

**ROUNDTABLE DISCUSSION: THE FAMILY AND MEDICAL LEAVE ACT: A DOZEN YEARS OF EXPERIENCE**

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**HEARING**  
OF THE  
**COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS**  
**UNITED STATES SENATE**  
**ONE HUNDRED NINTH CONGRESS**  
**FIRST SESSION**  
ON

EXAMINING THE FAMILY MEDICAL LEAVE ACT

—————  
JUNE 23, 2005  
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## **ROUNDTABLE DISCUSSION: THE FAMILY AND MEDICAL LEAVE ACT: A DOZEN YEARS OF EXPERIENCE**

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**THURSDAY, JUNE 23, 2005**

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:12 a.m., in room SH-216, Hart Senate Office Building, Hon. Michael B. Enzi (chairman of the committee) presiding.

Present: Senators Enzi, Isakson, and Clinton.

### OPENING STATEMENT OF SENATOR ENZI

The CHAIRMAN. Good morning. I want to thank everyone, and this is a great crowd, for joining us for this roundtable discussion of the Family and Medical Leave Act.

For all of us, time is a fixed and limited commodity, and setting priorities is a challenge that we have to deal with every day. For the parent of a seriously ill child, however, things are much different, because every moment spent caring for a son or daughter who is battling a serious illness is more precious than time spent in any other pursuit of life. As a parent and now as a grandparent, I know that if a child is seriously ill, the rest of the world stops and nothing is more important than providing care for that child and the attention that they need to get well.

Those are the realities that Congress recognized a dozen years ago when it enacted the Family and Medical Leave Act. The act was intended to assist individuals and families that are faced with serious health issues or blessed with a new child by providing job-protected unpaid leave for up to 12 weeks for those who qualify. Now, in the vast majority of cases, the leave provided for under the act has worked well and the response of both employers and employees to the terms of the act has been positive.

However, no system is perfect and, as with any piece of legislation, there have been some unforeseen and unintended issues with its implementation. In each instance, the few areas of concern have nothing to do with the statute itself but are confined to the regulations that have been promulgated to implement the statute. This should come as no surprise. In any legislative undertaking, the devil is in the implementing of regulations. Sometimes it is in the details. The regulations implementing the FMLA have been largely untouched since first authored following the passage of the act.

Under such circumstances, it might make good sense to revisit those regulations in the light of intervening experience.

We must also bear in mind that when Congress enacted the FMLA there were genuine concerns about weighing the needs of employees confronted by serious health issues, the burdens which their absence might place on their coworkers who must shoulder the additional work, and the legitimate need of employers for a steady and reliable work force. Those concerns are equally important today. The last 12 years have demonstrated that the implementation of FMLA has been largely successful but not entirely without problem. For example, in some instances, the unpredictability of leave often creates significant scheduling difficulties for employers, work distribution problems for coworkers, and service issues for consumers.

Now, the impact is greatest on the smallest businesses covered by the act. We need to acknowledge these facts and ask ourselves if we are accommodating these concerns in an appropriate way.

Also, we need to be candid and to recognize that there will always be those few individuals who choose to take unfair advantage and abuse the rights provided for them in the statute. While the number of such individuals may appear small, we cannot discount their disproportionate impact on employee morale and productivity and, most importantly, on the rights of their coworkers. Again, we need to acknowledge this reality and ask if there are ways to safeguard against such abuse.

Now, for millions of American workers, the FMLA is a valuable tool for helping them meet the demands of both work and family. The better any system is understood, the better it runs. Therefore, our efforts should focus on improving workers' and employers' understanding of how the FMLA is intended to operate. That requires clear definitions and plain, practical procedures. We need to be willing to revisit the original implementing regulations to ensure that this goal has been adequately met.

The most practical way to achieve these ends is by reviewing the actual experiences of those affected by the statute over the last dozen years. That is where you come in. I am looking forward to today's roundtable discussion and the views of our panelists on how the Family and Medical Leave Act is performing in the real world. Your views on how it has helped and how its provisions should be clarified will provide us with the perspective necessary to make the Family and Medical Leave Act more responsive to the needs of employers and employees and their families.

So I thank all of you for being here today. We have decided to use a roundtable format for this. It is something we kind of invented in this committee, rather than the formalized hearing format, in the hopes of encouraging greater participation. We would never be able to have this many people as witnesses at a hearing. And it also allows the participants to respond and elaborate on points raised by each other.

Now, to those of you who are new to the format, let me briefly review a few of the administrative items. To allow all the invited participants as much time as possible for discussion, there won't be any additional opening statements once Senator Kennedy has given his opening statement—and we will interrupt for that when he gets

here—or by the participants. Any statement that you want to submit will become a part of the record, but we want to move on to the questions. In our joint letter of invitation, we asked that you be prepared to discuss three questions concerning the Family and Medical Leave Act.

Following the introduction of the participants, we will begin with the first question. If you wish to respond to the question or at any time enter into the discussion, please take your nameplate and stand it on end and somebody will record the order in which those are raised so that we can follow that kind of a seniority procedure. I will then recognize you for the purpose of speaking on the issue. I will do my best to recognize each of you in the order that the nameplate was turned up.

Now, as we have a large number of participants, both Senator Kennedy and I would ask that you try to be concise with your comments and responses. To aid in this process, we use the time clocks in order that everybody has an opportunity to fully participate. It gives you a little bit of warning before it goes to red, but we would appreciate it if you would stay within the time lines. We are limited on overall time, and we would like to get to discussion on all three of the questions today that we have mutually agreed on.

Now, I would like to thank the panelists for being with us today. I know that many of you have traveled great distances and taken time out of your busy schedules to be with us today, and we do appreciate your participation.

I will introduce the participants.

Our first panelist today is Jamie Marsden, who is the director of human resources for the City of Gillette, Wyoming, a place very near and dear to my heart. That is where I live. I used to be the mayor of that city.

The next person is Ellen Bravo, who is the coordinator of the Multi-state Working Families Consortium in Milwaukee, Wisconsin.

Dr. Cheryl Barbanel is the chief of occupational and environmental medicine and medical director of Boston University Occupational Health Center.

Robert Prybutok is the owner of Polymer Technologies, a small business which employs about 90 people in Newark, Delaware.

Debra Ness is the president of the National Partnership for Women and Families in Washington, DC.

Sue Willman is an attorney with Spencer Fane in Kansas City and maintains a survey of litigation under FMLA.

Laurie Dohnalek is a nurse manager specializing in inpatient oncology and blood and marrow transplant at Georgetown University Hospital here in Washington, DC.

Sandra Boyd is the vice president of human resource policy for the National Association of Manufacturers.

Marie Alexander is the CEO of Quova, Inc., of Mountain View, California.

Patrick Lancaster is the vice president, chief administrative officer and secretary of American Axle & Manufacturing in Detroit, Michigan.

Patti Philips is a working mother and FMLA beneficiary from Atlanta, Georgia.

Dr. Janemarie Mulvey is the president and chief economist of the Employment Policy Foundation in Washington, DC., and author of the recent report, "The Costs and Characteristics of Family and Medical Leave."

Susan O'Flaherty is the vice president and manager of Disability Management Services of Bank One, Chicago, Illinois.

Dr. Jody Heymann is the director of policy for the Harvard Center for Society and Health in Cambridge, Massachusetts.

And Jeff Payne is the director of human resources at Palmeto Health Hospitals in Columbia, South Carolina.

So we certainly have a cross-section of the United States and quite a variety of occupations and expertise and viewpoints, both beneficiaries and employers.

So let me turn to the first of our agreed-upon questions for the panelists. The first question reads as follows: What has been your own experience or that of your company with the Family and Medical Leave Act and its regulations?

Always early in the morning people are kind of hesitant to turn their cards up.

Ms. Bravo, do you want to start us off?

**STATEMENT OF ELLEN BRAVO, COORDINATOR, MULTI-STATE WORKING FAMILIES CONSORTIUM, MILWAUKEE, WI**

Ms. BRAVO. Thank you very much.

My name is Ellen Bravo and I coordinate a multi-state consortium, eight State coalitions that are working to expand access to family and medical leave. Before, I was the director of 9to5. So for 22 years I ran either the local office or the national office. And, you know, in many ways a nonprofit is a small business. I want to say for the record, it is inconvenient when people get sick and even more so when they get pregnant when they are on the job. I wish we had a way of taking care of these things. I, for one, have tried to train my children, for example, for many years only to get sick when it was convenient, and I failed. And I imagine if any of you know how to solve that problem, I would be glad to hear from you.

But what we found at 9to5 and as many other enterprises, I think, is that as inconvenient as it might have been to have someone out, it was much more inconvenient to lose them altogether or to have them at work when they were ailing or when they were preoccupied with a loved one. So we found it to be good business practice to have policies that were in fact much more generous than the Family and Medical Leave Act, including paid leave, for example.

And I remember, the person who was the founder and executive director before me, Karen Nussbaum, three times adopted a child and three times had lengthy paid leaves. It was hard when she was gone, but it was also a development opportunity for people like me and for other staff, who got to do things we otherwise wouldn't have done and were in a better position to assume leadership when those positions opened up.

I also want to share—I was on the Bipartisan Commission on Leave appointed by Congress and co-chaired by Senator Dodd, to examine the impact of the Family and Medical Leave Act on employers and employees. In the packet I brought from our consor-



tium, I have a summary of our findings. And, you know, this was a very interesting body. Six people were on it because they worked really hard to pass this law, and six people were on it because they worked really hard to stop the law from passing. We didn't know if we would be able to sit in a room together, much less come up with a unanimous report. And guess what happened? During the time that we met, three of the opponents experienced profound problems related to family and medical leave that challenged their own opposition.

One of them knew people who were in the bombing of the Federal Building in Oklahoma City and understood that family members of survivors needed time off to take care of them. A woman's daughter had a baby who was born with only one arm, and her daughter took every minute of those 3 months she got under Family and Medical Leave, and needed to in order to learn to care for that baby and to find a caregiver who could care for the baby. And this woman said, "How can I say that because someone works in a smaller firm, they, too, wouldn't have needed this same time?" A third commissioner who was an opponent had a godson who had a family tragedy. This man missed our commission meeting because he was at the hospital bedside. And he said, I know godchildren aren't covered under the law, but don't tell me that I wasn't going to be at that bedside.

I wish I could tell you that we won them over on the need to expand. We couldn't get them to break ranks. But they did join us in a unanimous report applauding the benefits of Family and Medical Leave for employers and employees and calling on States to voluntarily experiment with forms of paid leave.

So I urge you to consider that experience in understanding why this has been such a positive measure that we need now to expand, not gut.

Thank you.

[The prepared statement of Ms. Bravo follows:]

PREPARED STATEMENT OF ELLEN BRAVO

**1. Experience with the FMLA:** Thank you for the opportunity to testify before this committee. I coordinate a consortium of eight States working to make leave more affordable and more accessible. Before this, I was the executive director of 9to5, National Association of Working Women, which helped put the consortium together to raise funds for work being done at the grassroots level. After Linda Meric became executive director of 9to5, I continued to work with the consortium.

For 22 years I helped run first a local office and then the national office of 9to5. I know what small businesses mean about the difficulty of managing an operation when staff are absent. Work life is certainly easier if no one becomes sick or pregnant. Once our office had three women pregnant at the same time—that was a challenge. But we recognized that it would be much harder if we lost any of these staff altogether. 9to5's policies were always more generous than the FMLA, even though technically we were not covered by the law. We saw time off as a part of life, and also as a developmental opportunity for other staff.

Before coming to 9to5, I worked at the phone company in Milwaukee. I was told when I was hired that I could not be sick for 5 years. That meant people came to work sick, stayed ill much longer than they would have and made other people ill. At 9to5, we sent people home if they came to work when they were sick. Again, this is inconvenient—but much more harmful to the individual and co-workers (and in the case of service workers, to their clients and customers) and to overall productivity if people are forced to work sick out of fear for their income or their job.

I remember a colleague at 9to5 whose son had severe asthma. It wasn't easy when she was out, and her son was never able to warn her ahead of time when an attack was coming on. But his well-being and hers were important to us. By being flexible,

we were able to keep a valuable employee and she was literally able to keep her son alive. I was reminded of this when I heard the story of Maria Vazquez, a 41-year-old single mother and 9to5 member in Aurora, Colorado. The FMLA allows her to take off whenever her 11-year-old son, Vidal, has an attack caused by his chronic asthma. "When he does get sick, I have to be up practically 24 hours," Vazquez said in a telephone interview, praising her employer, Kaiser Permanente, and her supervisor for understanding her situation.

It may be easier to track leave if workers are forced to take only larger increments (although the law provides only for increments an employer already uses). But it's much more inconvenient to the rest of the workforce to force people to take half a day when they only need an hour for a doctor's appointment or radiation treatment. Not only would a change in this regulation penalize workers financially, but it would also make it more difficult for employers to get the work done.

Everyone loses when a parent or other caregiver cannot stay with a seriously ill child or a child who is having a procedure, or take care of an elderly parent or spouse who's had a stroke or heart attack and needs a few days' care. A young woman, the daughter of a 9to5 leader in Pennsylvania, told us how children "always know what's going on; we hear everything. Whenever I was sick, I would ask myself, 'Should I tell my mom? Will we have groceries this week?'" Whenever she was able, she said, she simply dragged herself to school. Surely as a Nation we can find a way to ensure that children don't have to go to school sick or stay home alone in order for their parents to keep their jobs.

Ten years ago Congress appointed a bipartisan Commission on Leave to study the impact of the Family and Medical Leave Act. I had the privilege of serving on that body. We commissioned two studies, one on the impact on employers and a second on employees. And what we learned was that the FMLA had a positive impact on both employers and employees. I included a handout for you in the Consortium packet.

