Additionally, the use of lead-based paint in residential structures began to decline by the 1950's. Although homes constructed after 1978 contain no lead-based paint, anyone engaged in residential remodeling activities is still required to comply with the Lead in Construction Standard.

Second, OSHA has not considered all recent available data. During the promulgation of the Interim Final Lead in Construction Standard, little information was available to document actual worker exposures during specific types of activities that are commonly performed during renovation and remodeling of residential structures. Early on, OSHA realized that there was insufficient information to resolve issues raised about the applicability of a lead standard to the entire construction industry. The preamble to the Lead in Construction Standard indicated that OSHA recognizes that "the limited amount of firm data available at the time of promulgation of [the lead in construction] standard" and that OSHA intends to consider further data "in a forthcoming rulemaking on a permanent final rule for lead exposures in the construction industry." Specifically for residential construction, OSHA notes that "...although lead exposures associated with remodeling project types are generally low, [only] 5 percent of residential remodeling jobs involving lead exposure are expected to be exposed over the [acceptable level]."

The majority of exposure data focused on intentional abatement activities or removal of lead based-paint in residential structures, rather than focusing on exposures during typical residential remodeling activities involving lead based paint. Based on recent available data, the requirements of the current Lead in Construction Standard are exceedingly stringent when applied to small-scale residential remodeling activities, as opposed to intentional abatement activities.

Third, the impacts of the Lead in Construction Standard to small businesses were not considered. The current Interim Final Rule was intended to apply only until a final standard was promulgated. During the development and promulgation of the Interim Final Lead in Construction Standard, OSHA was not bound to follow any procedural requirements, including the notice and comment provisions of both the Administrative Procedures Act and the Occupational Safety and Health Act. Because OSHA was not required to follow any specific notice and comment procedures before issuing the Interim Final Lead in Construction Standard, input was not solicited from the community impacted by the regulation.

Proposed Solution (Both the fix and the procedure to fix it): First, because the used of lead-based paint has been prohibited for residential use since 1978, OSHA should immediately exempt from compliance with the Lead in Construction Standard, all residential remodeling

activities that are performed in homes built after that year. This can be accomplished through issuance of a standard interpretation letter.

Second, since this rule is an Interim Final Rule, OSHA should reopen the rulemaking process to finalize the Lead in Construction Standard. As an alternative, OSHA could develop a separate permanent final Lead in Construction Standard specific to residential construction and remodeling activities. In either situation, OSHA should seek public input and consider the views of affected parties as to the impacts of a final Lead in Construction Standard. In addition, this standard would be a good candidate for a regulatory "look back" as discussed in OMB's draft report to Congress. OSHA should perform a review of this standard as required by Section 610 of the Regulatory Flexibility Act and Section 5 of Executive Order 12866. The Lead in Construction Standard should be reviewed to determine if it has become unnecessary as a result of changed circumstances and take into account any significant economic impact this rule has on small employers.

Estimate of Economic Impact (Quantified benefit and cost if possible): Qualitative description if needed.): OSHA estimated, in the preamble to the Lead in Construction Standard, that the total annual recurring costs of the Lead in Construction Standard for residential remodeling activities would be $59,163,000. Because this rule was promulgated prior to the passage of the Small Business Regulatory Enforcement Fairness Act, the regulatory impacts on small businesses were not identified. Because the majority of businesses engaged in residential remodeling activities are small businesses, the impact of this regulation is substantial on this industry segment, with no significant effect on worker safety.

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Record Type: Record

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

cc:
Subject: Cost/Benefit of Regulations - FMLA Nominations

<<SHRMFMLANominationtoOMB2.doc>> <<spencer fane fmla analys.pdf>>

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SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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 1993 & 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 CFRpart 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.shrrn.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", SHRM strongly recommends the nomination of the Department of Labor's (DOL) Family and Medical Leave Act (FMLA) of 1993 regulations and interpretations for review and revision.[1]

11. **SHRM's Historic Involvement with FMLA Technical Corrections**

[1] 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.

As the leading association of the human resources profession, SHRM and its members who are charged with implementing the FMLA in large and small companies across the nation are vitally concerned with the proper application of the FMLA. 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.

III. 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 as well as court interpretations, the "medical" leave component of the FMLA has become increasingly complex to administer.

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

SHRM members who have testified in six hearings before Congress have established a solid public record for FMLA interpretive corrections. Each of these hearings has laid out an extensive record of the costs of the DOL's FMLA misapplications and the benefits to interpretive corrections.*

Additionally, two DOL studies and an SHRM survey all confirm that 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. The DOL report conducted by the prior Administration 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.[3]

The DOL studies and the SHRM survey clearly establish that the greatest cost of the FMLA interpretive problems is to employees themselves. For example, each 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. The FMLA interpretations also require little or no notice and employers have responded by requiring unscheduled overtime that is frequently unwelcome to coworkers.

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

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

V. Specific Nominations f FMLA Reform and d

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

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."[4] The DOL's current regulations are extremely expansive, defining the term "serious health condition" as including, among other things, any absence of more than 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 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)."

- 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."

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[4] H R REP. NO. 103-8, at p. 40 (1993).

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.[5] 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 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.

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

The issue of intermittent leave continues to be extremely difficult for human resources professionals. The SHRMB 2000 FMLA Survey found that 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.

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

[5] 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."

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

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, "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.

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

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.

Another issue of note regarding request for leave is the recent U.S. Supreme Court decision, *Ragsdale v. Wolverine WorldwideInc.*, 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. 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.

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

Regarding the *Ragsdale* decision, we believe it is prudent for the DOL to make the appropriate changes reflecting this decision. However, *Ragsdale* also provides the opportunity for DOL to look beyond the notice penalty and seriously consider additional and practical changes associated with these comments.

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

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).

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

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.

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.

