

CLASP

CENTER FOR LAW AND SOCIAL POLICY

February 1, 2007

Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division, Employment Standards Administration
U.S. Department of Labor, Room S03502
200 Constitution Ave, NW
Washington, DC 20210

Dear Mr. Brennan:

This letter responds to the Department of Labor's request for information regarding the administration and operation of the Family and Medical Leave Act of 1993 (FMLA). The Center for Law and Social Policy (CLASP) fully supports the FMLA, which provides critical flexibility to millions of American workers and allows them to balance their workplace and family responsibilities.

The request for information raises concern that the Department of Labor may be considering changes to the regulations, changes that would roll back the FMLA's protections or scale back coverage for workers' health and family needs. CLASP strongly opposes changes that would limit the scope of the FMLA and supports regulations that will ensure workers can take full advantage of their FMLA protections.

The ability to take time off when ill or to care for an ill family member or new baby is critical to the well-being of all workers. Workers who are not protected by FMLA are routinely forced to choose between going to work sick—or leaving a family member in inadequate care—and risking their jobs. When a worker is unable to take such leave, the costs to the individual and his or her family are obvious—but there are also significant societal costs:

- Some serious illnesses, such as avian flu and SARS, are highly contagious. Workers whose jobs are not protected are more likely to continue to work when ill, spreading illness to coworkers and customers. Similarly, parents who are unable to take leave are more likely to send their children to school or child care sick, spreading illness to other families.
- Our health care system now discharges patients from hospitals while they are recovering from major illness or operation and are still in need of significant ongoing care. The assumption is that a family member is available to provide such

care. It would cost society far more to provide such care through paid health care providers.

- New mothers who are unable to take leave to care for their newborns are less likely to breastfeed their babies. The health benefits of breastfeeding are well documented.

In assessing the impact of FMLA on business, it is crucial to distinguish between the effect of the *law* and the effect of the underlying medical *need* for time off work. While there is no doubt that it is sometimes inconvenient for employers when key workers take family or medical leave, this would be the case without the FMLA as well. The issue at question is not whether workers will miss work due to their own serious illnesses or those of their families, but whether they will risk losing their jobs as a result.

Many workers' lives are a delicate balance between their work and family responsibilities, their income and their expenses. When a worker is unable to take protected leave due to illness, everything can come toppling down. The family may lose the child care slot that makes work possible, or even the health insurance that pays for treatment. Society can't protect everyone against the risk of a serious health condition, but it is appropriate to assure workers that they can take needed family and medical leave without jeopardizing their jobs.

Job-protected leave also strengthens our economy as a whole—because it encourages employers to make long-term investments in workers, rather than treating them as commodities to be discarded and replaced. The 1995 Commission on Leave report found that 10.9 percent of leave-takers who are not covered by FMLA fail to return to the same employer after taking leave, compared to only 1.9 percent of workers who are covered. Employers who expect their workers to remain with them are more likely to invest in training and to adopt production strategies that require the use of skilled workers. Such “high road” production strategies are essential to maintaining America's competitiveness in a global marketplace.

Key Issues

The request for information specifically solicited comments on several key issues.

Data Availability

In a number of places, the Department requests information on the extent and impact of FMLA leave. Unfortunately, there are no recent and nationally representative data regarding many of these questions. The most reliable data on coverage and use of the FMLA come from the 1995 and 2000 surveys conducted for the Department by Westat and the Institute for Social Research. It is likely that both employee and employer practices evolved as the FMLA became a more familiar part of the workplace landscape. Thus it is critical that an accurate, up-to-date picture of the existing situation be captured before any significant restrictions in the flexibility of the FMLA are considered.

Employee Eligibility

CLASP opposes any changes to the current eligibility standards that would impose additional barriers for workers seeking to take FMLA leave. Existing rules regarding eligibility were drafted to strike an appropriate balance between the needs of employers and those of employees. At a minimum, we should preserve this balance and ensure that workers who meet the statutory requirements for leave are able to take that leave.

Workers who telecommute from distant locations should not be penalized with respect to FMLA; they should be treated as if their worksite was the office where their supervisor or coworkers are based. Such a policy would be consistent with congressional intent to ensure that employees are available to cover for the employee taking leave and with government actions to promote telecommuting to address congestion and environmental concerns.