The Commission on Leave included six people who were appointed precisely because they worked to oppose the bill and six who worked to pass it. Many of us thought we wouldn't be able to hold a conversation, much less reach agreement on a report. But an interesting thing happened. Some of the opponents experienced personal situations that showed the need for expanding FMLA. One opponent had a grandbaby born with only one arm. This woman knew that her daughter, the mother, needed every minute of her 3 months leave to learn to care for the baby and to find a provider who could learn that as well. Although she was specifically on the Commission to argue against expanding the bill to smaller businesses, this woman said she knew there could be employees in those companies who also needed that guarantee. Another opponent of FMLA missed a Commission meeting because of a tragedy involving his godson. "I know godchildren aren't counted as family under the FMLA," he said, "but there was no way I wasn't going to be there." We weren't able to persuade these Commission members to go along with recommendations to expand the FMLA, but their experiences and others we all heard in three hearings around the country helped win them to support unanimous adoption of a report acknowledging how well the FMLA worked, and encouraging voluntary action by States to experiment with forms of paid leave.

The flexibility in the current regulations allows for examples like the following:

This winter, the FMLA saved Kelly Edwards of Milwaukee. When her son broke his ankle, required surgery and needed her care for a few days, she was able to take family medical leave. Because of the law her son was able to get 4 days of parental attention, and start recuperating with an employed mother putting food on the table. If not for the FMLA, Kelly would have no legal protections to take this time for her child.

Donna Skenadore, also from Milwaukee, has a diabetic father who had to have his leg amputated at the same time her mother had heart surgery. Donna and her sister were each able to take a week off and go to DePere, Wisconsin to care for them.

Paul Galantowicz of West Branch, Michigan is grateful that he can be a responsible dad while he helps put food on the table. "I want to be there for my 3 year old as she faces her battle against cerebral palsy," said Galantowicz. "She has weekly visits with doctors, physical therapists, and every few months has to take an 8 hour trip to a university children's hospital. She is legally blind, can't walk, and the visits are needed to maintain her fragile medical status. Her mom does a lot, but as a responsible dad, I need to share the caregiving for Lauren. I was also able to take time off for her when she was a new baby. On Father's Day I'm thankful my job is protected under the Family Medical Leave Act (FMLA), so I can be a good father and a dedicated employee."

But we need to remember that more than two in five workers are not covered. They include people like 9to5 member Virginia Beyer. Earlier this year, Ginny had a hernia problem that landed her in the emergency room on a Thursday night. She was still in the hospital Friday and called her supervisor, who immediately asked for a doctor's note. Ginny told 9to5, "Even though the doctor faxed a note, my employer said I was 'self-terminated' for having to miss less than a week recovering in the hospital."

It's time to move forward, not backward on the FMLA. I urge you NOT to recommend adoption of any regulations that would in fact gut the bill and result in millions of workers losing their much-needed right to flexibility to care for family members.

**2. Improvements in implementation:** Every year thousands of workers call the 9to5 hotline. Many of them don't know their rights under FMLA. An employer might say they can't have time off because they want to use the leave to care for a parent. Often they receive absence points for using FMLA-protected time, in spite of fact that this is illegal. The DOL needs to expand education for employees on their rights under the law, and for employers on both their responsibilities and protections such as provisions regarding medical certification requests.

**3. What families need for work-life balance:** The law needs to cover more people, for more reasons, and to be affordable. Some special interest lobbyists argue that smart employers will do the right thing on their own because it helps the bottom line. We agree. But laws aren't written for smart employers. They're written to create a floor to guarantee minimum levels of protection. We must remember that two-thirds of all employers covered under the FMLA had to change one or more provisions of their policies in order to comply with the law. For many, that meant allowing men to take leave, or adoptive parents, or those who needed to care for a seriously ill child.

Here are some other measures that workers need: The Healthy Families Act, which would guarantee a minimum number of paid sick days so that employees are not fired if they have a child with a routine illness. We need to recognize the irony with current welfare reform. We say low-income mothers must work to show that they're good parents, and then allow them to be fired because as a good parent they stay home with a child who's sick. Employers need flexibility, but certain kinds of flexibility—like firing a parent because they have a sick child should never be permitted. A certain number of hours of FMLA leave should be allowed for routine school and routine medical activities.

As the Commission urged, States need to experiment with forms of paid leave. States that have Temporary Disability Insurance Funds should expand those to cover family leave. And others should create a new fund, paid for by modest amounts from employees, employers and the State or Federal Government.

In the meantime, the Federal FMLA should follow the model of the Wisconsin bill, which allows employees to substitute sick days or other paid time off they have accrued for the unpaid leave allowed under the act.

Employees should be allowed to use their own sick time to care for a sick family member.

We should also expand the use of unemployment insurance to cover those who lose a job because of a legitimate family care hardship.

The CHAIRMAN. I would ask you to stay with the time. I know it is very short, but if you can expand on your remarks later, that will be accepted for the record. But at our present pace, only about half of you are going to get to talk. So if you can kind of summarize and give us the examples in writing, that would be very helpful.

Ms. Ness?

Ms. NESS. Can you hear me?

The CHAIRMAN. Yes.

**STATEMENT OF DEBRA NESS, PRESIDENT, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, WASHINGTON, DC**

Ms. NESS. I want to say thank you for holding this hearing because it is an opportunity for us to talk about what I think has been one of the most significant advances for working families in the last several decades. We are an organization that has been around for 30 years working on issues important to women and

families, and we believe that this has been a really monumental step in moving us toward being a more family-friendly Nation.

We live at a time when three-quarters of families have both parents working. And we still are very badly out of sync with the realities that most working families face because we still primarily operate as a society on the assumption that there is still a full-time caregiver at home. We as a Nation care a great deal about family values and I think the Family and Medical Leave Act was a step toward putting those values into action in ways that really support families.

Since its enactment, 50 million Americans have taken advantage of the Family and Medical Leave Act; 42 percent of those have been men, 58 percent of those have been women. And we know from some of the research that has been done that many of those individuals say that it led to quicker recoveries, it led to their ability to follow doctor's orders more carefully, it led to avoidance of parents being put into nursing homes. And we also know that 98 percent of employees who have taken advantage of Family and Medical Leave have returned to the same employer.

I would like to reinforce what Ellen said. It has been an extraordinarily important law for employees, but I believe also a good law for employers as well. We have lots of evidence, including research from the Department of Labor, which show very high levels of support from employers who said that it had, if anything, a positive or neutral impact on profitability and growth and employee morale.

So I thank you for this opportunity and say that it is an important step forward for our Nation that cares about families.

[The prepared statement of Ms. Ness follows:]

PREPARED STATEMENT OF DEBRA NESS

Good morning, Chairman Enzi, Senator Kennedy, and members of the committee. My name is Debra Ness. I am President of the National Partnership for Women & Families. The National Partnership is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality healthcare, and policies that help Americans balance work and family responsibilities.

The National Partnership for Women & Families leads a broad, diverse coalition of over 200 groups dedicated to defending the FMLA on behalf of working Americans. The coalition reaches across a broad spectrum of concerned citizens, including religious, women's, seniors veterans, and disability groups.

Our leadership of this coalition is a natural extension of our original role as drafter of the FMLA and leader of the coalition of more than 250 organizations advocating for its passage. We were very pleased when the act was signed into law in 1993 and the regulations were issued by the Department of Labor in 1995. We appreciate having been invited to speak with the committee here today on the FMLA and to address the important questions the committee has outlined for discussion.

*Question 1:* What has been your own experience, or that of your company, with the FMLA and its regulations?

The FMLA is a major advance for working families. It provides unpaid, job-protected leave for up to 12 weeks a year to care for a newborn, newly adopted or foster child, to care for a seriously ill family member, or to recover from an employee's own serious illness. It also protects the health insurance of those on leave.

Over 50 million men and women have taken leave under the act since its passage 12 years ago. This includes Americans from all walks of life. For example, 75 percent of leave takers earn less than \$75,000 a year. A significant number of leave takers are men (42 percent) who use the FMLA for both their own serious illness (58 percent) and to care for seriously ill family members (42 percent).

The FMLA is one of the most popular laws passed in recent decades. Over 80 percent of employees surveyed by the Department of Labor say that all workers should be able to take up to 12 weeks of leave a year for family and medical reasons—

a finding duplicated in poll after poll, with uniformly high support across all demographic, political, and regional groups.

Parents and children's advocates are particularly supportive of the FMLA because of its extremely positive outcomes for children. The medical leave protected under the act translates to important improvements in child health outcomes. Job-protection (and the attendant protection of health insurance) during pregnancy allows mothers covered by the act to get the prenatal care so important to a healthy birth. The family leave protected in the act allows parents to nurture and bond with newborns in their first year of life—the most critical time in a child's development. Job-protection during family leave also allows parents to care for seriously ill children, care that research shows promotes more rapid recovery. Children's hospital stays, for example, are shortened by one-third when parents are present during their care, according to Harvard researcher Dr. Jody Heymann.

Healthcare professionals and healthcare advocates are passionate advocates of the FMLA, because of its importance both to children's health and to the health of adults and the general public. The FMLA is the only source of job-protected leave under Federal law for the many American workers who fall seriously ill each year or for those who need time off to care for seriously ill family members. Dr. Jay Fathi, Chief of the Department of Family Medicine at Swedish Medical Center in Seattle, Washington, captured these sentiments when he stated, at a recent press briefing:

“The FMLA has been critical to the health of many of my patients and to the health of Americans more generally. It's because of the law that people—or more specifically those covered under the act, and particularly my lower-income patients—don't have to risk putting their jobs in jeopardy to come see me and get treatment. Moreover, people who lose their jobs through illness generally lose their health insurance along with their employment. People without health insurance generally get worse healthcare, and worse healthcare means worse health.”

The FMLA is broadly supported by the medical profession. Health organizations, such as the American Academy of Pediatrics, were key players in the passage of the act and continue to be deeply invested in its maintenance.

Those concerned with healthcare costs also recognize the critical role that the FMLA plays in cost containment. Threat of job loss is a powerful disincentive to seeking healthcare. By ensuring job protection, the act allows people to seek the treatment they need, when they need it.

The FMLA has also been accepted and welcomed by employers. Data from the most recent national research on the FMLA, conducted by the Department of Labor, show that the vast majority of U.S. employers report that complying with the FMLA has a positive/neutral effect on productivity (83 percent), profitability (90 percent), growth (90 percent), and employee morale (90 percent). The act benefits employers in numerous ways, most notably the savings derived from retention of trained employees, from productive workers on the job, and from a positive work environment.

*Questions 2 & 3.* Are there ways in which the implementation of the act might be improved? Given the importance of maintaining a work/life balance for all working Americans, what do you believe are the most reasonable options to achieve the desired balance?

Before I address the National Partnership's suggested improvements to the FMLA and options to achieve work/life balance, I would like to take a moment to address why regulatory changes proposed by some business groups would not improve implementation, but would in fact undermine the act.

### **Intermittent Leave**

One proposed regulatory change would force employees to take unpaid leave in half-day increments. This would seriously undermine protections in the act badly needed by working families. Currently, the regulations allow employees to take intermittent leave when medically necessary in the smallest increment that an employer already uses to track employee time. Making employees use intermittent leave in half-day increments would force employees to take more unpaid time off than they need to. As a result, employees who use intermittent leave because they require frequent, short treatments would use up their allotment of FMLA more quickly. A working woman needing prenatal care is a good example of the negative impact such a change would have. An estimated 14 prenatal care visits are necessary for a healthy pregnancy. These visits often take less than an hour. If women are forced to take a half-day leave for each visit, they will run through their FMLA leave faster, depriving them of crucial time to bond when the baby is born. People who need treatments like the following would also face similar consequences: radi-

ation dialysis, steroid or chemo infusions for patients with multiple sclerosis, and cardiac rehabilitation after a heart attack.

Furthermore, the proposed change to intermittent leave would also hurt the large numbers of working Americans who rely on every paycheck just to make ends meet. To force these employees to take unneeded, unpaid leave would threaten their families' already-fragile economic stability. Faced with this untenable choice, many employees would deprive themselves and their loved ones of much needed healthcare.

#### **Serious Health Condition**

Another proposed regulatory change would limit the definition of a serious health condition. Current regulations define a serious illness, in part, as a condition that requires more than 3 consecutive days of treatment and recovery. Historically, some business groups have proposed changing the definition of serious health condition to exclude illnesses that require less than 10 days for treatment and recovery. Narrowing the definition will exclude numerous serious conditions. For example, an employee with acute appendicitis may not be covered. This employee, with medical treatment, can be back at work in less than 10 days. Untreated, acute appendicitis is life threatening. Of the 50 million Americans who have taken job-protected leave under the FMLA, half have taken leave for serious illness, whether their own or a family member's, for 10 days or less. Workers with chronic and serious health problems such as asthma and diabetes would also be prevented from taking FMLA leave for their brief but incapacitating episodes. Other examples of illnesses that would be excluded are pneumonia, certain kinds of heart attacks, some gynecologic surgeries that can be done laparoscopically such as removal of ovarian cysts, day surgeries such as hernia repairs, some breast reconstruction surgeries after a mastectomy and carotid artery cauterization for patients that are at risk for strokes. Furthermore, the length of leave for surgeries and recovery will continue to shorten with advances in health technology. We urge the Department of Labor to maintain the current definition of a serious health condition which provides job protection for millions of Americans when they need it most.

#### **Serious Health Condition and Intermittent Leave Regulations Work Well**

More education would address many of the concerns raised about intermittent leave and serious health condition. Many leave-taking difficulties stem not from the regulations, but rather from the lack of education regarding employer and employee rights and responsibilities. The FMLA regulations as written provide robust employer safeguards to ensure that leave is taken appropriately. Under the regulations, employees must comply with notification requirements and medical certification requirements. They also must explain reasons for required leave and failure to do so gives the employer the power to deny leave. Furthermore, employers may require up to three medical certificates by doctors. The employer may also request that the original certification include the likely duration and frequency of episodes of illness. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations. These protections and others are designed to balance employer management needs and employee family and medical needs.

#### **NEEDED REGULATORY IMPROVEMENTS**

Regulatory improvements should be made to protect employees attempting to exercise their FMLA rights. Below are three proposals for regulatory improvements.