Respectfully,

Deron Zeppelin, PHR
Director, Governmental Affairs

Enclosure:

Spencer Fane Britt & Browne LLP Survey: *Reported Court Cases in Which the Validity of an FMLA Regulation Has Been Challenged*

SPENCER FANE

BRITT & BROWNE LLP

ATTORNEYS & COUNSELORS AT LAW

REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED

Final Report
March 20,2002

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INTRODUCTION

In **1993,** Congress enacted the Family and Medical Leave Act of **1993,** Pub. L. No. **103-3, 107** Stat. **6,** codified at **29** U.S.C. **§ 2601,** et seq. and **5** U.S.C. **6381,** et seq. (the Act or the FMLA). The FMLA became effective on August **5,1993.** The Act requires covered employers to allow eligible employees twelve weeks of leave during a twelve-month period to attend to certain medical and family situations, including the birth of a child, the adoption or foster care of a child, and the need to care for one's self, spouse, child or parent with a serious health condition.

Section **2654** of the Act directs the Secretary of Labor to promulgate regulations "as are necessary to carry out" the provisions of the Act. The Secretary of Labor accordingly issued interim final regulations on June **4, 1993** (which became effective on August **5, 1993), 58** Fed. Reg. **31,812 (1993),** codified at **29** C.F.R. pt. **825,** and final regulations on January **6,1995** (which became effective on April **6, 1995), 60** Fed. Reg. **2237 (1995),** replacing the interim final regulations at **29** C.F.R. pt. **825.**

Over the past several years, courts have addressed the validity of these regulations in varying contexts. On March **19, 2002,** the U. **S.** Supreme Court issued its first decision under the FMLA. In that case, the Supreme Court held that the FMLA regulation in question was invalid. ***Ragsdale v. Wolverine Worldwide, Inc.,*** **122 S.** Ct. **1155 (2002).**

As a result of the Ragsdale decision, the law firm of Spencer Fane Britt & Browne LLP recently conducted a survey of all the court decisions reported by Westlaw® and/or LexisNexis™ involving challenges to the validity of the FMLA regulations. The survey covered both published and unpublished decisions reported as of March **20,2002.**

This report represents the results of that survey. The information in this report does not purport to reflect all lawsuits filed in which an FMLA regulation has been challenged or all court decisions involving challenges to the validity of the regulations. Instead, the information reflects only those lawsuits in which court decisions have been rendered and the decisions were reported by Westlaw® and/or LexisNexis™ as of March **20,2002.**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY ..... Page 1

LIST OF REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED ..... Page 10

TEXT OF CHALLENGED FMLA REGULATIONS ..... Page 24

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EXECUTIVE SUMMARY

- There have been ***58*** reported court decisions in which the validity of an FMLA regulation was challenged. All of the underlying cases were filed and the relevant decisions were made during the period of August **5,1993** (the effective date of the Act and the Interim Final Regulations) through March 20,2002.

- These **58** court decisions represent **57** different court cases. (There is one more court decision than the number of court cases because a district court issued two separate opinions addressing two separate challenges in the same underlying case.) In the situation where **a** lower court issued a reported decision which was subsequently appealed, and the reviewing appellate court also issued a reported decision, the lower court case and the appellate court case have been treated as two separate court cases. These ***58*** court decisions **(57** court cases) represent **52** different underlying cases.

- Of these ***58*** court decisions:

  (a) **51** included a ruling on the validity issue; and

  (b) **7** were decided on other grounds and did not include a ruling on the validity issue.

- Of the **51** court decisions in which there was a ruling on the validity issue:

  (a) **63% (32** decisions) held that the FMLA regulation in question was ***invalid;*** and

  (b) **37% (19** decisions) held that the FMLA regulation in question was ***valid.***

- Of the **51** court decisions in which there was a ruling on the validity issue, **4** of the decisions were overruled by the Supreme Court's decision in ***Ragsdale.*** When this factor is taken into account, it means that:

  - **71% (36** of **51** decisions) have held that the FMLA regulation in question was ***invalid or would have held it to be invalid*** if the case had been decided after ***Ragsdale.***

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ANALYSIS BY REGULATION CHALLENGED

- These 51 court decisions involved challenges to 11 different FMLA regulations:
  - § 825.110
  - § 825.207
  - § 825.301
  - § 825.305
  - 5825.111
  - § 825.208
  - § 825.302
  - § 825.700
  - 5825.114
  - 5825.220
  - § 825.303
- The 3 most frequently challenged regulations were:
  - § 825.208(c)
  - § 825.110(d)
  - § 825.700(a)
- Section 825. 08(c) (or a related portion of § 825.208) was the subject **af 23 of** the reported decisions:
  - (a) 67% (12 of 18 decisions in which the validity issue was decided) held the regulation to be ***invalid;***
  - **(b)** 33% (6 of 18 decisions in which the validity issue was decided) held the regulation to be ***valid;*** and
  - (c) 5 of the 23 cases were decided on other grounds and did not include a ruling on the validity issue.

Note: The ***Ragsdale*** decision involved a regulation similar (in part) to § 825.208(c). Consequently, the 6 decisions referenced above in which the regulation was found to be valid may now be questionable in light of ***Ragsdale.***

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- Section 825.110(d) was the subject of 16 of the reported decisions:

  (a) 93% (13 of 14 decisions in which the validity issue was decided) held the regulation to be ***invalid*;**

  (b) 7% (1 of 14 decisions in which the validity issue was decided) held the regulation to be ***valid;*** and

  (c) 2 of the 16 cases were decided on other grounds and did not include a ruling on the validity issue.

- Section 825.700(a) was the subject of 14 of the reported decisions:

  (a) **71%** (10 of 14 decisions in which the validity issue was decided) held the regulation to be ***invalid;*** and

  (b) 29% **(4** of 14 decisions in which the validity issue was decided) held the regulation to be ***valid.***

Note: Section 825.700(a) was the subject of the ***Ragsdale*** decision. In light of the Supreme Court's ruling that § 825.700(a) is invalid, the 4 decisions referenced above in which the regulation was held to be valid have now been overruled by ***Ragsdale.***

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ANALYSIS BY COURT AND GEOGRAPHIC AREA

