HOWELL INSTRUMENTS
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May 20,2002

Mr. John Morrall
Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street **NW,** Room 10235
Washington, DC 20523

Re: Family and Medical Leave Act Reforms

Dear Mr. Morrall:

We would like to recommend that the Family and Medical Leave Act's (FMLA) implementing regulations and associated non-regulatory guidance be reviewed under OMB's request for comments on the costs and benefits of federal regulations. Specifically, the Department of Labor's (DOL's) regulation, and subsequent interpretations, regarding the definition of "serious health condition" under the FMLA should be reviewed. In addition, the regulation and interpretations of "intermittent leave" issues as well **as** the notification and recordkeeping requirements should also be reviewed. Specifically, we would like to draw your attention to wage and hour opinion letters that, while technically non-binding guidance have, in effect, and without benefit **of** notice and comment, **usurped** the regulations.

1. Definition *of* "Serious Health Condition" 29 C.F.R. **825.1**14

When the FMLA passed, Congress covered both leave for the ***birth*** or adoption of **a** child **as** well **as** medical leave (for the individual or an immediate family member) for serious health conditions. Congress made.clear that the term "serious health condition" was not meant to cover short term illnesses **where** treatment and recovery are brief and such conditions fall within even modest sick leave policies. Nevertheless, DOL broadly defined what constitutes **a** serious health condition when it promulgated its definition of serious health condition at 29 C.F.R. **825.114.** The expansive way in which the regulation **was** written has been further stretched beyond recognition by nonregulatory guidance, specifically, wage and hour opinion letters that **DOL** has subsequently **issued** without benefit of public notice and comment. As a result, the FMLA, which began as a statute meant to protect jobs for new parents and those who are seriously ill, has turned into **a** national sick leave *law which* would **be** barely recognizable to its drafters. Moreover, employers and employees are left with no discernable guidance on what constitutes a "serious health condition."

On April ***7,*** 1995, DOL issued **wage** and hour opinion letter number **57** which **stated** that "the fact that an employee is incapacitated for more than three days, has been treated by **a** health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed **by** the health care provider does not convert minor illnesses such **as**

the common cold into serious health conditions in the ordinary case (absent complications)." Just a year and a half later, on December 12, 1996, DOL issued opinion letter number 86. That opinion letter stated that wage hour opinion letter 57 expresses an "incorrect view" with respect to the common cold, *the* flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease etc. and that if "any of these conditions met the regulatory criteria for a serious health condition, e.g. an incapacity of more than three consecutive calendar days and receives continuing treatment e.g. *a* visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA."

In effect, the issuance of this later opinion letter has superceded the regulation itself and has become the standard in enforcement actions and before the courts. If an employee has a three day absence, has been to a doctor and has received a prescription, no matter what the underlying cause-- from a cold to cancer—the employee is entitled to FMLA leave and all of the rights it confers.

The resulting confusion to employers and employees should be fixed immediately, first by DOL rescinding wage and hour opinion letter 86 and restoring the meaning of the word "serious" to serious health conditions protected by the FMLA. DOL should also institute rulemaking to determine whether its current regulation defining serious health condition *is* consistent with the statute.

2. Intermittent Leave 29 C.F.R. 825.203

DOL's intermittent leave regulation has also been problematic. Congress drafted the **FMLA** so that employees could take leave in increments of less than one day (for example for chemotherapy or radiation treatments). Unfortunately, the regulation provides that leave may be counted "to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." Since many employers track in increments of as small as six minutes, *the* task of accounting for and tracking intermittent leave is a significant administrative burden. This *is* especially the case when coupled with the broad definition of "serious health condition" which means that employers are keeping track of a large number of partial days for serious and non-serious conditions alike. Allowing employers to track intermittent leave in larger increments (such as by the hour or half day) would ease the cost and paperwork burden while ensuring that those employees who need intermittent leave are granted such leave. Redefining what constitutes a serious health condition will also reduce the number of absences and conditions under which an employer must track intermittent leave,