We urge the Department of Labor to issue a new regulation that maintains the notice requirement at issue in *Ragsdale v. Wolverine Worldwide Inc.*, but adds a new penalty provision, protecting employees who can show that they would have used this leave in a different manner if given appropriate notice about the company policy. In *Ragsdale*, the Supreme Court invalidated a penalty provision in the regulations that required employers to grant employees additional FMLA leave if they did not notify employees that they were using FMLA leave. (Section 825.700(a)). In the wake of *Ragsdale*, employers still have an obligation to notify employees that their leave is being treated as FMLA leave, but there is no incentive for employers to comply with this requirement, since the penalty provision has been invalidated. Without a penalty provision, employees' right to employer notification that their leave is FMLA-qualifying is hollow.

We urge the Department of Labor to issue regulations that would minimize employee penalties when there is no harm to the employer. Currently, employees who do not give 30 days advance notice when taking foreseeable FMLA leave can have their leave delayed 30 days from the date they gave their employer notice of leave. (Section 825.302(a)). Employees are often unaware of this obligation. We recommend that the regulations provide that an employee who does not give 30 days of advance

notice for foreseeable FMLA leave not be penalized unless his or her failure actually harms the employer.

Finally, we urge the Department of Labor to issue regulations that lift the current burden placed on employees when a healthcare professional is negligent. Under the regulations, an employer may require an employee to get a medical certification to his or her doctor. If the employee's doctor fails to submit the medical certification, there is nothing in the regulations that protects the employee. The doctor's negligence should not endanger the employee's job. We recommend that employees not be penalized when they can show that they in good faith visited a doctor and requested a medical certification be submitted to the employer within the allotted time.

#### **Additional Improvements to the FMLA**

We speak passionately about building a Nation that values families, and the FMLA is a monumental step toward this goal. 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 the protections it affords. We strongly advise expanding the FMLA to make it more affordable and accessible to all working families. We also strongly advise a bold new public education campaign to increase employers' and employees' awareness of their rights and responsibilities under the law.

We urge Congress to expand the FMLA to cover the nearly 40 percent of American workers as yet unprotected by the act. In over 75 percent of U.S. families, both parents work. When their roles as workers and parents conflict, uncovered employees find themselves forced to choose between the jobs they need and the family they love. Rather than leave sick babies or dying parents untended, many workers are forced to forfeit their jobs—and with it, their health insurance. This double blow to a family's economic security is often a family's undoing.

The decision, in 1993, to leave unprotected those working for employers of less than 50 employees was due in large part to claims made by some stakeholders that the law would drastically harm employers and the economy. We now have 12 years of experience with the law, and these concerns have not been validated. Today, there is near universal agreement, even among those who originally opposed the FMLA, that the act has been enormously beneficial to the 60 percent of the workforce protected by it and has made good sense to the businesses that employ them. We strongly recommend extending the act's protections to all working Americans. Doing so would be a win-win for American employers and American families.

We strongly recommend that Congress pass legislation to provide those taking FMLA leave with income during their leave. Seventy-eight percent of those who need but do not take family and medical leave do not take it because they can not afford to, according to the Department of Labor. Three hundred thousand bankruptcies a year are caused by lack of paid medical leave, according to research by Harvard professor Elizabeth Warren. Twenty-five percent of all poverty spells begin with the birth of a child, according to The David and Lucile Packard Foundation.

The urgent need to fill this gap in the law is widely reflected in poll after poll: 89 percent of parents of young children and 84 percent of all adults support expanding disability or unemployment insurance as a vehicle for paid family leave, according to research by Zero to Three. State polls have shown that large majorities of residents respond affirmatively when asked if they are willing to pay the costs of such programs through regular payroll contributions or other means.

A number of States have passed laws to establish popular, low-cost programs to assure working families income while on leave. For example, 5 States have laws establishing programs of temporary disability insurance for medical leave. These programs have been in place for decades. More recently, California passed a law establishing a State-administered insurance program to provide income for employees during family leave. Employees receive 55 percent of their wages for up to 6 weeks when taking leave to bond with a new baby or care for a seriously ill family member. Economists estimate the average cost of this policy is \$2.20 per employee per month. State laws establishing temporary disability insurance and family leave insurance serve as successful models on which national legislation can be based.

We also strongly recommend that the Department of Labor significantly increase efforts to educate the public about the FMLA. Sixty-two percent of employees at covered establishments do not know if the FMLA applies to them, according to the DOL. This is not because eligibility is difficult for stakeholders to determine—the vast majority of employers, for example, find it “easy” to determine whether employees are eligible. It is because we have failed to adequately educate employees about their eligibility under the law. It is not enough to have a policy in a CEO's desk drawer. Real education needs to happen and involve managers, supervisors and employees. And lack of education is not all on the employees' side. Education is needed

to help employers better understand the robust employer safeguards that exist in the current regulations.

#### **New Policies to Advance Work/Life Balance**

We urge Congress to pass the Health-Families Act, new legislation that addresses the need for employees to have paid leave for minor illness and preventive care. While the FMLA has provided millions of American workers protections to deal with serious illnesses, it does not cover routine illnesses like the flu and preventative medical care such as mammograms and colonoscopies. Nearly 50 percent of full-time, private sector employees do not have a single paid sick day and 75 percent of low-wage workers lack this basic employment benefit. Only 33 percent of workers have paid sick days that may be used for doctors' appointments and fewer have plans that allow leave to care for sick children. Working families are often forced to choose between a paycheck and caring for sick children, ailing parents, or for themselves.

The Healthy Families Act would establish a minimum standard of 7 paid sick days per year. The benefits provided under the act would help 66 million Americans. The act would also generate cost savings: saved wages that employers would pay to unproductive workers who go to work sick, reduced turnover, reduced spread of contagion to other employees, increased employee morale, and informal care. The Healthy Families Act benefits everyone: children and family members, employers, taxpayers, and consumers who are less likely to catch the flu or other diseases from restaurant, hotels, and other public spaces. The act is estimated to result in a net savings to our national economy of \$8.2 billion per year, according to the Institute for Women's Policy Research. I urge the committee to seriously address the need for paid sick days and hold hearings on the Healthy Families Act.

#### **Conclusion**

The Family and Medical Leave Act is a major advance for working families. Not only should we not roll back its protection, we should build on its success. The FMLA is a great first step, but our workplace policies are still badly out of sync with the realities of many of today's working families. We need to stop simply talking about family values and start valuing families.

# Appendix A

## FMLA Coalition Members

*Document: Letter of Support  
Mailed to Secretary Elaine L. Chao,  
U.S. Department of Labor*

NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,  
WASHINGTON, D.C. 20009,  
*April 12, 2005.*

ELAINE L. CHAO,  
*Secretary,  
U.S. Department of Labor,  
200 Constitution Avenue NW,  
Washington, D.C. 20210.*

DEAR SECRETARY CHAO: We are writing on behalf of millions of American families who have benefited from the Family and Medical Leave Act (FMLA) and the millions more who will benefit in the years to come. We urge you not to make any regu-



latory changes that would undercut the critical protections it provides to working women and men and their families.

More than 50 million Americans have taken job-protected leave to bond with a new baby, care for a seriously ill family member, or recuperate from their own serious illness since the enactment of the FMLA just 12 years ago. As a result, fewer people have had to choose between a job and family when medical crises strike or babies are born.

We are very concerned that, despite the law's great success, important provisions of the FMLA are threatened. Opponents of the FMLA are calling for changes to the law that would rollback many of the protections that it provides to America's workers by changing the definition of a *serious health condition* and restricting the use of *intermittent leave*.

One suggestion is to change the definition of a serious health condition to deny job protected, unpaid leave to workers unless their condition, or the condition of the person they are caring for, lasts 10 or more days. Current regulations define a serious health condition, in part, as a condition that requires more than 3 consecutive days of treatment and recovery.

Altering the definition will leave out numerous serious conditions. For example, an employee with acute appendicitis may not be covered. This employee, with medical treatment, can be back at work in less than 10 days. Untreated, acute appendicitis is life threatening. Of the 50 million Americans who have taken job-protected leave under the FMLA, *half* have taken leave for serious illness, whether their own or a family member's, for 10 days or less. We are concerned that altering the definition of a *serious health condition* will remove much needed job protection for millions of Americans when they need it most.

FMLA opponents are also pushing for changes that could force employees to take leave for no less than a half-day at a time. This change would force many employees to take unnecessary leave without pay. Employees who require frequent, short treatments, such as radiation treatment for cancer or pre-natal visits, will be forced to exhaust their FMLA leave sooner than necessary, leaving them without adequate job-protection for medically necessary treatments and recovery time they require. The current law aims to *minimize* employers' administrative burdens by offering leave in the smallest units that employers *already* use to track employee leave while ensuring that workers are not absent from work any longer than necessary.

Research shows that the FMLA has been beneficial to business. United States Department of Labor employer surveys, released in 2000, found that 9 in 10 covered employers report that the FMLA has a positive or neutral effect on productivity and growth. Another nationally representative employer survey found that 3 in 4 private-sector employers say the FMLA's benefits outweigh or offset its costs. The Department of Labor survey also found that, for the vast majority of employers, intermittent leave has no impact on productivity (81 percent) or profitability (94 percent).

As a Nation, we can do a better job of helping our Nation's families be responsible employees and parents. Working Americans need the Department of Labor and Congress to provide more solutions as they struggle to balance work and family. We hope that we can work with you to develop programs that help meet the needs of our Nation's families and ensure the security of the Family and Medical Leave Act. Thank you.

Sincerely,

National Partnership for Women & Families; 9to5 Colorado; 9to5, National Association of Working Women; 9to5 Poverty Network Initiative—Wisconsin; AARP; ACORN; ADA-OHIO (The Americans with Disabilities Act); AFL-CIO; Aging Resources of Central Iowa; All Families Deserve a Chance (AFDC) Coalition—Colorado; Alpha-1 Association; Alpha-1 Foundation; American Association of People with Disabilities (AAPD); American Association of University Women (AAUW); American Association on Mental Retardation; American Autoimmune Related Diseases Association; American Civil Liberties Union (ACLU); American Civil Liberties Union Women's Rights Project; American Federation of Government Employees (AFGE); American Federation of State, County, and Municipal Employees (AFSCME); American Federation of Teachers (AFT); American Society on Aging (ASA); Asian Law Caucus, CA; Association for Women in Science (AWIS-WVU), West Virginia University Student Chapter; Association of Flight Attendants—CWA; Association of University Centers on Disabilities (AUCD); Atlanta/North Georgia Labor Council, GA; Atlanta 9to5, GA; Atlanta Women's Foundation, GA; Bay Area & Western Paralyzed Veterans of America; Black Women's Health Imperative; Business and Professional Women (BPW), USA; California Commission on the Status of Women; California Labor Federation, AFL-CIO; California Nurses Association (CNA); Cambridge Commission for Persons with Disabilities, MA; Cambridge Commission on the Status of Women, MA; Candlelighters Childhood Cancer Foundation; Candlelighters Child-

hood Cancer Foundation of the Inland Empire, Inc., CA; Candlelighters of Southwest Florida; Center for Community Change (CCC); Center for Independent Living of Jasper, Alabama; Center for Law and Social Policy (CLASP); Center for Women and Work, Rutgers University, NJ; Center on Women and Public Policy, Humphrey Institute of Public Affairs, University of Minnesota; Cerebral Palsy of Colorado; Chester County Commission for Women, PA; Child Care Law Center; Children's Advocacy Institute, Center for Public Interest Law; Children's Alliance of New Hampshire; City of Boston Women's Commission, MA; City of Fairfax Commission for Women, VA; Coalition on Human Needs; Colorado AFL-CIO; Colorado Center on Law and Policy; Colorado Fiscal Policy Institute; Colorado Progressive Coalition; Colorado Women's Agenda; Communications Workers of America (CWA); Communications Workers of America (CWA), Local 1034, NJ; Cook County Department of Human Rights, Ethics and Women's Issues, IL; Cumberland County Commission for Women, PA; Communications Workers of America (CWA), Local 3204, GA; Dads and Daughters; DC Employment Justice Center; Delaware Commission for Women; Denver Area Labor Federation, CO; Early Childhood Policy Research; Epilepsy Foundation; Equal Rights Advocates (ERA), CA; Equality State Policy Center, WY; Faith Voices for the Common Good, CA; Families USA; Families of Spinal Muscular Atrophy (SMA); Family Caregiver Alliance (FCA)/National Center on Caregiving; Family Caregiver Coalition of New England; Family Voices New Jersey; Gateway/Midwest Paralyzed Veterans of America; Georgia AFL-CIO; Greater Boston Legal Services, MA; Great Plains Chapter Paralyzed Veterans of America; Illinois Maternal and Child Health Coalition; International Association of Machinists Aerospace Workers (IAMAW); International Federation of Professional and Technical Engineers (IFPTE); International Union of Bricklayers and Allied Craftworkers; Iowa Commission on the Status of Women; Iowa Annual Conference of The United Methodist Church; Labor Project for Working Families, CA; Leadership Conference on Civil Rights (LCCR); Legal Aid Society-Employment Law Center (LAS-ELC), CA; Legal Momentum; LIUNA (Laborers' International Union of North America); LIUNA Women's Caucus; Lutheran Office of Governmental Ministry in New Jersey; Maine Civil Liberties Union; Maine Women's Lobby; Massachusetts AFL-CIO; Massachusetts Paid Leave Coalition; Paralyzed Veterans of America, Michigan Chapter; MOTHERS (Mothers Ought To Have Equal Rights); Montgomery County Commission for Women, MD; Ms. Foundation for Women; NARAL Pro-Choice America; NARAL Pro-Choice Arizona; NARAL Pro-Choice Colorado; NARAL Pro-Choice Massachusetts; NARAL Pro-Choice New Hampshire; NARAL Pro-Choice New York; NARAL Pro-Choice North Carolina; NARAL Pro-Choice Ohio; NARAL Pro-Choice South Dakota; NARAL Pro-Choice Wisconsin; National Association for the Education of Young Children (NAEYC); National Association of Commissions for Women (NACW); National Association of Social Workers (NASW); National Association of Social Workers (NASW), Colorado Chapter; National Association of Social Workers (NASW), Iowa Chapter; National Association of Social Workers (NASW), Metro Chapter; National Association of Social Workers (NASW), Oregon Chapter; National Coalition for Cancer Survivorship; National Council of Churches (NCCCUSA); National Council of Jewish Women (NCJW); National Council of La Raza (NCLR); National Council of Women's Organizations (NCWO); National Council on Independent Living; National Education Association (NEA); National Employment Law Project (NELP); National Employment Lawyers Association (NELA); National Family Caregivers Association (NFCA); National Mental Health Association; National Multiple Sclerosis Society; National Organization for Women (NOW); California National Organization for Women (NOW); Connecticut National Organization for Women (NOW); National Psoriasis Foundation; National Respite Coalition; National Women's Health Network; National Women's Law Center (NWLC); NETWORK: A National Catholic Social Justice Lobby; New Hampshire AFL-CIO; New Hampshire Commission on the Status of Women; New Jersey Citizen Action; New Jersey Time To Care Coalition; New Mexico Association of Community Action Agencies; New Mexico Commission on the Status of Women; New Mexico Conference of Churches; New Mexico Voices for Children; North Carolina Justice & Community Development Center; Paralyzed Veterans of America, North Central Chapter, SD; Older Women's League (OWL); Padres Unidos—Colorado; PA Family Economic Self-Sufficiency Project, PathWaysPA; Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE); Paralyzed Veterans of America; Parent to Parent of Colorado; Parents' Action for Children; ParentsWork, IL; Pax Christi; Pennsylvania Council of the Blind (PCB); Philadelphia Citizens for Children and Youth, PA; Planned Parenthood Federation of America (PPFA); Program on WorkLife Law, American University Washington College of Law, DC; PROJECT! OUTREACH: Early Breast Care, Education, Screening & Education, Inc.; Project WISE, CO; Protestants for the Common Good; Public Justice Center, MD; RESULTS; Seattle