- Of the 51 court decisions in which there was a ruling on the validity issue:
  - (a) 1 was decided by the U. S. Supreme Court;
  - (b) 17 were decided by Federal Courts of Appeal; and
  - (c) 33 were decided by Federal District Courts.
- Although reported state court decisions were surveyed, there were no state court decisions involving the validity of an FMLA regulation.
- At the Supreme Court level, the Court has only decided one case involving the validity of an FMLA regulation. The Court found the regulation **(§** 825.700(a)) to be ***invalid.***
- At the Federal Court of Appeals level (in which 17 decisions involved rulings on the validity issue):
  - (a) 9 of the 12 Circuits of the Court of Appeals (75%) have issued rulings on the validity issue; and
  - **(b)** 3 of the 12 Circuits of the Court of Appeals **(25%)** have not yet issued such a ruling (the **3rd,** 10th, and D.C. Circuits).
- Of the 17 Federal Court of Appeals decisions in which there has been a ruling on the validity issue:
  - (a) 59% (10 decisions) have held that the FMLA regulation in question was ***invalid;*** and
  - (b) 41% (7 decisions) have held that the FMLA regulation in question was ***valid***

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Of the **10** Federal Court of Appeals decisions holding the FMLA regulation in question ***invalid,***

(a) **4 of** the decisions **(1** each by the **5th** and **11th** Circuits; **2** by the **8th** Circuit) involved the same regulation held to be invalid in ***Ragsdale;*** and

(b) in all **4** decisions, that same regulation was held to be invalid.

- At the District Court level (in which **33** decisions have involved rulings on the validity issue):

(a) **25 of** the **94** District Courts **(27%)** have issued rulings on the validity issue; and

(b) **69** of the **94** District Courts **(73%)** have not yet issued such a ruling.

- Of the **33** District Court decisions in which there has been a ruling on the validity issue:

(a) **64% (21** decisions) have held that the FMLA regulation in question was ***invalid;*** and

(b) **36% (12** decisions) have held that the FMLA regulation in question was ***valid.***

- Of the **12** District Court decisions in which an FMLA regulation was held to be valid, **4** of the decisions were overruled by the Supreme Court's decision in ***Ragsdale.*** When this factor is taken into account, it means that:

  - **76% (25** of **33** decisions) have held that the FMLA regulation in question was ***invalid*** or ***would have held it to be invalid*** if the case had been decided after ***Ragsdale.***

- Of the **33** District Court decisions in which there has been a ruling on the validity issue:

(a) the underlying District Courts were located within **11** of the **12** Circuits of the Court of Appeals; and

(b) only **1** Circuit of the Court of Appeals (the D.C. Circuit) has had no District Court decision involving a ruling on the validity issue.

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► Of the 33 District Court decisions in which there has been a ruling on the validity issue:

(a) the underlying District Courts were located in **22** of the ***55*** U. S. states and territories **(40%);** and

(b) 33 of the ***55*** U. S. states and territories (60%) have not yet had a District Court decision involving the validity of an FMLA regulation.

Note: The U. S. states and territories include the **50** states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

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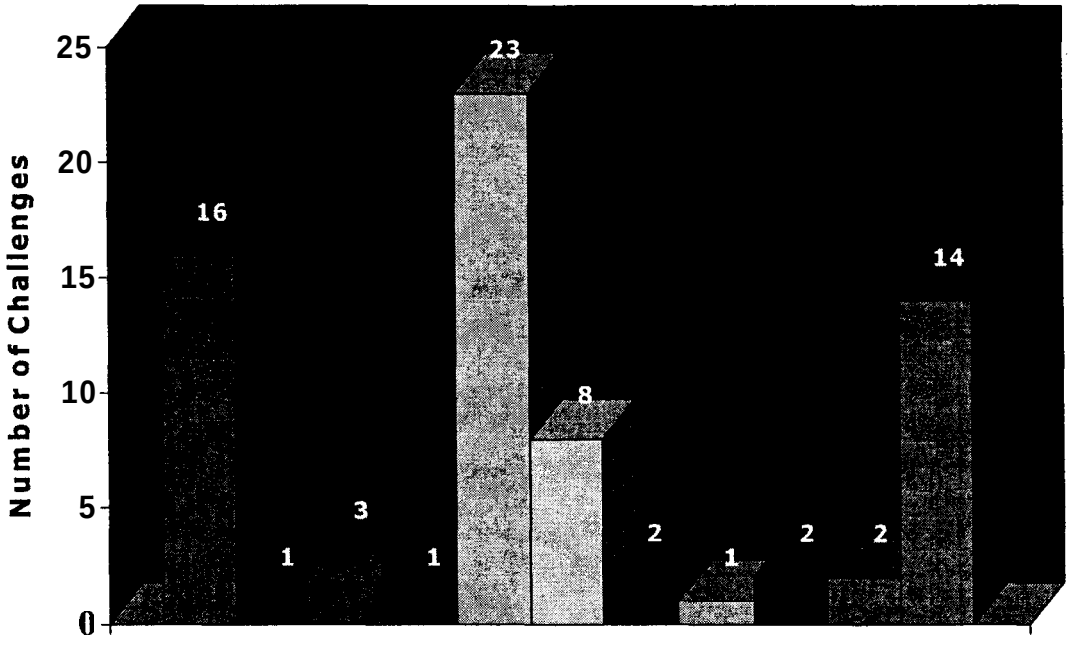
Regulations Challenged*



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Number of Cases Filed Each Year Involving Challenges*