Conclusion

It *is* important, in order to fulfill the purpose of the FMLA. to alleviate the current interpretive and legal confusion which is actually serving as a disincentive for companies to offer or expand programs, including paid leave. DOL's interpretations have especially penalized companies which have gone beyond the FMLA's requirements. This problem, which manifests itself throughout DOL's **FMLA** regulations, was recognized by the Supreme Court when it recently struck down DOL's notice requirements in "Ragsdale vs. Wolverine Worldwide."

Vague, confusing **and** contradictory regulations and guidance **do no** allow employers to administer the FMLA's requirements with confidence and certainty. **A** thorough **review** of DOL's **FMCA** regulations, specifically those regulations that define serious health condition **and** intermittent leave, **is** in order.

Sincerely,

William R. Howell

William R. Howell
Chief Executive Officer

WRH:tp

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May 20,2002

Mr. John Morrall
Office of Information and Regulatory **Affairs**
Office of Management and Budget, NEOB, Room 10235
725 17th Street, NW
Washington, D.C. 20503.

Dear Mr. Morrall:

I respectfully urge the Office of Management and Budget to support rescission of the Birth and Adoption Unemployment Compensation (BAA-UC) rule promulgated by the Department of *Labor* in 1999. The BAA-UC regulations authorize states to withdraw funds from their Unemployment insurance (UI) trust accounts to compensate employed workers who take leave following the birth or adoption of a child.

By diverting UI trust funds for paid leave, BAA-UC is clearly contrary to Congress's intent under both the Federal Unemployment Tax Act and the Family and Medical Leave Act. Paid leave as authorized under the BAA-UC regulations is not unemployment insurance. Workers who **take** leave are not "unemployed." Their employers have work for them, but these individuals are not available for work.

BAA-UC will hurt workers and employers by putting the safety net for unemployed workers at risk **by** inviting states to spend down their unemployment insurance reserves for the entirely unrelated purpose of compensating leave takers. State UI trust fund reserves are needed to assure that funds are available to pay unemployment compensation to jobless workers while they seek new work and to protect against the adverse economic consequences of payroll tax increases needed to finance unemployment benefits.

State UI trust fund reserves are drawn down quickly when the economic cycle turns Several states, including New York and Texas, have already needed federal loans *to* pay their UI benefits In these and many other states, payroll tax increases are will be imposed on employers to replenish UI trust funds Moreover, using UI trust funds for paid leave puts the federal budget itself at significant risk, because the federal government is the financial guarantor for state UI benefits

A legal challenge to BAA-UC is currently pending in the United States District Court for the District of Columbia. The case is ***LPA, Inc. v. Herman*** (No. 00-01505 PLF). The plaintiffs contend that the BAA-UC rule violates the Federal Unemployment Tax Act and the Family and Medical Leave Act. During the Clinton Administration, DOL asked the court to dismiss this lawsuit because no state has enacted **a** UI-paid leave law. There has been no decision yet on the motion to dismiss or the underlying merits of the case. **As** a result, UI-paid leave proposals are now under active consideration in New Jersey and other states. It is extremely important that the BAA-UC rule **be** rescinded before any state enacts a "Baby UI" statute. The judicial system will need years to resolve this

issue. In the interim, the continued existence of the BAA-UC regulations as final rules fosters unhealthy interest in "**raiding**" UI trust funds

We encourage dialogue on positive ways to encourage financial support for parents who take leave following the birth or adoption of a child. However, the misuse of the unemployment insurance program for this unrelated purpose is unwise and unworkable. I therefore respectfully urge OMB to recommend that the BAA-UC rule **be** rescinded, and to urge DOL to begin the rulemaking process to accomplish this objective as soon as possible.

Sincerely,

William R. Howell

William R Howell
Chief Executive Officer

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