Women's Commission, WA; Service Employees International Union (SEIU); South Dakota Coalition of Citizens with Disabilities; South Plains Post Polio Support Network, TX; Statewide California Coalition for Battered Women; Statewide Parent Advocacy Network (SPAN), NJ; Take Back Your Time Day; Take Care Net; The Arc of the United States; UAW Massachusetts CAP Counsel; United American Nurses; Unitarian Universalist Association of Congregations; United Auto Workers (UAW); United Cerebral Palsy; United Electrical, Radio and Machine Workers of America (UE); United Food and Commercial Workers (UFCW), Women's Network; United Steelworkers of America (USWA); USAction; Utility Workers Union of America; Vaughan Chapter Paralyzed Veterans of America, IL; Veteran Feminists of America; Virginia Interfaith Center for Public Policy; Voices for Children of Greater Cleveland, OH; Voices for America's Children; Wider Opportunities for Women (WOW); Wisconsin Council on Children and Families; Wisconsin Paralyzed Veterans of America; Women Employed, IL; Women's Employment Rights Clinic, Golden Gate University School of Law, CA; Women's Law Center of Maryland; Women's Law Project, PA; Women's Lobby of Colorado; Women's Policy Group, GA; Women's Way, PA; Women Work! The National Network for Women's Employment; WomenVotePA; YWCA Greater Portland, ME; YWCA USA.

## Appendix B

### Detailed Methodological Concerns of the Employment Policy Foundation FMLA Cost Study

#### Document: *Assessing the Family and Medical Leave Act: An Analysis of an Employment Policy Foundation Paper on Costs*

ASSESSING THE FAMILY AND MEDICAL LEAVE ACT: AN ANALYSIS OF AN EMPLOYMENT  
POLICY FOUNDATION PAPER ON COSTS

INSTITUTE FOR WOMEN'S POLICY RESEARCH

JUNE 29, 2005

Policy Foundation paper, *The Cost and Characteristics of Family and Medical Leave*,<sup>1</sup> purports to evaluate the costs to employers of the Family and Medical Leave Act (FMLA). The paper provides none of the standard information about the methods used in conducting the survey, such as the sample size or characteristics of the employers who participated in the survey. Personal communication with the author revealed that the sample was quite small (110 employers) and that the survey participants were not randomly selected. Despite this, the paper generalizes its findings as if the study represents all U.S. employers.

In this analysis, we highlight a number of weaknesses in the EPF paper that limit its usefulness in the debate over use of the FMLA.

#### **1. The paper does not represent U.S. employers.**

<sup>1</sup>Janemarie Mulvey, *The Cost and Characteristics of Family and Medical Leave* (Washington, D.C.: Employment Policy Foundation, 2005).

- The survey used to generate the cost assessment did not use a randomly selected group of employers, so responses do not reflect the average experience of all U.S. employers.

- The survey's sample was very small—110 employers. Firms answering the survey employ only 0.36 percent of all U.S. workers (less than half of one percent).

- The survey responses may depend on the size and location of employers, but no information about employers' characteristics is provided in the paper.

**2. Employers' responses may be very subjective.**

It is unclear whether the information used in the paper was based on data maintained in employers' records or was simply one employee's impression, since the paper does not reveal who at each firm responded to the survey and what resources they had available to do so.

**3. Employers with complaints are probably more likely to answer the survey than satisfied employers.**

- Individuals with a specific interest in a survey topic are more likely than others to participate in surveys.<sup>2</sup>

Employers who are managing FMLA leaves effectively are probably less likely to take the time to say that things are going well than are those with concerns over the FMLA. Thus, the survey responses likely over-estimate the difficulty all U.S. employers perceive in implementing the FMLA.

**4. The paper incorrectly assumes that workers who take FMLA leave would not miss work if they had no FMLA leave.**

- Workers with serious health conditions cannot go to work whether they have FMLA leave or not.

- Many workers whose children are very ill or in the hospital will be with their children, even if they do not have FMLA leave.

- The difference the FMLA makes is ensuring that workers can go back to work once a health crisis is over.

- Workers are unlikely to miss work unnecessarily since the FMLA does not require that workers be paid during their leaves, and many workers go without pay during their FMLA leave.

**5. The paper ignores savings to employers who do not pay wages to workers on unpaid FMLA leave.**

- The paper reports both lost productivity (when workers are not on the job) and net replacement costs, but does not appear to account for employers' savings related to not paying workers who are on unpaid leave.

**6. Other research finds much lower replacement costs for workers on FMLA leave.**

- In an independent survey, the U.S. Government Accountability Office found that employers' savings from not paying salaries and benefits to workers on leave are *greater* than the cost of the few replacement workers hired.<sup>3</sup>

**7. The paper's conclusions about trends in use of FMLA leave are derived from faulty analysis.**

- Comparisons of EPF's survey findings to those of a 2000 Department of Labor survey of FMLA use<sup>4</sup> are inappropriate—not only because the EPF survey is not representative of all employers (which the Department of Labor survey is), but also because questions were worded differently in the two surveys.

The CHAIRMAN. Thank you.

Ms. Marsden?

**STATEMENT OF JAMIE MARSDEN, DIRECTOR OF HUMAN RESOURCES, CITY OF GILLETTE, WY, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM)**

Ms. MARSDEN. I would like to state that as a HR director for a small entity, I have engaged in the opportunity to help people with this family and medical leave for about 10 years. And also to reit-

<sup>2</sup>Robert M. Groves, Stanley Presser, and Sarah Dipko, "The Role of Topic Interest in Survey Participation Decisions," *Public Opinion Quarterly* 68, no. 1: 2-31 (2005).

<sup>3</sup>U.S. General Accounting Office [now the U.S. Government Accountability Office], *Estimated Costs of H.R. 925, The Family and Medical Leave Act of 1987* (Washington, D.C.: U.S. General Accounting Office, 1987).

<sup>4</sup>David Cantor, Jane Waldfogel, Jeffrey Kerwin, Mareena McKinley Wright, Kerry Levin, John Rauch, Tracey Hagerty and Martha Stapleton Kudela, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* (Washington, D.C.: U.S. Department of Labor, 2001 <<http://www.dol.gov/asp/fmla/main2000.htm>>accessed January 20, 2001).

erate that it is a good benefit and for the most part it does work very well. But there are instances that we have to deal with in HR that are abuses of it, and it is a problem for those individuals who are using it well. In particular, I would like to see some additional language to help clarify what is a serious health condition and also to better clarify regarding intermittent leave.

I have had instances where individuals have asked for as little as 15 minutes a day, some that have had a lot of disruption to the work unit they have been with because of the morale issues surrounding that. And also, the serious health condition, I have had issues of whether or not the individual was actually in need of the leave.

So I would like to see some further clarification. I do believe that it works well. I do believe we need to have a means by which our people can take care of problems that come along with health conditions. We provide sick leave and, for the most part, most of our employees do go out on paid family and medical leave.

Thank you.

[The prepared statement of Ms. Marsden follows:]

PREPARED STATEMENT OF JAMIE MARSDEN

Chairman Enzi, ranking member Kennedy, and members of the Senate Health, Education, Labor, and Pensions Committee my name is Jamie Marsden and I am the Director of Human Resources for the City of Gillette, Wyoming. I appeared at the FMLA Roundtable on behalf of the Society for Human Resource Management (SHRM) and I am pleased to submit the following statement for the record.

Human resource professionals are committed to the proper application of the Family and Medical Leave Act (FMLA). Since the enactment of the law in 1993 and the issuance of the act's implementing regulations, as well as Wage and Hour Opinion letters, a variety of concerns and questions have been raised surrounding the correct application of the act in the workplace. This is evidenced not only by research from the U.S. Department of Labor (DOL), but also by outside groups like SHRM, of which I am a member.

SHRM conducted surveys in 2000 and 2003 on the FMLA and I believe that the findings from the survey efforts substantiate my personal experiences in administering this act and are also representative of the human resource profession's experience with the law overall. The research found that while organizations strongly support the FMLA and the benefit that it provides to so many employees nationwide, Wage and Hour interpretations have created numerous compliance difficulties as well as misuse of the act's leave provisions. For example, the 2000 survey identified the following as the most difficult areas of FMLA compliance for human resource professionals:

- Managing intermittent use of leave;
- Communicating with physicians and care providers;
- Determining whether an intermittent serious health condition should be protected by the FMLA;
- Managing leave of less than 1 day.

The 2003 findings were consistent with those found in the 2000 research. In addition, the 2003 survey confirmed that half of human resource professionals had to grant, based on DOL regulations/interpretations, FMLA requests that they believe were not legitimate. In addition, 34 percent of human resource professionals stated employees complained because of other workers' questionable use of FMLA leave. SHRM conducted supplemental research in 2005, which yielded similar results.

The DOL has the responsibility to bring clarification to the FMLA so that issues related to the interpretations, related notification and record keeping requirements regarding serious health condition, management of intermittent leave, and communication with healthcare providers and physicians is clearly understood by both employees and employers alike.

Mr. Chairman, I would like to provide the committee with my own practical examples that underscore the research findings that I've cited in this statement.

### Experiences in Administering FMLA

1. **Definition of “Serious Health Condition”:** When the FMLA was passed in 1993, the definition of serious health condition appeared to cover circumstances such as cancer, serious heart conditions, advanced diabetes, dialysis, etc. I have received medical certifications from doctors indicating that employees need FMLA leave for a variety of reasons, including symptoms of stress. Human resource professionals must rely upon information provided by doctors, even if the condition cited is questionable. Therefore, we err on the side of caution and grant virtually all FMLA leave requests accompanied with a medical certification in order to ensure that an employee’s rights under the act are not violated.

I would like the DOL to clarify the definition of “serious health condition” so that it reflects conditions that are truly serious in nature. In 1993, Congress, in the legislative language, provided direction for serious conditions. Yet today, the common cold, broken big toes, or even in-grown toenails are protected by the FMLA according to the DOL regulations and Wage and Hour Opinion Letters. Clarity must be restored to this definition so that employees who experience truly serious conditions have access to “job protected” leave and are able to freely exercise their rights under the FMLA.

2. **Intermittent Leave:** Current law requires that employers track time in the smallest time increments that their systems allow. This requirement is cumbersome. I believe that intermittent leave should be tracked in no less than 1 hour increments or in a manner that is consistent with how employers track and keep time for other leave programs. In addition, employees may utilize intermittent leave for chronic conditions or to seek treatments to recover from a serious health condition.

There are a small percentage of employees who misuse certified “job protected leave.” I find this most often occurs when an employee is certified for a chronic condition. The result of inappropriate leave use, perceived or real, may be devastating to employee morale, particularly if notice has not been provided to the employer that the employee will be absent. The Employment Policy Foundation reports that more than 50 percent of leave-takers provide notice either the day leave begins or after the leave has commenced. This puts co-workers in a position of working unscheduled overtime.

3. **DOL Certification Form:** It has been my experience that the DOL certification form that doctors complete for their patients is too lengthy and in need of revision. I’ve noticed that doctors rarely complete the form, as we all know, the writing is frequently difficult to read. As it is, doctors are burdened by the amount of paperwork that they are required to complete in the normal course of their practice, and the FMLA certification form adds to this burden. Doctors now charge their patients out-of-pocket fees for completing the DOL certification form.

4. **Return to Work Certifications:** We have concerns about how healthcare providers handle return to work certifications. Employees too often have undue influence in prolonging certified leave regardless of whether or not additional recovery time is necessary.

Example: I had an employee on FMLA leave who exhausted all of his/her PTO (employer sponsored paid time off) with our organization. The employee visited the doctor who certified that additional FMLA leave was needed. As a result, our organization notified the employee that further FMLA leave would be un-paid. The employee’s spouse called the doctor to request a change in the certification of health so that the employee could return to duty. The doctor changed the form and the employee was back to work a few days later.

5. **FMLA and the Americans with Disabilities Act:** Because many employees who request FMLA leave also qualify under the Americans with Disabilities Act (ADA) for “reasonable accommodations,” the interaction between FMLA and the ADA continues to be a subject of confusion. Often, accommodations under the ADA for a reduced work schedule or light duty are often better solutions for employees than intermittent leave.

### Suggestions for Improving the Regulations

1. Limit intermittent leave time increments to 1 full hour or the increment of time that employers use to track other leave programs in the workplace. This would allow employees to take FMLA leave in smaller time increments, yet eases administration and tracking issues for employers as all leave would be in blocks of full hours.