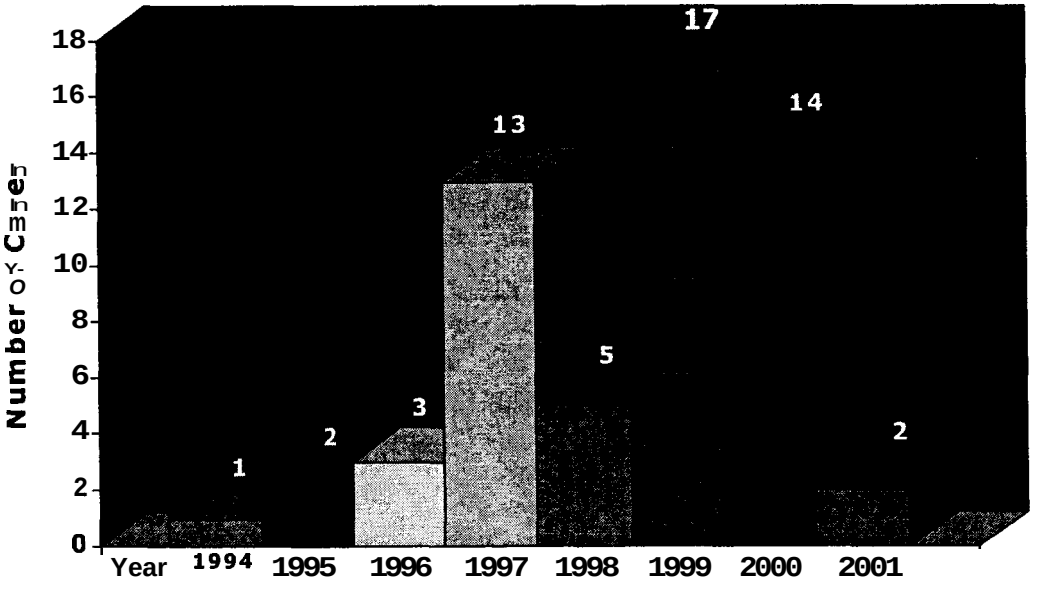

**Illustration is based solely on court decisions reported by Westlaw® and/or LexisNexis™ as of March 20, 2002. Where a court decision has been appealed, the appellate case has been treated as a separately filed case. There may be other cases filed in these years with decisionspending that are not represented*

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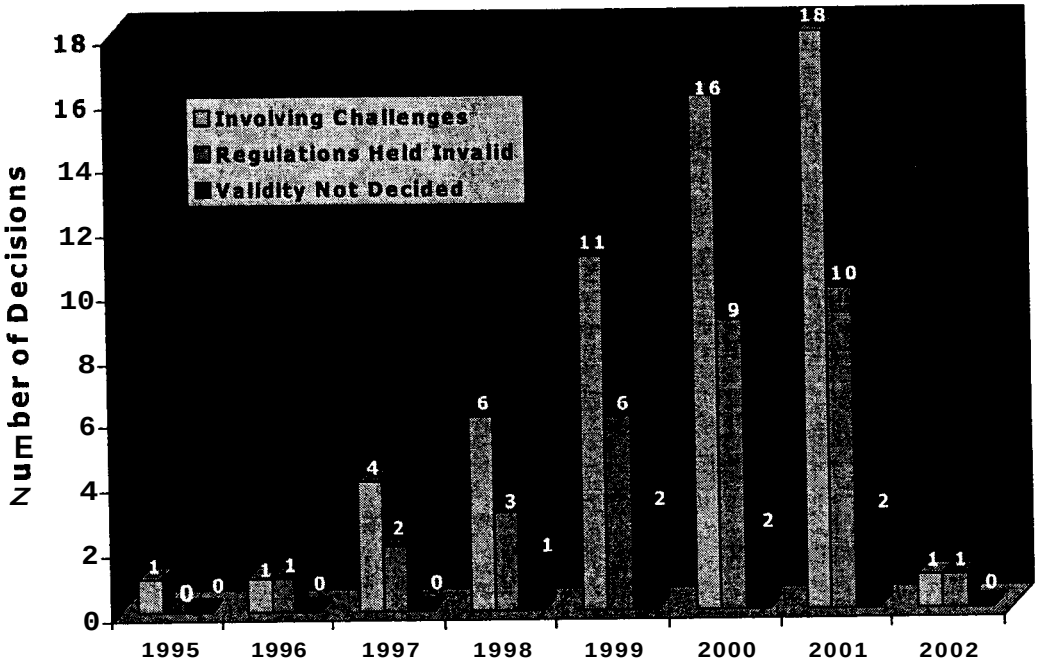
Court Decisions Involving Challenges By Year Decided"



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LIST OF REPORTED COURT CASES IN WHICH THE VALIDITY OF AN FMLA REGULATION HAS BEEN CHALLENGED

March 20,2002

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
				1995			
1	*Manuel v. Westlake* ***Polymers Corp.,*** 66 F.3d 758 (5th Cir. 1995)	1995	10/3/95	5th Cir.	825.302(c); 825.303(a) interim regulations	Valid.	Employee does not have to invoke the statute by name in order to invoke the protection of the statute.
				1996			
2	*Rich v.* ***Delta Air Lines,*** *Inc.*, 921 F. Supp. 767 (N.D. Ga. 1996)	1994	2/7/96	N.D. Ga.	825.700(a)	Invalid.	Regulation is invalid to the extent it authorizes a private cause of action under the statute to enforce the terms of an employment program or plan that provides more than the statutorily required twelve weeks leave.
				1997			
3	*Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997)	1996	2/19/97	E.D. Va.	825.110(d)	Invalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours for that employer within the immediately preceding twelve months.
4	***Dodgens v. Kent Manufacturing*** Co., 955 F. Supp. 560 (D. S.C. 1997)	1995	2/20/97	D. S.C.	825.220(b)	Valid.	Regulation (stating that the statute's prohibition against "interfering with" the exercise of employee's rights under the FMLA prohibits employers from violating the FMLA, refusing to authorize FMLA leave, discouraging employees from taking FMLA leave, and manipulating the work force to avoid responsibilities under the FMLA) is not plainly erroneous ***or*** inconsistent with the statute.
5	***Duckworth v. Pratt & Whitney,*** 980 F. Supp. 552 (D. Me. 1997) ***rev'd.*** 152 F.3d 1 (1st Cir. 1998)	1997	9/26/97	D. Me.	825.220(c)	Invalid.	Regulation (purporting to extend scope of FMLA's anti-discrimination protection to prospective employees) is contrary to the statute which provides a cause of action solely for employees and not for job applicants.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
6	*Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997)	1997	12/12/97	N.D. Ohio	825.110(d)	Valid.	Regulation constitutes a reasonable interpretation of the statute and defendant's failure to notify plaintiff that she was not eligible within two days of receiving her request for leave violated the regulation.
				1998			
7	*Cox v. Autozone, Inc.*, 990 F. Supp. 1369 (M.D. Ala. 1998), *affd, McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999)	1997	1/20/98	M.D. Ala.	825.208	Invalid.	Regulation (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is invalid to the extent that it entitles employee to more than twelve weeks of leave during a twelve month period.
8	*Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751 (D.	1997	1/20/98	D. Md.	825.110(d)	Invalid.	Followed *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997), which held that the regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours for that employer within the immediately preceding twelve months.
9	*Bluitt v. Eval Company of America, Inc.*, 3 F. Supp. 2d 761 (S.D. Tex. 1998)	1997	5/4/98	S.D. Tex.	825.220(d)	Valid.	Regulation (stating that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA") is a permissible construction of the statute.
10	*Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998)	1997	7/14/98	1st Cir.	825.220(c)	Valid.	Regulation (providing that employers may not take prospective employee's past use of FMLA leave into account in hiring decisions) is a permissible reading of the statute.
11	*Santrizos v. Aramark Corp.*, 1998 WL 704114 (N.D. Ill. Sept. 29, 1998)	1996	9/29/98	N.D. Ill.	825.110(d)	Validity not decided.	Court resolved the case on another issue, declining to take the significant step of rejecting 825.110(d).