Serious Health Condition

CLASP strongly opposes any regulatory changes that would scale back the definition of “serious health condition.” Current FMLA regulations appropriately acknowledge that the relevant consideration for leave eligibility is the impact of the medical condition on a worker’s need for leave, not the particular diagnosis. The existing regulations properly define “serious health condition” by applying objective criteria—including the duration of an illness and the number of treatments—to a worker’s individual case, rather than categorically excluding any set of health conditions from FMLA coverage.

Paid Leave

The current regulations allowing for the substitution of paid leave for FMLA leave are essential to workers’ ability to exercise their rights under the law. Few workers can afford to take extended periods of leave without pay. Permitting workers to use their accrued paid leave as wage replacement during FMLA leave makes it possible for them to afford to take time off to address critical family and medical issues.

Intermittent and Unscheduled Leave

The current regulations addressing leave flexibility, including regulations on intermittent leave, balance appropriately workers’ need for flexibility with employers’ interest in having adequate staff to cover their workplace needs. Leave flexibility benefits not only workers but also employers—by maximizing workers’ ability to meet workplace demands in the face of family and health challenges.

The need for leave will not always be continuous and predictable; this is simply the nature of most serious health conditions. Once a worker has submitted the proper paperwork that establishes an illness as fitting the criteria of a serious health condition, the worker should be protected when that serious illness interrupts work. For example, 12 percent of children in the U.S. have been diagnosed with asthma. If a child has an attack during work hours, a parent needs the flexibility to leave work immediately. An FMLA that does not allow for such conditions provides only the illusion of protection for workers and their families.

CLASP would also like to address the suggestion in the request for information that it is less feasible for employers of hourly workers to accommodate the need for intermittent and unscheduled leave. In particular, we would like to draw the Department of Labor's attention to a recent report by Corporate Voices for Working Families, *Workplace Flexibility for Lower Wage Workers*.¹ This report notes that "access to flexibility results in reduced absenteeism and higher employee retention, reduced cycle times, and enhanced customer service, and contributes to greater customer retention and higher profits. Some findings indicate that the impacts of flexibility are *greater* among lower wage workers than higher wage workers."

Communication between Employers and Employees

The Department of Labor should require employers to take steps to provide workers with adequate information regarding their rights and responsibilities under the FMLA. Employers should be required also to inform workers promptly when they are using their FMLA leave and to maintain records of FMLA leave balances. CLASP also urges the Department of Labor to increase significantly efforts to educate the public about the FMLA.

The current FMLA regulations properly prohibit employers from counting FMLA leave against an employee in employee benefit programs. The regulations appropriately recognize that workers should not be penalized for exercising their FMLA rights.

Medical Certification

CLASP opposes any changes to the medical certification regulations that would impose additional, unnecessary obstacles for workers seeking FMLA leave. The existing medical certification regulations appropriately balance a worker's interest in a manageable certification process that does not impose unreasonable burdens with an employer's interest in accurate certification of the worker's medical condition.

Additionally, the regulations recognize that an employer's judgment regarding an employee's health condition should not be substituted for the professional medical opinion of the employee's health care provider. CLASP opposes any regulatory changes that would allow employers to contact a worker's health care provider directly, as this unnecessarily violates the worker's right to keep medical information confidential. As President Bush said in the 2007 State of the Union address, the best health care decisions are made by patients and their doctors.

Conclusion

The FMLA is a significant step toward our goal of being a nation that values families and that recognizes that most workers also have family responsibilities—whether to their children, their parents, or their spouses. But it is only a first step. Millions of Americans do not have access to the act's protections, and millions more cannot afford to take advantage of them. Instead of questioning the protections workers currently have under

¹ Available at: <http://cvworkingfamilies.org/downloads/lower%20wage%20flex%20review%20report.pdf>

the FMLA, we should be expanding the FMLA to make it more affordable and accessible to all working families.

CLASP supports legislation that would provide those taking leave with income during their leave, such as paid family and medical leave legislation. We also support the Healthy Families Act, which would provide a minimum number of paid sick days per year for each worker to recover from her or his own illness or to care for a sick family member.

Thank you for the opportunity to comment on the importance of the Family and Medical Leave Act for millions of working Americans and their families.