2. Provide a clear definition of what qualifies as a serious health condition. Elective cosmetic surgery and employees feeling “stressed out” (unless diagnosis is made by a certified mental health specialist) should not qualify as job-protected FMLA leave. However, serious heart conditions, cancer, advanced arthritis, advanced dia-

betes, kidney failure, etc. should be conditions that were once envisioned by Congress to rise to that level of protection.

3. Revise the “certification of health” form so that the form is clear for healthcare providers, employers, and employees to complete, and clearly understand and complete and submit electronically.

4. Allow employers to take appropriate disciplinary actions (absent dismissal) with employees in question if employers uncover abuse of medical leave.

#### **Conclusion**

Chairman Enzi, thank you again for the opportunity to submit this statement for the record. The regulations governing the FMLA have been in place for 10 years and it is important for the DOL to conduct a thorough review of the rules and issue clarifications to the medical leave regulations. The majority of Roundtable participants agreed that clarifications are necessary for not only employers but also to ensure that employees have a clear understanding of their rights.

The practical experience I’ve provided along with survey data from SHRM clearly indicates that while human resource professionals and employers support the FMLA, they have experienced difficulty in administering and implementing these regulations.

Chairman Enzi, I look forward to working with your office on this important issue, and if there is any further information that I can provide to you, please do not hesitate to contact me at your convenience.

The Society for Human Resource Management (SHRM) is the world’s largest association devoted to human resource management. Representing more than 200,000 individual members, the Society’s mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society’s mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries. Visit SHRM Online at [www.shrm.org](http://www.shrm.org).

The CHAIRMAN. Thank you.

Mr. Prybutok?

#### **STATEMENT OF ROBERT PRYBUTOK, PRESIDENT, POLYMER TECHNOLOGIES, NEWARK, DE**

Mr. PRYBUTOK. Thank you. I am Robert Prybutok, president of Polymer Technologies and principal owner. We have been in business since 1989. We manufacture acoustical and thermal composites and sell these composites to a broad range of markets, a broad range of original equipment manufacturers in the United States.

We have been in business since 1989, and from the time that we started business, we offered a full complement of benefits—100 percent paid healthcare, short-term and long-term disability, 5 sick days, personal days, vacation, 401(k). We work in a competitive environment and, as most businesses do, particularly manufacturers, we fight rising costs that we can’t pass on to our customers.

We were impacted by FMLA in 1996, and it has been easier to administer in the office environment where employees are more autonomous and can be more flexible in making time up than in the manufacturing environment. Typically in a manufacturing environment you will have anywhere from two to half a dozen employees working in a cell. And in today’s lean manufacturing implementation, it is very difficult to overstaff. So when employees are out, it causes inefficiency and an economic burden.

Some of the problems we face with FMLA: one has to do with the—let’s say the employee doesn’t return to work. A typical example is an employee who is out on maternity leave and covered, from a salary perspective, under our short-term disability, elected to extend it, and then indicated that they had no intention of returning

to work. The coworkers had to take on that burden. Additionally we had to search for and hire a replacement, which extended that problem. But there was also exposure for Polymer Technologies, financial exposure.

We self-insure. By self-insuring, we are able to offer our employees excellent healthcare benefits at a reasonable cost. However, our exposure is up to \$20,000 per employee. So for that employee and other employees who abuse FMLA out of the work environment, we have a financial responsibility, potentially, if they are ill during FMLA leave. So the option that we have considered is to introduce a less comprehensive HMO-type program at similar cost, with less benefit to the employee. And we don't want to do that, and I think that would be a mistake. But unfortunately, we may be faced with that.

Thank you.

[The prepared statement of Mr. Prybutok follows:]

PREPARED STATEMENT OF ROBERT PRYBUTOK

These comments specifically address three questions raised by the committee:

*Question 1.* What has been your own experience, or that of your company, with the Family Medical Leave Act and its regulations.

*Question 2.* Are there ways in which the implementation of the act might be improved?

*Question 3.* Given the importance of maintaining a work life balance for all working Americans, what do you believe are the most reasonable options to achieve the desired balance?

Polymer Technologies Inc. is a manufacturing company located in Newark, Delaware. We have been in operation for 15 years. Currently we have 90 employees at our primary facility located in Newark, Delaware and 15 employees at a satellite facility in Northern New Jersey. Polymer manufactures and markets a broad range of acoustical and thermal composites sold to equipment manufacturers in the industrial, transportation, power generation, medical, recreational and aircraft markets.

From the time Polymer began operations we provided our employees with 100 percent company paid healthcare benefits. The Delaware State Chamber sponsored healthcare program enabled us to afford this benefit. We soon followed by providing company paid short-and long-term disability insurance and a company sponsored 401K plan. Employees earn 2 weeks vacation with 1 day added for each year of service. We allow employees 5 sick days and 2 personal days per year. By offering a full complement of benefits and being flexible in the administration of our policies to help employees balance family life with business obligations we have been able to avoid potential difficulties that FMLA presents to employers.

In our production environment most processes require a minimum number of experienced operators. These work cells cannot operate effectively if they are short an experienced employee. We recognize the need to cross train in order to have flexibility in our work force in order to provide coverage due to vacations, sickness and other scheduled and unscheduled events which take an employee away from the manufacturing environment. The normal approach to determining additional staffing is typically conservative since labor costs drive overhead costs and potentially put manufacturers in an uncompetitive position. With competition from low labor markets this pressure for cost containment becomes even more acute.

FMLA presents a danger to small manufacturers since it enables employees to take an extended leave while obligating the employer to maintain their position or provide an equivalent position. As employees take advantage of these laws the labor cost per unit of production time increases. Other costs are associated with the lack of efficiency in keeping a position open for the duration of the leave. Since the work must be adequately covered, the burden falls on fellow employees or expensive temporary workers. When the employee uses this time to search for another job or other endeavors that cause them to not return to work, an even more significant cost and performance impact falls on the company.

A potential problem with FMLA is that employees who are more financially independent or have more resources may be in a better position to implement FMLA to the fullest extent possible where as co-workers with less resources will be much more judicious in utilizing FMLA because they need the income. This presents po-



tential personnel issues within the organization since those workers who are impacted by having to handle the workload of the chronic missing employee will develop a negative attitude. Of course, under FMLA the company is powerless to manage this situation except by insuring that adequate "justification" accompanies the employee's absence.

From Polymer Technologies perspective FMLA has not been any more or less difficult than other Government employment laws or regulations to understand or administer. Understanding the law, as it is written, is extremely difficult however, we rely on well-written guides which explain FMLA in normal English, citing examples and case law. This is most helpful however; there is still some confusion and lack of clear direction and definition in certain areas.

Over the past 2 years Polymer Technologies has had 5 cases where FMLA was utilized. Most of these cases were pretty straightforward however in one case the employee did not return to work and had a negative impact on the company performance. In this situation the employee who did not return to work took FMLA upon the birth of their child. Their income was supplemented for the first 6 weeks through our short-term disability program. We continued to pay healthcare benefits and held their position open with the expectation of the employee returning to work. The employee did not return to work and we lost valuable time in searching and hiring a replacement.

Polymer Technologies self-insures for our healthcare coverage thereby offering our employees excellent coverage in relationship to our total out of pocket costs. However, there is the potential of a \$20,000 per employee stop loss which we are responsible for. An employee on FMLA who does not intend to return to work can potentially have an accident or other major healthcare issue during this leave period. By attempting to be pro active and responsive in offering our employees an excellent benefit we find ourselves exposed through this Government mandate. There is a compelling motivation to back off and provide a low cost HMO program that limits our financial liability. In addition we, like most small manufacturers, are concerned over Government mandates in areas of health and welfare which can remove our flexibility in administering personnel policies and adding additional cost burdens in an economic environment where increasing prices to cover increased costs is near impossible!

One area where FMLA presents a difficulty is in the vague interpretation of a "Serious Health Condition." In those areas where the definition of employment law or regulations is vague, qualitative or subject to interpretation too much resource is spent on an individual situation.

Another area of concern is understanding the conflict between FMLA and other legislation such as ADA. An employee on FMLA may then acquire a disabling injury or condition and remain out an extended period beyond FMLA. The companies liability is not clearly defined.

An improvement in FMLA would be a more specific definition of where FMLA must be utilized and what constitutes a "Serious Health Condition." The law should also be more specific regarding the employee's obligation where healthcare and other benefits are provided by the employer with the full intention of the employee returning to work. Should the employee not return to work they should clearly be responsible for re-imbusement of these costs. This would limit employees from abusing FMLA while not intending to return to work for personal reasons or because they are utilizing FMLA while searching alternate employment.

In the United States we enjoy a free enterprise system structured such that entrepreneurs have a much easier time starting businesses, having access to resources and capital and a higher probability of success than our world counterparts. Our industrial environment has become increasingly sophisticated and the success of our system has resulted in low unemployment and a growing economy, unlike our European partners. The competition for employees in industry is significant and companies today realize they must offer competitive benefits and a reasonably flexible administration of benefits including work schedules in order to hire and retain quality employees. Insuring affordable healthcare is available to small manufacturers is an important step towards allowing them a vehicle for providing a strong benefits package to their employees. This is a major requisite for fostering positive employer/employee relationships in small businesses. Because Polymer Technologies, Inc. has always provided comprehensive benefits to our employees and has been responsive to employee's personal needs, FMLA has not been a major burden.

Employers and employees must both approach the issue of the balance between work and life from a responsible and responsive perspective. Most employers, like Polymer technologies are responsive to those employees who demonstrate a positive work ethic and positive motivation. When mandates remove employers' flexibility

and consequently their ability to differentiate in administering benefits then policies and benefits will seek the least cost alternative.

The CHAIRMAN. Thank you.

Ms. Willman?

**STATEMENT OF SUE WILLMAN, ATTORNEY, SPENCER FANE,  
KANSAS CITY, MO**

Ms. WILLMAN. As a lawyer, I represent only employers. It is important to know that. I have dealt with hundreds of employers on hundreds of FMLA issues since its enactment. Overall, I find employers to be very supportive of the act itself and genuinely interested in complying with it and honoring legitimate requests for FMLA leave. I have never had an employer tell me that they want to abolish the act, although they would like to see some enhancements and fine-tuning of the regulations.

Over the last several years, the questions I get from employers about FMLA really fall into two categories. I get questions about the definition of “serious health condition” and how to interpret it and how to decide if a particular absence falls within that definition. And I get questions about how to stop abuse of FMLA intermittent leave. Those are the two main questions that come to my attention as a lawyer.

I think it is important to focus on what is a problem under the FMLA regulations—not the act itself—and also to focus on what is not a problem. Under the FMLA there are two types of leaves. There is family leave and there is medical leave. I do not believe there are problems with the family leave portion of the FMLA or the regulations.

Under the medical part of FMLA, there are actually three types of leaves. We have continuous leaves for temporary medical conditions, and I do not believe that continuous leaves of absence are a problem. That is the person who goes out for surgery and they come back to work; it is a short-term condition, you can plan for it, you can schedule it, they are legitimate, it is verifiable.

Then there are, the second type of medical leave, the intermittent leave for temporary conditions. Again, I think there are some issues with those because of the definition of “serious health condition,” but overall they are usually for planned or scheduled medical treatment and they are verifiable types of leaves. I don’t believe there is a major problem there.

But the third type of medical leave, the intermittent leave for permanent conditions, or the chronic serious health condition, is where we are seeing abuses under the FMLA. And if there is one issue that needs to be addressed in addition to the definition of “serious health condition,” it is abuses of the intermittent leave provisions.

[The statements of Ms. Willman follows:]

## POSITION STATEMENT OF SUE K. WILLMAN

July 8, 2005.

Hon. MICHAEL ENZI,  
*Chairman,*  
*Committee on Health, Education, Labor, and Pensions,*  
*U.S. Senate,*  
*Washington, D.C. 20510.*

Hon. EDWARD KENNEDY,  
*Ranking Member,*  
*Committee on Health, Education, Labor, and Pensions,*  
*U.S. Senate,*  
*Washington, D.C. 20510.*

Re: Position Statement on the Need for FMLA Regulatory Reform

DEAR SENATOR ENZI AND SENATOR KENNEDY: I want to thank both of you and the entire Senate Health, Education, Labor, and Pensions Committee for the opportunity to participate on June 23 as a witness at the committee's Roundtable on "The Family and Medical Leave Act: A Dozen Years of Experience." It was an honor and privilege for me to share my perspective on the FMLA and its regulations with the committee at that time.

As indicated in my testimony, I am a strong advocate for FMLA regulatory reform. It is my belief that FMLA regulatory reform will help ensure that the act itself is properly respected in good faith by both employers and employees and that both groups have a better understanding of what their respective rights and obligations are. I am neither pro-employer nor pro-employee on FMLA regulatory reform issues. I am pro-fairness.

FMLA regulatory reform provides the perfect opportunity for a bi-partisan effort to promote the original intent and purposes of the act. I urge the committee, all Members of Congress, and the Administration to support FMLA regulatory reform. I firmly believe that the regulations can be revised by DOL in a manner that will strike a fairer balance between employer and employee rights and obligations, while at the same time respecting the entitlements granted by the act, reducing FMLA litigation, and preventing FMLA abuse.

This position statement is submitted to you and the committee to supplement my testimony and as an official part of the committee's record. It includes my responses to the questions posed during and after the Roundtable by each of you.

#### **A. Expertise on The FMLA and Its Regulations**

Spencer Fane law firm represents management exclusively on labor and employment matters. We represent clients of all sizes, in all industries and throughout the country. As a result, our 25+ labor and employment attorneys have dealt with hundreds of clients on hundreds of FMLA issues.

I have been practicing labor and employment law for over 24 years. I have served as both in-house employment counsel as well as a private practitioner specializing in labor/employment law. Prior to becoming an attorney, I was employed as a human resources professional for 3 years. I am also a certified Senior Professional in Human Resources (SPHR).

As an attorney, I specialize in what we refer to as "preventative employment law" issues. My practice focuses on assisting clients in complying with Federal, State, and local employment laws, preventing employment-related claims, and minimizing potential liability.