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
12	*Dormeyer v. Comerica Bank-Illinois,* 1998 WL 729591 (N.D. Ill. Oct. 14, 1998), *aff'd.*, 223 F.3d 579 (7th Cir. 2000)	1996	10/14/98	N.D. Ill.	825.110(d)	Invalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours for that employer within the immediately preceding twelve months.
	1999						
13	*Toro v. Mastex Industries,* 32 F. Supp. 2d 25 (D. Mass. 1999)	1997	1/7/99	D. Mass.	825.303	Valid.	Regulation (providing that "when the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer **of** the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case") is not contrary to congressional intent.
14	*Covucci v. Service Merchandise* Co., *Inc.,* 178 F.3d 1294 (6th Cir. 1999)	1997	2/8/99	6th Cir.	825.208(a), (b) interim regulations	Invalid.	Technical violation of the interim regulation (requiring employer to designate leave as FMLA leave) did not deny plaintiff substantive rights under the statute and thus plaintiff is not entitled to an additional twelve weeks leave.
15	*Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F. Supp. 2d 878 (**S.D.** Miss. 1999)	1998	2/17/99	S.D. Miss.	825.208(c)	Valid.	Regulation (stating that employer who fails **to** designate leave as FMLA qualifying "may not designate **FMLA** leave retroactively" and "none **of** the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is based on a permissible construction **of** the statute.
16	*Henthorn v. Olsten Corp.,* 1999 WL 102764 (N.D. Ill. Feb. 24, 1999)	1997	2/24/99	N.D. Ill.	825.305(d)	Invalid.	Regulation (requiring that employer advise employee of the consequences **of** failing to comply with the statute's medical certification requirement) is invalid to the extent **it** relieves employee **of** the statutory obligation **to** provide such certification.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
17	*McQuain v. Ebner Furnaces, Inc.*, 55 F. Supp. 2d 763 (N.D. Ohio 1999)	1998	/17/99	].D. Ohio	825.110(d)	ıvalid.	Regulation (providing that employee who is otherwise not yet eligible for coverage will be deemed eligible if employer fails to advise employee of **FMLA** ineligibility within two days of receiving request for leave) is contrary to the plain language **of** the statute which clearly sets forth minimum requirements for eligibility.
18	*Covey v. Methodist Hospital of Dyersburg, Inc.*, 56 F. Supp. 2d 965 (W.D. Tenn. 1999)	1997	/25/99	Y.D. Tenn.	825.208(c); 825.700(a)	ıvalid.	Regulations (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as **FMLA** leave will result in none of the absence being counted as **FMLA** leave) are invalid to the extent they require employer to provide more than twelve weeks of leave during a twelve month period.
19	*McGregor v. Autozone, Inc.*, 180 F.3d 1305 (1 1th Cir. 1999)	1998	/14/99	1th Cir.	825.208(c); 825.700(a)	ivalid.	Regulations (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as **FMLA** leave will result in none of the absence being counted as **FMLA** leave) are invalid to the extent they require employer to provide more than twelve weeks **of** leave during a twelve month period.
20	*Donnellan v. New York City Transit Authority*, 1999 WL 527901 (S.D.N.Y. July 22, 1999)	1998	'/22/99	S.D.N.Y.	825.208 interim regulations	'alidity not ecided.	Court assumes regulation is valid and reads regulation as not redefining or expanding the substantive rights of the statute.
21	*Neal v. Children's Habilitation Center*, 1999 WL 706117 (N.D. Ill. Sept. 10, 1999)	1997	)/10/99	N.D. Ill.	825.208(a)	ivalid.	Regulation (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as **FMLA** leave will result in none of the absence being counted as **FMLA** leave) is manifestly contrary to the statute because it can result in employer being required to provide more than twelve weeks of leave during a twelve month period.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
22	***ongstreth v. Copple,*** 189 .R.D. 401 (N.D. Iowa 999)	1997	10/22/99	N.D. Iowa	825.208	V'alidity not decided.	Court refuses to modify its prior summary judgment decision in light of ***McGregor v. Autozone, Inc.***, 180 F.3d 1305 (11th Cir. 1999) (holding regulation invalid). Due to the split in authority regarding the validity of 825.208 and given the Eighth Circuit's recurrent application of the regulations as an interpretive guide, the court affirms its denial of summary judgment and allows plaintiff to proceed on her claim that defendant violated the notice provisions of the FMLA.
23	*Chan v. Loyola* ***University Medical Center,*** 1999 WL 1080372 (N.D. Ill. Nov. 23, 1999)	1997	1 1/23/99	N.D. Ill.	825.207(f); 825.208(a), (b)(1), (b)(2), (c); 825.301(b); 825.700(a)	V'alid.	Regulations reflect a reasonable accommodation of conflicting policies and fill in the gaps of the FMLA by prescribing what information employers must provide to employees and when and how they must provide it.
				2000			
24	*Schloer v.* ***Lucent Technologies, Inc.***, 2000 VL 128698 (D. Md. Jan. 21, 2000)	1999	1/2 1/00	D. Md.	825.208(c); 825.700(a)	Invalid.	Follows ***McGregor v. Autozone, Inc.***, 180 F.3d 1305 (11th Cir. 1999), as the dispositive rule that regulations (providing that employer's failure to notify employee that leave taken pursuant to company leave policy counts as FMLA leave will result in none of the absence being counted as FMLA leave) are invalid to the extent they require employer to provide more than twelve weeks of leave during a twelve month period.
25	*Thorson v.* ***Gemini, Inc.,*** 205 F.3d 370 (8th Cir. 2000), *cert.* ***denied,*** 531 U.S. 871 (2000).	1999	31/3/00	8th Cir.	825.114(a)(2)	Valid.	Congress has not directly spoken on the issue of what constitutes a "serious health condition" and regulation's objective test for what constitutes a "serious health condition" is a permissible construction of the statute.
26	*Dirham v.* ***Van Wert County Hospital***, 2000 WL 621139 (N.D. Ohio March 3,2000)	1999	31/3/00	N.D. Ohio	825.208	Validity not decided.	Court distinguishes ***McGregor v. Autozone, Inc.,*** 180 F.3d 1305 (11th Cir. 1999) (holding regulation invalid), and applies the regulation.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
21	*Curry v. Neumann,* 2000 WL 1763842 (S.D. Fla. Apr. 3,2000)	1998	'3100	.D. Fla.	25.301(b)(1), :); 825.305(a)	Invalid.	Regulations (requiring employers to provide employees with written notice of the consequences of failing to provide medical certification) are invalid to the extent they purport to prevent employers from taking adverse action against employees for failing to provide such certification.
28	***Plant v. Morton International, Inc.,*** 212 F.3d 929 (6th Cir. 2000)	1999	'12100	th Cir.	25.208(c)	Valid.	Statute is silent as to the notice employer must give before designating paid leave as FMLA leave and regulation (prohibiting employer from retroactively designating paid leave as FMLA leave) constitutes a reasonable understanding of the statute.
29	***Ragsdale v. Wolverine Worldwide, Inc.,*** 218F.3d 933 (8th Cir. 2000), *aff'd,* 122 S. Ct. 1155 (2002)	1999	'1 1/00	th Cir.	25.208(c); 25.700(a)	Invalid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are invalid to the extent they contradict the statute and require employer to provide more than twelve weeks of leave during a twelve month period.
30	*Dormeyer v. Comerica Bank-Illinois,* 223 F.3d 579 (7th Cir. 2000)	1999	124100	th Cir.	25.110(d)	Invalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it attempts to change the statute which clearly defines an eligible employee as one who has worked for the same employer for at least twelve months and who has worked at least 1250 hours for that employer within the immediately preceding twelve months.
31	*Bowden v. Bill Dodge Buick-GMC Truck, Inc.*, 2000 WL 1061226 (D. Me. July 28,2000)	1999	/28/00	). Me.	325.208	Validity not decided.	Court does not reach the issue of whether regulation (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is valid because a genuine issue of material fact exists as to whether plaintiff voluntarily resigned.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
32	***Schober v.*** *SMC* ***Pneumatics, Inc.***, 2000 WL 1231557 (S.D. Ind. Aug. 21, 2000) Please note that this decision arises from the same district court case as the decision reported on Row 39 of this chart.	1999	8/21/00	.D. Ind.	25.220(c)	'alid.	Regulation (prohibiting employer from discriminating against employee for having used FMLA leave) **is** based **on** a reasonable interpretation of the statute.
33	***Twyman v. Dilks***, 2000 WL 1277917 (E.D. Pa. Sept. **8,** 2000)	1999	9/8/00	.D. Pa.	25.208(c); 25.700(a)	nvalid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are inconsistent with the express language of the statute which provides that **an** employer must provide a total of twelve weeks leave during a twelve month period.
34	*Gadinski* **v. Shamokin Area Community Hospital,** 116 F. Supp. 2d 586 (M.D. Pa. *2000)*	1999	10/19/00	M.D. Pa.	325.208(a); 325.700(a)	'alid.	Regulations are valid where employer refuses to allow employee to return to work at the end of an agreed upon six-month leave; FMLA requires employer to return employee to previously held position after leave expires regardless of whether employer provides more leave than required by the statute and, where employer fails to do so, notice requirements and the consequences to employer for not providing notice will be enforced.
35	*Smith v. BellSouth Telecommunications International, Inc.*, 117 F. Supp. 2d 1213 (N.D. Ala. 2000), *rev'd*, 273 F.3d 1303 (11th Cir. 2001)	1999	10/24/00	N.D. Ala.	325.220(c)	nvalid.	Regulation (prohibiting discrimination against prospective employees on the basis of their use of FMLA leave) is inconsistent with the definition of employees provided by the statute.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
36	***Brungart v. BellSouth Telecommunications, Inc.***, 231 F.3d 791, ***cert. denied,*** (11th Cir. 2000)	1999	1/24/00	11th Cir.	825.110(d)	valid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid to the extent it extends the statute's eligibility provisions to cover employees who have not worked for the same employer for at least twelve months and who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
37	*Dolese v. Office Depot, Inc.*, 231 F.3d 202 (5th Cir. 2000)	2000	11/7/00	5th Cir.	825.700	invalid.	Regulation is invalid to the extent it authorizes a private cause of action under the statute to enforce the terms of an employment program **or** plan that provides more leave than the statutorily required twelve weeks.
38	***Scheidecker v. Awig Enterprises,*** 122 F. Supp. 2d 1031 (D. Minn. 2000)	1999	1/9/00	D. Minn.	825.110(d)	valid.	Regulation (prohibiting employer from later challenging employee's eligibility under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid to the extent it attempts to grant employees greater rights than those conferred **by** the statute.
39	***Schober v. SMC Pneumatics, Inc.***, 2000 WL 1911684 (S.D. Ind. Dec. **4,** 2000) Please note that this decision arises from the same district court case as the decision reported on Row 32 of this chart.	1999	2/4/00	S.D. Ind. S.D. Ind.	825.208(c); 825.208(a); 825.700(a)	Valid.	In deciding motion in ***limine*** to exclude evidence regarding employer's failure to designate time **as** FMLA leave, court determines that, in the circumstances of this case, application of the regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") will not amount to an elevation of form over substance.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
				2001			
40	*Sewall v. Chicago Transit Authority*, 2001 WL 40802 (N.D. Ill. Jan. 16,2001)	*1999*	1/16/01	N.D. Ill.	825.110(d)	Invalid.	(deeming i ligibl : eligible for FMLA leave where employ& fails to notify employee that he has not met the twelve months of employment requirement) is unreasonable to the extent that it changes the statutory eligibility requirements to include persons who have not worked for the same employer for at least twelve months and who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
41	***Nordquist v. City Finance Co.***, 173 F. Supp. 2d 537 (N.D. Miss. 2001)	2000	1/19/01	N.D. Miss.	8125.110(d)	Validity not ecided.	Court determines regulation (prohibiting employer from later challenging employee's eligibility where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is not applicable to the facts of the case; court notes, however, that if it were, it would likely reject regulation as an invalid attempt to extend FMLA coverage to employees who are not otherwise eligible.
42	***Nolan v. Hypercom Manufacturing Resources,*** 2001 WL 378235 (D. Ariz. Mar. 26,2001)	2000	'26/01	D. Ariz.	25.208	ıvalid.	Regulation (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is contrary to the statute to the extent it requires employer to provide more than twelve weeks of leave during a twelve month period.
43	*Evanoff v.* ***Minneapolis Public Schools,*** 11 Fed. Appx. 670 (8th Cir. 2001)	2000	'17/01	3th Cir.	25.110(d)	ıvalid.	Regulation (prohibiting employer from later challenging employee's eligibility where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) contravenes the plain language of the statute because it broadens the definition of eligible employee to include persons who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
44	***Miller v. AT&T Corp.,*** 250 F.3d 820 (4th Cir. 2001)	2000	/7/01	th Cir.	825.114(b), (c)	'alid.	Regulation's definition of "treatment" by a health care professional (which includes examinations to determine if a serious health condition exists and evaluations of that serious health condition) is not overly broad; regulation does not contravene the underlying purpose of the statute to the limited extent that it permits coverage for the common flu.
45	*Daley* **v. WellpointHealth Networks, Inc.,** 146 F. Supp. 2d 92 (D. Mass. 2001)	1999	/14/01	). Mass.	825.208(c)	ıvalid.	Regulation (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") is invalid to the extent it contradicts the statute and requires an employer to provide more than a total of twelve weeks leave during a twelve month period.
46	*Haggard* **v. Levi Strauss &** *Co.*, 8 Fed. Appx. 599 (8th	2000	/18/01	th Cir.	825.208(c); 825.700(a)	nvalid.	Court follows ***Ragsdale*** v. ***Wolverine Worldwide, Inc.***, 2 18 F.3d 933 (8th Cir. 2000), which held that regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are invalid to the extent they require an employer to provide more than a total of twelve weeks leave during a twelve month **neriod.**
47	***Bachelder v America West Airlines, Inc.,*** 259 F.3d 111 (9th Cir. 2001)	1999	/8/01	th Cir.	825.220(c)	/alid.	Regulation (stating that employer cannot use the taking of FMLA leave as a negative factor in employment actions) constitutes a reasonable interpretation of the statute's prohibition on "interference with" and "restraint of' employee rights under the statute even though it uses the term "discrimination" as opposed to the term "interfere" or "restrain."