I have considerable experience with and expertise on the FMLA and its regulations. Since the FMLA's inception, I have handled hundreds of FMLA matters. Over the last several years, requests from clients for assistance on FMLA issues have increased. I receive inquiries and requests for legal assistance on FMLA issues far more frequently than any other employment law issue. For the last couple of years, I have received requests from clients on FMLA issues almost every day. For more information regarding my FMLA expertise, I refer you to the summary attached as Exhibit "A."

#### **B. What Needs To Be Reformed: The Act or The Regulations?**

As I mentioned during my testimony, I firmly believe that the FMLA regulations need to be reformed, *not* the act itself. FMLA compliance has been unnecessarily complicated by a set of regulations that are difficult for employers to understand and apply and that allow abuse by employees at the expense of the employees who do not abuse the FMLA's protections.

Overall, I find employers to be very supportive of the act itself and its intent and spirit. I also find employers to be compassionate towards their employees and genuinely interested in complying with the act and honoring legitimate requests for FMLA leave. No employer has ever told me that it wishes to see the act itself repealed. However, most of the employers with whom I work or have spoken are very frustrated by the FMLA regulations and have indicated that FMLA regulatory reform is very much needed.

I do not believe it makes any sense to consider expansion of the act itself (as advocated by employee-oriented organizations) when the current FMLA regulations are creating numerous compliance challenges and problems that need to be addressed. We need to fix the problems, not expand them.

I also do not believe that FMLA regulatory reform should be delayed in order for DOL to commission comprehensive, methodologically rigorous, independent research on the FMLA to update DOL's 1995 and 2000 studies, as some have suggested. Although I am not opposed to FMLA research per se, there is already sufficient research and evidence that the FMLA regulations need to be revised. As a practical matter, FMLA research should be conducted on an ongoing basis by DOL, and not just when it is conveniently needed by special interest groups as an excuse for delaying much needed regulatory reform. Any proposal for research at this time strikes me more as a stall tactic than as a reflection of any real need for the research.

### **C. Why is There a Need for FMLA Regulatory Reform?**

There are numerous reasons why FMLA regulatory reform is needed and needed now. I have summarized some of those reasons below (both legal and business reasons):

1. Compliance with *Ragsdale* Decision. The U.S. Supreme Court, in the first FMLA case decided by it (*Ragsdale v. Wolverine Worldwide, Inc.*, 122 S.Ct. 1155, decided March 19, 2002), has already invalidated at least one FMLA regulation (29 CFR 825.700(a)) as being contrary to the act and beyond the DOL's authority. To date, the DOL has not removed the invalidated regulation.

2. Compliance with *Ragsdale* Principles on Categorical Penalties. In the *Ragsdale* case, the Supreme Court found the regulation in question to be a categorical penalty that is contrary to the act's remedial design. The Supreme Court specifically stated that "The challenged 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." Although the Supreme Court was called upon to consider only one particular FMLA regulation, the broad principles announced by the Court cast doubt on the validity of any FMLA regulation that includes a categorical penalty. Therefore, all categorical penalties in the regulations need to be removed.

In addition to the specific regulation invalidated by the Supreme Court, there are at least 12 other FMLA regulations that clearly contain categorical penalties and many more that arguably contain categorical penalties. (See Exhibit "B" for a list of other regulations that contain categorical penalties). To date, the DOL has not removed any of these other categorical penalties.

3. Reduction of Litigation Over Regulatory Validity Issues. Both before and since the *Ragsdale* decision, there has been a significant amount of litigation regarding the validity of various FMLA regulations. In 67 percent of the reported cases on validity issues, various FMLA regulations have been invalidated and determined to have been outside the scope of the DOL's authority or contrary to the act (or would have been so decided if the court had ruled after the date of the *Ragsdale* decision).

Litigation over validity issues has continued even after the *Ragsdale* decision. Much of this litigation could be avoided by revising the regulations. Litigation over validity issues is not in anyone's best interests. It costs all parties (the courts, employees and employers) unnecessary time and expense. To date, the DOL has not taken steps to address these numerous validity questions.

The above data is taken from an FMLA litigation study that I and other colleagues at Spencer Fane conducted, beginning in 2002 and updated annually since then. Our study was prompted by a belief (based on our review of daily court case advance sheets) that regulatory validity questions seemed to be increasing. We wanted to determine if that was actually occurring. Our study was limited to FMLA cases in which the validity of an FMLA regulation was challenged.

A copy of the study is attached and incorporated by reference. It indicates that, as of March 31, 2005, there have been 79 reported court decisions in which the validity of an FMLA regulation was challenged. The validity of 13 different FMLA regulations was called into question. Of those 79 decisions, 67 included a ruling on the validity issue (and 12 were decided on other grounds). Of the 67 decisions in which

there was a ruling on the validity issue, 67 percent of them held the regulation to be invalid or would have held it to be invalid if the case had been decided after (rather than before) the *Ragsdale* decision.

The *Ragsdale* decision has not stopped the litigation over validity issues. Although there have been more than 100 cases (not included in our study) that have followed or cited to the *Ragsdale* decision, there are still numerous other lawsuits in which validity issues are being litigated. Such litigation is not a good use of judicial, employer, or employee effort and resources when sound regulatory revisions would likely preclude much of this litigation.

The lawsuits mentioned above do not include hundreds of FMLA lawsuits involving non-validity issues (such as interpretation, application, and other problems faced by employers in attempting to comply with the FMLA). When those lawsuits are added to the validity lawsuits, there is a significant amount of time and expense being invested over issues that could be and should be resolved at the regulatory level instead of in the courts.

4. Prevention of FMLA Abuse. The regulations allow easy abuse by employees of FMLA entitlements without providing employers with any effective tools to prevent such abuses. In fact, the regulations actually tie the hands of the employer by prohibiting certain actions that would help an employer combat the abuses. The FMLA has become a national vacation policy for employees who are inclined to abuse the FMLA. Such employees can frequently be absent from work with no adverse consequences.

If an employee abuses the FMLA, how much work time can he/she miss? Under the FMLA, an eligible full-time employee is entitled to 60 FMLA days per year. This means that the employee can actually miss work at least 1 day a week with impunity by taking FMLA intermittent leave. This allows an employee to be absent from work 23 percent of the time for the rest of the employee's work life (i.e., he/she can miss 60 of the 260 work days in a year).

How easy is it for abuse to occur? Most of the abuses involve intermittent leave for unscheduled absences due to a chronic serious health condition. In particular, an employee with a chronic serious health condition simply has to: (a) see his/her doctor once and obtain a prescription for medication; (b) obtain a medical certification that he/she needs to be absent from work periodically (intermittently) for the rest of his/her lifetime (which certification seems fairly easy to obtain from his/her health care provider); and (c) call the employer right before work begins to say that he/she is taking an "FMLA day." Although intermittent leave is only permitted if "medically necessary," it is the employee (not his/her health care provider) who is making that decision on a day-to-day basis, while the employer is prohibited from even talking to the employee's health care provider except with the employee's consent (which the employee is not required to give and does not voluntarily give very often).

Who is affected by FMLA abuses? Fortunately, there is a small percentage of employees who abuse the FMLA. Unfortunately, the abuses by even a small percentage of employees have a tremendous impact on the rest of the workforce (i.e., the majority of employees who do not abuse the FMLA). When an abuser is absent, his/her workload is usually absorbed by other employees (non-abusers). Abusers typically give no advance notice of the need to be absent (other than calling in shortly before the start of his/her shift). Consequently, it is usually not feasible for an employer to obtain temporary help, and the rest of the workforce has to cover for the abuser. It is incredibly unfair to expect the vast majority of employees who do not abuse the FMLA to do the work of the abusers.

In addition, abuse of the FMLA creates morale problems within the workforce as a whole. The non-abusers know when abuse is occurring, and they resent the abuses and how it affects their own workloads. Non-abusers have even started filing internal complaints with their employers about FMLA abuses. They wonder why the employer does not fire the abusers.

The reason why abusers are not fired for abusing the FMLA is because it is virtually impossible for an employer to take any adverse action. The FMLA regulations on intermittent leave for chronic conditions allow the employee (not a doctor) to make the medical determination as to whether he/she can work on any given day. The employer has no effective mechanism for verifying whether the employee is truly unable to work due to his/her medical condition or if the employee is even absent that day because of the medical condition. If the employer requires a note from the employee's doctor regarding a particular FMLA absence (which the employer may request no more often than every 30 days), the abusers seem to be able to easily obtain one.

Healthcare providers have told me that they provide such notes (normally after the fact), usually based solely on the employee's word that he/she was unable to

work. The healthcare provider has no way of knowing retroactively, and without having examined the employee, whether the employee's absence was medically necessary. If a healthcare provider is in no position to question the employee's judgment about the "medical necessity" of an absence, who is? And why is the employee allowed to be the sole party who makes that decision, especially since the employee has such a vested interest in the outcome?

Based on my experience in working with employers, I believe that they are interested in and doing their best to comply with the FMLA and to honor legitimate requests for FMLA leave. I also know that they are frustrated by and strongly opposed to FMLA abuses. Most of the employer witnesses at the Roundtable spoke out strongly in favor of honoring employees' rights and spoke out strongly against the abuse issue.

Although the Roundtable witnesses from employee rights' organizations voiced strong support of FMLA rights and expansion, I do not recall any of them voicing strong opposition to FMLA abuse or the need to prevent it. I have also read a fair amount of FMLA literature that has been issued by both labor organizations and advocates for employee rights. The literature does not seem to address the abuse issue. I am genuinely baffled by what seems to be an apparent lack of concern by these groups about FMLA abuse (especially when the vast majority of their constituents and those they claim to protect are non-abusers who bear the brunt of the abuses).

In light of the fact that non-abusers are adversely affected by FMLA abuse (in terms of their own morale and by absorbing the abusers' workloads), I would think that labor and employee advocate groups would be taking a strong position against FMLA abuse. I encourage these groups to become vocal about their opposition to FMLA abuse, instead of wearing blinders and ignoring it or trivializing it. They may claim that it is only a minority of employees who abuse the FMLA (a fact I do not dispute), but the effect of the abuse hurts the majority of employees who do not abuse it. Many of these groups are in favor of expanding the FMLA to give protection (FMLA leave) to employees who are the victims of *domestic* abuse. I would think they would be as equally committed to protecting employees who are the victims of *FMLA* abuse.

The abuse issue provides an ideal opportunity for the labor and employee advocate groups to speak out against FMLA abuse (on behalf of the significant majority of their members who are non-abusers), to encourage DOL to address the abuse issue, and to join forces with employers to minimize abuses. Regulatory reform is needed to address the abuse issue, if for no other reason than out of respect for the vast majority of employees who make legitimate use of the FMLA and do not abuse it. The abuses of the few simply should not be allowed to interfere with or outweigh the rights of the many who do not abuse the FMLA.

5. Reduction of Litigation Over the Act's Intent. The act, as adopted by Congress, specifically states at the beginning that it is "An Act . . . To grant family and **temporary medical leave** under certain circumstances." [Emphasis added.] It was never intended to permit "*permanent*" medical leaves, even on an intermittent basis. It is the regulations that allow these permanent medical leaves, which are the types of FMLA leaves where the abuses are occurring.

The Courts have already started to address this issue involving permanent FMLA medical leaves. Two Circuit Courts of Appeal (the 7th and 8th Circuits), as well as various Federal districts courts, have taken the position that the act was not intended to allow FMLA leaves on an intermittent basis for the rest of an employee's work life:

"Courts have been reluctant to read the FMLA as allowing unscheduled and unpredictable, but cumulatively substantial, absences . . ." *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001).

". . . the FMLA does not provide an employee suffering from depression with a right to 'unscheduled and unpredictable, but cumulatively substantial, absences' or a right to 'take unscheduled leave at a moment's notice for the rest of her career.'" *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2001).

I believe that the Courts will, sooner or later, resolve this issue about permanent medical leaves. However, a better resolution would be for DOL to address it with revised regulations. If DOL addresses the issue, all stakeholders will have the opportunity to provide input and proposed resolutions, which, in my opinion, is preferable for all concerned than a court mandate.

6. Elimination of Interpretive Problems, Complexity, and Inconsistencies. The FMLA regulations are more difficult for employers to understand, interpret and apply than they need to be. They are the most complex set of employment regula-

tions with more interpretive problems than I have ever seen in my career. The regulations suffer from the following deficiencies (which are examples, but by no means intended to be an exhaustive list):

a. The regulations create numerous interpretation problems. One of the most common questions raised by employers when they consult with me is the definition of “serious health condition.” The definition is extremely long, with numerous subparts, and has to be read in conjunction with other definitions and other regulatory provisions.

b. The regulations create numerous application problems. The various notice provisions are a prime example. Employers are given extremely short and unrealistic time frames in which to comply with some of the notice provisions.

c. Some of the topics covered in the regulations are covered in more than one regulation, thereby making it difficult to find all applicable provisions.

d. Some of the regulations appear to conflict with each other.

e. DOL has issued advisory opinion letters that appear to expand not only the act but the regulations themselves.

#### **D. What Specific Regulatory Reform is Needed?**

Although I believe that FMLA regulatory reform is sorely needed and long overdue, not all of the regulations are problematic. I believe it is appropriate for DOL to focus on those parts of the regulations that are creating the problems.

**Types of Leaves.** Before I discuss specific regulatory issues that need to be addressed, I believe it is helpful to understand the types of leaves that are available under the FMLA. Some of them are problematic; some of them are not.

1. Family Leaves. The act provides two types of FMLA leave: family leave and medical leave. Family leave (sometimes referred to as maternity and paternity leave) is for the purpose of providing bonding time between a parent and a newborn child, newly adopted child, or a newly placed foster child. Family leave is generally not a problem for employers for three reasons:

a. It is easily verifiable. In addition, it is normally noticeable. When an employee has a new child, this milestone event is normally well-known by the employer and other employees. This, of course, makes it difficult for an employee to misrepresent his/her need for FMLA leave.

b. It must be taken within 1 year after the birth, adoption, or foster placement of the child. This means that the leave will be for a temporary period of time (not a permanent period of time or for the rest of the employee’s work life).

c. It must be taken on a continuous basis, unless the employer consents to it being taken on an intermittent or reduced schedule basis. As a practical matter, most employees request family leave on a continuous basis, and most employers usually require that such a leave be taken on a continuous basis. However, when both parties mutually agree to taking such leave on an intermittent or reduced schedule basis, a specific schedule for the leave is established (such as the employee working fewer hours each day or fewer days each week). This means that the employer can plan for the absence and arrange to have the employee’s workload temporarily allocated to others in a way that will not be unduly burdensome. This also means that the employee cannot abuse FMLA leave by taking it on an unscheduled, unpredictable basis.