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
48	*Whitaker v. Bosch Braking Systems*, 2001 WL 1694233 (W.D. Mich. Aug. 27,2001)	2000	27/01	W.D. Mich.	:5.114	alid.	Regulation (stating that pregnancy can be a serious health condition based upon continuing treatment by a health care provider only if the pregnancy produces a period of incapacity or if preventive care is sought) is a reasonable and valid exercise of the Secretary of Labor's authority to promulgate regulations to assist in carrying out the provisions of the statute.
49	*Fulham v. HSBC Bank USA.* 2001 WL 1029051 (S.D.N.Y. Sept. 6,2001)	1999	6/01	S.D.N.Y.	:5.208(c); :5.700	ivalid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence pxeceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are invalid to the extent they require employer to provide more than twelve weeks of leave during a twelve month period.
50	*Harbert v. Healthcare Services Group, Inc.*, 173 F. Supp. 2d 1101 (D. Colo. 2001)	2000	'28/01	D. Colo.	25.1 11(a)(3)	'alid.	The statute does not provide a definition of "worksite" and regulation's definition (in the context of a joint employment relationship) is not in contravention of the plain language or the stated goal of the statute.
51	*Woodford v. Community Action of Greene County, Inc.*, 268 F.3d 51 (2d Cir. 2001)	2000	0/10/01	2nd Cir.	125.110(d)	ıvalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer confirms employee's eligibility) is invalid to the extent it widens the statutory definition of eligible employee to include employees who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
52	*Nusbaum v. CB Richard Ellis, Inc.*, 171 F. Supp. 2d 377 (D. N.J. 2001)	2000	0/26/01	D. N.J.	325.208; 25.700	'alid.	Regulations (stating that if employer fails to designate leave as FMLA qualifying then "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement") are consistent with the overall statutory scheme of allowing employees to make informed decisions about leave.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
53	*Alexander v. Ford Motor Co.*, 204 F.R.D. 314 (E.D. Mich. 2001)	2001	1/5/01	.D. Mich.	25.110(d)	ıvalid.	Regulation (prohibiting employer from later challenging employee's eligibility status under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it impermissibly contradicts the clear intent of Congress to restrict FMLA leave to employees who have worked for the same employer for at least twelve months and who have worked at least 1250 hours for that employer within the immediately preceding twelve months.
54	***Smith v. BellSouth Telecommunications, Inc.***, 273 F.3d 1303 (11th Cir. 2001)	2000	1/27/01	Ith Cir.	25.220(c)	'alid.	Regulation (prohibiting employers from discriminating against employees or prospective employees on the basis of their use of FMLA leave) is entitled to deference because the statute is ambiguous as to whether it provides a private cause of action solely to current employees, as opposed to former or prospective employees, and regulation constitutes a reasonable interpretation of the statute.
55	***Caraballo v. Puerto Rico Telephone, Inc.***, 178 F. Supp. 2d 60 (D. P.R. 2001)	2001	2/12/01	). Puerto Rico	25.110(d)	nvalid.	Regulation (prohibiting employer from later challenging employee's eligibility under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid because it attempts to change the statute's definition of eligible employee to include persons who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.
56	[redacted]***akow v. New Rochelle liology Associates, P.C.***, F.3d 706 (2d Cir. 2001)	2000	2/20/01	nd Cir.	$25.110(d)	nvalid.	Regulation (prohibiting employer from later challenging employee's eligibility under the statute where, upon request for FMLA leave, employer fails to timely notify employee that he is ineligible) is invalid to the extent it attempts to change the statutory definition of eligible employee to include persons who have not worked for the same employer for at least twelve months and/or who have not worked at least 1250 hours for that employer within the immediately preceding twelve months.