As a result of the above factors, we generally do not see abuses of family leave. I do not believe that the FMLA regulations need to be fixed in any major way with respect to family leave.

2. Medical Leaves. The other type of leave under the act is the medical leave. In my experience working with employers, certain types of FMLA medical leaves are not as problematic as others. The FMLA provides two types of medical leaves: continuous leaves and intermittent leaves. Overall, continuous leaves are generally not a problem in terms of abuse, whereas intermittent leaves have so many loopholes that abuse can easily occur. I have discussed each of these types of leaves below:

a. Continuous Medical Leaves. Continuous leaves are normally taken for short-term or acute medical conditions. Sometimes such leaves last for more than a week (up to the maximum of 12 weeks); sometimes they last a week or less (and as short as one day or less).

(1) Continuous Medical Leaves of More Than 1 Week. If a continuous leave is expected to last more than a full week, an employer usually does not experience abuses. Such leaves are easily verifiable in most instances. In many cases, the leave is scheduled in advance due to planned surgery/medical procedures and recovery therefrom. In addition, an employer can normally make appropriate arrangements to reallocate the employer’s workload. Employers generally do not experience abuse of these types of longer-term continuous leaves.

(2) Continuous Medical Leaves of 1 Week or Less. If a continuous leave is expected to last a week or less, an employer often experiences problems. The major problem with such short-term continuous leaves is not usually abuse by employees as much as doubt about whether the condition in question is truly a “serious” health condition. If an employee only has to miss 2 or 3 days of work, one wonders just how serious the condition can possibly be. This particular issue goes more to the definition of “serious health condition” than abuse, and I refer you to a subsequent discussion about that issue.

b. Intermittent Medical Leaves. Intermittent leaves are sometimes taken for short-term or acute conditions and sometimes are taken for permanent or chronic conditions.

(1) Intermittent Medical Leaves for Short-Term or Acute Conditions. When an intermittent leave is taken for a short-term condition, it is usually needed because of planned or scheduled treatment (such as radiation treatment, chemotherapy, physical therapy, etc.). Under the FMLA regulations, any intermittent leave for planned or scheduled treatment requires that the employee schedule the treatment to be as least disruptive to the employer’s operations as possible.

Such leaves are easily verifiable, and the employer generally knows that the employee is in fact using the time off for a valid FMLA reason. The employer also knows that such leaves have a definitive ending point (anywhere up to perhaps 6 months), at which point the employee will return to full duty. In other words, they are predictable. In light of the foregoing, employers generally do not experience a substantial amount of abuse when intermittent leave is used for planned or scheduled treatment/therapy.

(2) Intermittent Medical Leaves for Long-Term, Permanent or Chronic Conditions (Excluding Terminal Conditions). Intermittent leave for a long-term, permanent, or chronic condition is the type of leave where most FMLA abuses occur. This type of leave is discussed in more detail in the next section.

**Problematic Areas.** As explained above, some types of FMLA leave are not a problem and no major revision of the regulations regarding them may be necessary. However, other types of leaves and FMLA issues create major problems. The following section identifies some of the FMLA issues that create major compliance and abuse problems that need to be addressed with revised regulations:

1. Intermittent Medical Leaves for Long-Term, Permanent, or Chronic Conditions and Abuse. Abuse of the FMLA is occurring with increasing frequency in connection with intermittent medical leaves for long-term, permanent, or chronic conditions (excluding terminal conditions). There are many medical conditions that appear to qualify as long-term, permanent or chronic ones. The most common ones for which FMLA intermittent leave is requested include migraines, asthma, arthritis, bronchitis, fibromyalgia, hypertension, sleep apnea, and mental disorders (such as depression, anxiety, bi-polar disorder, post-traumatic stress syndrome, etc.).

Most of these conditions have several common denominators: (a) their symptoms are subjective in nature; (b) the extent and scope of the symptoms are difficult for a healthcare provider to evaluate and measure; (c) the conditions are difficult to treat; and (d) the most common form of treatment appears to be prescription medication.

Once the employee’s healthcare provider certifies that the employee has the medical condition and that the employee will periodically need to be absent because of it, all the employee has to do is call the employer before his/her shift begins and state that he/she is taking an FMLA day due to the condition. The employee does not need to see or even call the healthcare provider. The employee gets to make the decision as to whether the condition renders him/her unable to work. The employer gets no say on the medical necessity of the absence; the healthcare provider need not be contacted or consulted by the employee and the employer is prohibited from making such contact.

In most of these cases, the employer does not doubt that the condition itself exists. Therefore, it makes no sense to obtain a second and third medical opinion regarding the existence of the condition. The abuses arise in connection with the employee using the condition as an excuse to be absent from work. An employer has no effective mechanism under the regulations: (a) to ascertain with any degree of certainty whether an absent on any particular day is “serious” enough to justify an absence from work; or (b) to determine if the absence is really related to an FMLA condition at all. Employees who abuse the FMLA are well aware of these obstacles faced by an employer. These obstacles are one of the reasons that abuse can so easily occur in connection with an intermittent leave for a long-term, permanent, or chronic condition.

2. Definition of “Serious Health Condition.” The two most common questions I get from employers about the FMLA involve the abuse issue discussed above and the



definition of “serious health condition.” As mentioned earlier in this letter, the definition is extremely complex and lengthy and seems to have been expanded by the DOL to the point of covering what would normally be considered as “non-serious” health conditions. The definition needs a major overhaul.

3. Medical Information and Certification Process. If an employee wants to exercise his/her rights under the FMLA, an employer should be able to obtain necessary medical information to verify the existence of a serious health condition and the need for FMLA leave. Instead, the employer is generally restricted from doing so. An employer has such rights under the Americans with Disabilities Act (ADA) and is not restricted from obtaining necessary medical information to verify the existence of a disability or the need for an accommodation under that law. It makes no sense at all why there are two totally different approaches to this issue under the FMLA and ADA (especially when the FMLA regulations incorporate the ADA definition of “essential job functions” and makes reference to the ADA in several provisions).

4. Notice Provisions. The FMLA regulations go to great length and in great detail regarding notice provisions imposed upon employers. In some cases, these notice provisions are unrealistic and arguably are beyond the scope of DOL’s authority (considering that the only notice required by the act itself is a poster). Although employers are subject to numerous notice requirements, the regulations place very little responsibility on employees to provide adequate notice to employers of the need for FMLA leave.

5. Other Problematic Areas. I believe the above issues are the major problematic areas under the FMLA regulations. However, they are by no means the only problems.

Employers also face many challenges related to: (a) tracking FMLA intermittent leave (since it can be used in increments equal to the smallest increment that can be measured by the employer’s system, such as one minute); (b) not being able to disqualify an employee who has taken FMLA leave from receiving a perfect attendance bonus (even if the employee has missed a substantial part of the measuring period and even though employees with better attendance records who are not eligible for FMLA can be disqualified); and (c) not being able to require an employee to accept light duty (since the FMLA regulations allow an employee to take full-time leave even if the employee can perform some or all of his/her job).

I strongly believe that the problems identified above can be resolved through FMLA regulatory reform in a manner that is consistent with the intent of the act, that does not result in any major reduction of regulatory protections for employees, and that will not negatively affect employees who legitimately use FMLA leave. I am not proposing that we tear the house down; I am proposing that we scrub it and clean it up.

Quite frankly, if DOL would just address and resolve what I believe are the three biggest regulatory problems, I suspect that most of the controversy surrounding the regulations would subside. First, DOL needs to put meaning back into the word “serious” so that FMLA absences are for truly “serious” health conditions. Second, DOL needs to limit FMLA medical leaves to “temporary” medical leaves, especially since the act itself specifies that it is for temporary medical leaves (not permanent medical leaves, like the ones taken by abusers as a form of vacation). Third, DOL needs to eliminate the obstacles that make proving abuse almost impossible and to replace them with effective and workable tools that employers can use to address abuse issues (like permitting employers to have reasonable communications directly with healthcare providers and requiring employees to provide consent for those communications).

### **E. Conclusion**

There is no question that the FMLA regulations need to be revised so that they provide a meaningful and practical guide to FMLA compliance. Employers deserve adequate notice and a clearer understanding of what is required so that they can maximize their chances of complying with the act. Employees deserve the opportunity to exercise their rights in a legitimate manner without being able to abuse the act.

In light of all of the foregoing, I encourage the committee, the Senate, Congress as a whole, and the Administration to support FMLA regulatory reform so that we can put the problems described above behind us. The problems are fixable, and if properly fixed in a fair and balanced manner, I have no doubt that FMLA problems, controversy, and litigation over interpretative and validity questions will quickly become a thing of the past.

Thank you for consideration of my comments and the opportunity to share my perspective.

Respectfully submitted,

SUE K. WILLMAN, JD, SPHR.

EXHIBIT A

SUMMARY OF FMLA EXPERIENCE AND EXPERTISE

SUE K. WILLMAN

1. Beginning in 2002, I and other colleagues at Spencer Fane conducted and published an FMLA litigation study (“Reported Court Cases in Which the Validity of an FMLA Regulation Has Been Challenged”). We have updated that study on an annual basis since that time. The most recent update was made available to the Senate Health, Education, Labor, and Pensions Committee at the Roundtable on June 23. A copy is attached as a part of this position statement.

2. I and two other colleagues at Spencer Fane prepared and submitted an *amicus curiae* brief (on behalf of the Society for Human Resource Management) in the first FMLA case to be heard by the U.S. Supreme Court (*Ragsdale v. Worldwide Wolverine, Inc.*, 122 S.Ct. 1155, decided on March 22, 2002). Our brief raised the issue on which the Supreme Court ultimately decided the Ragsdale case.

3. During the last several years, the Department of Labor (DOL) has conducted series of meetings with various interest groups to discuss their experiences with the FMLA regulations. I was one of numerous witnesses who met with the DOL during those meetings.

4. For several years, I was involved with the National Coalition to Protect Family Leave (formerly known as the FMLA Technical Corrections Coalition). My primary role was to provide the legal perspective on the challenges faced by employers in complying with the FMLA regulations.

5. I have made numerous presentations to human resource professional organizations and conducted dozens of client training sessions on FMLA compliance. I have also published materials on the FMLA and been interviewed numerous times by the media regarding the FMLA and its regulations.

EXHIBIT B

FMLA REGULATIONS WITH CATEGORICAL PENALTIES

The following 13 FMLA regulations (which include the regulation invalidated by Ragsdale) are not intended to be an exhaustive list of all FMLA regulations that include or arguably include categorical penalties.

**1. 29 CFR 825.207(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), 825.205(e) and 825.306(c).

**2. 29 CFR 825.208(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 2 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.

**3. 29 CFR 825.213(f)**

When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. **The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefits coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave.** To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

**4. 29 CFR 825.300(b)**

An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed \$100 for each separate offense. **Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.**

**5. 29 CFR 825.301(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.**

**6. 29 CFR 825.302(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.**

**7. 29 CFR 825.302(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.

**8. 29 CFR 825.305(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.**

**9. 29 CFR 825.306(c)**

**If the employer's sick or medical leave plan requires less information to be furnished in medical certifications 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 au-**

thorized (see 825.207), only the employer's lesser sick leave certification requirements may be imposed.

**10. 29 CFR 825.310(c)**

An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A healthcare provider employed by the employer may contact the employee's healthcare 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, and clarification may be requested only for the serious health condition for which FMLA leave was taken. **The employer may not delay the employee's return to work while contact with the healthcare provider is being made.**

**11. 29 CFR 825.310(f)**

**An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in paragraph (e) of this section.**

**12. 29 CFR 825.312(h)**

If the employer has a uniformly-allied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. **An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.**

**13. 29 CFR 825.700(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 any 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). **If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.**

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

EXECUTIVE SUMMARY

UPDATED REPORT MARCH 31, 2005

PREPARED BY: SUE KENNEDY WILLMAN, JD, SPHR AND KATHERINE A. HANSEN, JD,  
SPENCER FANE BRITT & BROWNE LLP

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 12 weeks of leave during a 12 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 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 initially covered both published and unpublished decisions reported as of March 20, 2002, and was updated thereafter as of January 1, 2003; August 1, 2003; January 31, 2004; and March 31, 2005.

This report represents the results of the original and updated 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™ through March 31, 2005.

#### EXECUTIVE SUMMARY

► There have been 79 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 31, 2005.

► These 79 court decisions represent 78 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 79 court decisions (78 court cases) represent 73 different underlying cases.

► Of these 79 court decisions:

(a) 67 included a ruling on the validity issue; and

(b) 12 were decided on other grounds and did not include a ruling on the validity issue.

► Of the 67 court decisions in which there was a ruling on the validity issue:

(a) 61 percent (41 decisions) held that the FMLA regulation in question was *invalid*; and

(b) 39 percent (26 decisions) held that the FMLA regulation in question was *valid*.

► Of the 67 court decisions in which there was a ruling on the validity issue, 51 were decided on or before the date of the Supreme Court's decision in *Ragsdale*, and 4 of those decisions were overruled by *Ragsdale*. When this factor is taken into account, it means that:

► 67 percent (45 of 67 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*.

#### ANALYSIS BY REGULATION CHALLENGED

► These 58 court decisions involved challenges to 13 different FMLA regulations:

► § 825.110    ► § 825.207    ► § 825.216    ► § 825.302    ► § 825.700  
 ► § 825.111    ► § 825.208    ► § 825.220    ► § 825.303  
 ► § 825.114    ► § 825.215    ► § 825.301    ► § 825.305

► The 3 most frequently challenged regulations were:

► § 825.208(c)

► § 825.110(d)

► § 825.700(a)

► Section 825.208(c) (or a related portion of § 825.208) was the subject of 32 of the reported decisions (of which 24 included a ruling on the validity issue):

(a) 75 percent (18 of 24 decisions in which the validity issue was decided) held the regulation to be *invalid*;

(b) 25 percent (6 of 24 decisions in which the validity issue was decided) held the regulation to be *valid*; and

(c) 8 of the 32 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 8 decisions referenced above in which the regulation was found to be *valid* may now be questionable in light of *Ragsdale*.