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	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
57	*Hunt v. Rapides Healthcare System, LLC*, 211 F.3d 757 (5th Cir. 2001)	2000	12/26/01	5th Cir.	825.208(c)	Validity not decided.	Court determines that the posture of the case does not require it to reach the issue of whether regulation (prohibiting employer from retroactively designating leave as FMLA leave) is valid.
				2002			
58	*Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002)	2000	3/19/02	U.S. Supreme Court	825.700(a)	Invalid.	Regulation (providing that if employer fails to designate leave as FMLA qualifying then none of the absence preceding the notice to the employee of the designation will be counted against the employee's 12-week FMLA leave entitlement) is invalid because it creates a categorical penalty unconnected to any prejudice suffered by employee, which is "incompatible with the FMLA's comprehensive remedial mechanism"; regulation is "invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice."

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TEXT OF CHALLENGED FMLA REGULATIONS

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TEXT OF CHALLENGED FMLA REGULATIONS

The entire regulation is included in this Appendix, even though only a portion of it may have been challenged. The challenged portion of the regulation is in bold print.

TABLE OF CONTENTS

Regulation	Page
825.110	26
825.111	28
825.114	30
825.207	33
825.208	35
825.220	38
825.301	40
825.302	43
825.303	45
825.305	46
825.700	47

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§ 825.110	Which employees are "eligible" to take leave under FMLA?

§ 825.110 Which employees are "eligible" to take leave under FMLA?

(a) **An** "eligible employee" is an employee of a ***covered*** employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) **Is** employed at a worksite where 50 or more employees are employed by the employer within 75 miles **of** that worksite. ***(See*** § 825.105(a) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work *(see* 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning **of** the FLSA. The determination is not limited by methods **of** record-keeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept **of** their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee **is** deemed to have met this test. See also § 825.500(f). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are

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deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of the need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop **to** 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

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§ 825.111	**In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?**

§ 825.111 In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs **50** employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, ***etc.,*** the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite." The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or

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more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work **to** their personal residence, or employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are "maintained on the payroll" during any portion of the year when school is not in session. ***See*** § 825.105(c).

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§ 825.114	What is a "serious health condition" entitling an employee to FMLA leave?

§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) ***Inpatient care*** (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of ***incapacity*** (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) ***Continuing treatment*** by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of ***incapacity*** (***i.e.***, inability work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, ***etc.,*** are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use ***of*** the substance, rather than for treatment, does not qualify for FMLA leave.

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(e) Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee **or** the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. **For** example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

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§ 825.207	Is FMLA leave paid or unpaid?

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. **An** employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. **An** employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d):

(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

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(2) The Act provides that a serious health condition may result from injury to the employee "on or off' the job. If the employer designates the leave as FMLA leave in accordance with § 825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave **is** not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job". **As** a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. ***See*** also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d)(I) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave eamed or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks **of** FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (*e.g.*, notice or certification requirements), only the **less** stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. ***See*** § § 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance

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with Regulations, **29** CFR § 553.25, the absence which paid from the employee's accrued compensatory time "account" may not be counted against the employee's FMLA leave entitlement.

§ 825.208	Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

§ 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total **FMLA** leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, **in** explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in **§** 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an

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event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b):

(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

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(1) If the employee was absent for an **FMLA** reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an **FMLA** reason but the employer was not aware of the reason, and the employee desires that the leave be counted as **FMLA** leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert **FMLA** protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under **FMLA,** or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an **FMLA** reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an **FMLA** reason, the employer must withdraw the designation (with written notice to the employee).

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§825.220	How are employees protected who request leave or otherwise assert FMLA rights?

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise **of** (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has –

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating **to** a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

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(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (*see* § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

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§ 825.301	What other notices to employees are required of employers under the FMLA?

§ 825.301 What other notices to employees are required of employers under the FMLA?

(a):

(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) If such an employer does not have written policies, manuals, or handbook describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b):

(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate **(see** § 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see $825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

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(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see **§ 825.210),** and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see **§ 825.310);**

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see **§ 825.218);**

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see **§§ 825.214** and **825.604);** and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see **§ 825.213).**

(2) The specific notice may include other information – *e.g.*, whether the employer will require periodic reports ***of*** the employee's status and intent to return to **work,** but is not required to do so. **A** prototype notice **is** contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and **Hour** Division, which employers may adapt **for** their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2):

(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

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(ii) Subsequent written notification shall *not* be required if the initial notice in the six-month period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (*e.g.*, by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. **(See §** 825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

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§ 825.302	What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

§ 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(a) An employee must provide the employer at least **30** days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If **30** days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is **to** be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide **at** least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see **§ 825.305).**

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the

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employer and the employee. If an employee who provides notice of the need to take **FMLA** leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments ***so*** as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and **of** the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' **FMLA** notice requirements. In addition, an employer may not require compliance with stricter **FMLA** notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. **For** example, if an employee (or employer) elects to substitute paid vacation leave for unpaid **FMLA** leave (see § 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the **FMLA** leave taken in these circumstances. On the other hand, **FMLA** notice requirements would apply to a period of unpaid **FMLA** leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

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§ 825.303	**What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not** foreseeable?

§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for **FMLA** leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for **FMLA** leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when **FMLA** leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the **FMLA** or even mention the **FMLA,** but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking in to consideration the exigencies of the situation.

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§ 825.305	When must an employee provide medical certification to support FMLA leave?

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by **§ 825.301.** An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least **30** days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

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§ 825.700	What if an employer provides more generous benefits than required by FMLA?

§ 825.700 What if an employer provides more generous benefits than required by FMLA?

(a) **An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.** Conversely, the rights established by the Act may not be diminished by an employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. **If an employee takes paid or unpaid leave and the employer does not designate the leaves as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.**

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

(c):

(1) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (*i.e.*, its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specified times, *e.g.*, to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA.

(2) As discussed in § 825.102(b), the period prior to the Act's delayed effective date must be considered in determining employer coverage and employee eligibility for FMLA leave.

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