► Section 825.110(d) was the subject of 20 of the reported decisions (of which 17 included a ruling on the validity issue):

(a) 88 percent (15 of 17 decisions in which the validity issue was decided) held the regulation to be invalid;

(b) 12 percent (2 of 17 decisions in which the validity issue was decided) held the regulation to be valid; and

(c) 13 of the 20 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 (all of which included a ruling on the validity issue):

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

(b) 29 percent (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 § 85.700(a) is invalid, the 4 decisions referenced above in which the regulation was held to be valid have now been overruled by *Ragsdale*.

#### ANALYSIS BY COURT AND GEOGRAPHIC AREA

► Of the 67 court decisions in which there was a ruling on the validity issue:

(a) 1 was decided by the U. S. Supreme Court;

(b) 21 were decided by Federal Courts of Appeal; and

(c) 45 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 21 decisions involved rulings on the validity issue):

(a) 10 of the 12 Circuits of the Court of Appeals (83 percent) have issued rulings on the validity issue; and

(b) 2 of the 12 Circuits of the Court of Appeals (17 percent) have not yet issued such a ruling (the 3rd and D.C. Circuits).

► Of the 21 Federal Court of Appeals decisions in which there has been a ruling on the validity issue:

(a) 52 percent (11 decisions) have held that the FMLA regulation in question was *invalid*; and

(b) 48 percent (10 decisions) have held that the FMLA regulation in question was *valid*.

► 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 45 decisions have involved rulings on the validity issue):

(a) 28 of the 94 District Courts (30 percent) have issued rulings on the validity issue; and

(b) 66 of the 94 District Courts (70 percent) have not yet issued such a ruling.

► Of the 45 District Court decisions in which there has been a ruling on the validity issue:

(a) 64 percent (29 decisions) have held that the FMLA regulation in question was *invalid*; and

(b) 36 percent (16 decisions) have held that the FMLA regulation in question was *valid*.

► Of the 16 District Court decisions in which an FMLA regulation was held to be *valid*, 12 were decided on or before the date of the Supreme Court's decision in *Ragsdale*, and 4 of those decisions were overruled by *Ragsdale*. When this factor is taken into account, it means that:

► 73 percent (33 of 45 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 45 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.

► Of the 45 District Court decisions in which there has been a ruling on the validity issue:

(a) the underlying District Courts were located in 24 of the 55 U. S. states and territories (44 percent); and

(b) 31 of the 55 U.S. states and territories (56 percent) 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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**REPORTED COURT CASES IN WHICH  
THE VALIDITY OF AN FMLA REGULATION  
HAS BEEN CHALLENGED**

**CASE LISTING  
Updated Report  
March 31, 2005**

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Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
<b>1995</b>						
1 <i>Manuel v. Westlake Polymers Corp.</i> , 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.
<b>1996</b>						
2 <i>Rich v. Delta Air Lines, Inc.</i> , 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.
<b>1997</b>						
3 <i>Walke v. Dreadnought Marine, Inc.</i> , 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 <i>Dodgens v. Kent Manufacturing Co.</i> , 955 F. Supp. 560 (D.S.C. 1997)	1995	2/23/97	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 <i>Duckworth v. Pratt &amp; Whitney</i> , 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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6 <i>Miller v. DeFrance Metal Products, Inc.</i> , 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.
<b>1998</b>						
7 <i>Cox v. Autozone, Inc.</i> , 990 F. Supp. 1369 (M.D. Ala. 1998), aff'd, <i>McGregor v. Autozone, Inc.</i> , 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 <i>Seaman v. Downtown Partnership of Baltimore, Inc.</i> , 994 F. Supp. 751 (D. Md. 1998)	1997	1/20/98	D. Md.	825.110(d)	Invalid.	Followed <i>Walke v. Dreadnought Marine, Inc.</i> , 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 <i>Blutt v. Eval Company of America, Inc.</i> , 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 <i>Duckworth v. Pratt &amp; Whitney, Inc.</i> , 152 F.3d 1 (1st Cir. 1998)	1997	7/14/98	1st Cir.	825.220(e)	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.



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11	<i>Santros v. Aramark Corp.</i> , 1998 WL 704114 (N.D. Ill. Sept. 29, 1998)	1996	9/29/98	N.D. Ill.	825.110(d)	Validity not decided.	Court resolves the case on another issue, declining to take the significant step of rejecting 825.110(d).
12	<i>Dornmeyer v. Comerica Bank Illinois</i> , 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.
<b>1999</b>							
13	<i>Toro v. Mastex Industries</i> , 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	<i>Covneck v. Service Merchandise Co., Inc.</i> , 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	<i>Richie v. Grand Casinos of Mississippi, Inc.</i> , 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.

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16	<i>Henthorn v. Olsen Corp.</i> , 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.
17	<i>McQuain v. Ebner Furnaces, Inc.</i> , 55 F. Supp. 2d 763 (N.D. Ohio 1999)	1998	6/17/99	N.D. Ohio	825.110(d)	Invalid.	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	<i>Covey v. Methodist Hospital of Dyersburg, Inc.</i> , 56 F. Supp. 2d 965 (W.D. Tenn. 1999)	1997	6/25/99	W.D. Tenn.	825.208(c); 825.700(a)	Invalid.	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	<i>McGregor v. Anozone, Inc.</i> , 180 F.3d 1305 (11th Cir. 1999)	1998	7/14/99	11th Cir.	825.208(c); 825.700(a)	Invalid.	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	<i>Donnellan v. New York City Transit Authority</i> , 1999 WL 627901 (S.D.N.Y. July 22, 1999)	1998	7/22/99	S.D.N.Y.	825.208 interim regulations	Validity not decided.	Court assumes regulation is valid and reads regulation as not redefining or expanding the substantive rights of the statute.

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21	<i>Neal v. Children's Rehabilitation Center</i> , 1999 WL 706117 (N.D. Ill. Sept. 10, 1999)	1997	9/10/99	N.D. Ill.	825.208(a)	Invalid.	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.
22	<i>Longtrech v. Copple</i> , 189 F.R.D. 401 (N.D. Iowa (1999))	1997	10/22/99	N.D. Iowa	825.208	Validity not decided.	Court refuses to modify its prior summary judgment decision in light of <i>McGregor v. Autozone, Inc.</i> , 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	<i>Chan v. Loyola University Medical Center</i> , 1999 WL 1080372 (N.D. Ill. Nov. 23, 1999)	1997	11/23/99	N.D. Ill.	825.207(f); 825.208(a), (b)(1), (b)(2), (c); 825.301(b); 825.700(a)	Valid.	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.

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<b>2000</b>							
24	<i>Schoer v. Lucent Technologies, Inc.</i> , 2000 WL 1286998 (D. Md. Jan. 21, 2000)	1999	1/21/00	D. Md.	825.208(c); 825.700(a)	Invalid.	Follows <i>McGregor v. Autozone, Inc.</i> , 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	<i>Thorsen v. Gemini, Inc.</i> , 205 F.3d 370 (8th Cir. 2000), cert. denied, 531 U.S. 871 (2000).	1999	3/3/00	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	<i>Dirksen v. Van Wert County Hospital</i> , 2000 WL 621139 (N.D. Ohio March 3, 2000)	1999	3/3/00	N.D. Ohio	825.208	Validity not decided.	Court distinguishes <i>McGregor v. Autozone, Inc.</i> , 180 F.3d 1305 (11th Cir. 1999) (holding regulation invalid), and applies the regulation.
27	<i>Curry v. Neumann</i> , 2000 WL 1763842 (S.D. Fla. Apr. 3, 2000)	1998	4/3/00	S.D. Fla.	825.301(b)(1), (c); 825.308(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	<i>Plant v. Morton International, Inc.</i> , 212 F.3d 929 (6th Cir. 2000)	1999	5/12/00	6th Cir.	825.208(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.

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29 <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 218 F.3d 933 (8th Cir. 2000), aff'd, 122 S. Ct. 1155 (2002)	1999	7/11/00	8th Cir.	825.208(c); 825.700(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 <i>Dornmeyer v. Comerica Bank Illinois</i> , 223 F.3d 579 (7th Cir. 2000)	1999	7/24/00	7th Cir.	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 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 <i>Bowden v. Bill Dodge Buick-GMC Truck, Inc.</i> , 2000 WL 1061226 (D. Me. July 28, 2000)	1999	7/28/00	D. Me.	825.208	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.
32 <i>Schlusser v. SMC Pneumatics, Inc.</i> , 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	S.D. Ind.	825.220(c)	Valid.	Regulation (prohibiting employer from discriminating against employee for having used FMLA leave) is based on a reasonable interpretation of the statute.

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33 <i>Dwyman v. Dilks</i> , 2000 WL 1277917 (E.D. Pa. Sept. 5, 2000)	1999	9/8/00	E.D. Pa.	825.208(c); 825.700(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 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 <i>Gadinski v. Shamokin Area Community Hospital</i> , 116 F. Supp. 2d 586 (M.D. Pa. 2000)	1999	10/19/00	M.D. Pa.	825.208(a); 825.700(a)	Valid.	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 <i>Smith v. BellSouth Telecommunications International, Inc.</i> , 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.	825.220(c)	Invalid.	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.
36 <i>Prangari v. BellSouth Telecommunications, Inc.</i> , 231 F.3d 791, cert. denied, (11th Cir. 2000)	1999	7/0/24/00	11th Cir.	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 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.

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<i>Dolese v. Office Depot, Inc.</i> , 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.
<i>Scheldoecker v. Arvig Enterprises</i> , 123 F. Supp. 2d 1031 (D. Minn. 2000)	1999	11/9/00	D. Minn.	825.110(d)	Invalid.	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.
<i>Schober v. SMC Pneumatics, Inc.</i> , 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	12/4/00	S.D. Ind.	825.208(c); 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.
<b>2001</b>						
<i>Sewall v. Chicago Transit Authority</i> , 2001 WL 40602 (N.D. Ill. Jan. 16, 2001)	1999	1/16/01	N.D. Ill.	825.110(d)	Invalid.	Regulation (deeming ineligible employee eligible for FMLA leave where employer 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.

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<i>Nordquist v. City Finance Co.</i> , 173 F. Supp. 2d 537 (N.D. Miss. 2001)	2000	1/19/01	N.D. Miss.	825.110(d)	Validity not decided.	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.
<i>Nolan v. Hypercon Manufacturing Resources</i> , 2001 WL 378235 (D. Ariz. Mar. 26, 2001)	2000	3/26/01	D. Ariz.	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 contrary to the statute to the extent it requires employer to provide more than twelve weeks of leave during a twelve month period.
<i>Evanoff v. Minneapolis Public Schools</i> , 11 Fed. Appx. 670 (8th Cir. 2001)	2000	4/7/01	8th Cir.	825.110(d)	Invalid.	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.
<i>Miller v. AT&amp;T Corp.</i> , 250 F.3d 820 (4th Cir. 2001)	2000	8/7/01	4th Cir.	825.114(b), (c)	Valid.	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.

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45	<i>Daley v. Wellpoint Health Networks, Inc.</i> , 146 F. Supp. 2d 92 (D. Mass. 2001)	1999	5/14/01	D. Mass.	825.208(c)	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 it contradicts the statute and requires an employer to provide more than a total of twelve weeks leave during a twelve month period.
46	<i>Haggard v. Levi Strauss &amp; Co.</i> , 8 Fed. Appx. 599 (8th Cir. 2001)	2000	5/18/01	8th Cir.	825.208(c); 825.700(a)	Invalid.	Court follows <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 218 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 period.
47	<i>Bacheider v. America West Airlines, Inc.</i> , 259 F.3d 1112 (9th Cir. 2001)	1999	8/8/01	9th Cir.	825.220(c)	Valid.	Regulation (stating that employer cannot use the faking 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."
48	<i>Whitaker v. Bosch Braking Systems</i> , 2001 WL 1694233 (W.D. Mich. Aug. 27, 2001)	2000	8/27/01	W.D. Mich.	825.114	Valid.	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.

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49	<i>Fulham v. HSBC Bank USA</i> , 2001 WL 1029051 (S.D.N.Y. Sept. 6, 2001)	1999	9/6/01	S.D.N.Y.	825.208(c); 825.700	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 require employer to provide more than twelve weeks of leave during a twelve month period.
50	<i>Harbert v. Healthcare Services Group, Inc.</i> , 173 F. Supp. 2d 1101 (D. Colo. 2001)	2000	9/28/01	D. Colo.	825.111(a)(3)	Valid.	The statute does not provide a definition of "worksites" 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	<i>Woodford v. Community Action of Greene County, Inc.</i> , 268 F.3d 51 (2d Cir. 2001)	2000	10/10/01	2nd Cir.	825.110(d)	Invalid.	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	<i>Washburn v. CB Richard Ellis, Inc.</i> , 171 F. Supp. 2d 577 (D. N.J. 2001)	2000	10/26/01	D. N.J.	825.208; 825.700	Valid.	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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53 <i>Alexander v. Ford Motor Co.</i> , 204 F.R.D. 314 (E.D. Mich. 2001)	2001	11/5/01	E.D. Mich.	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.
54 <i>Smith v. BellSouth Telecommunications, Inc.</i> , 273 F.3d 1303 (11th Cir. 2001)	2000	11/27/01	11th Cir.	825.220(c)	Valid.	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 <i>Caraballo v. Puerto Rico Telephone, Inc.</i> , 178 F. Supp. 2d 60 (D. P.R. 2001)	2001	12/12/01	D. Puerto Rico	825.110(d)	Invalid.	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 <i>Kosakov v. New Rochelle Radiology Associates, P.C.</i> , 274 F.3d 706 (2d Cir. 2001)	2000	12/20/01	2nd Cir.	825.110(d)	Invalid.	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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57 <i>Hunt v. Rapides Healthcare System, LLC</i> , 277 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 <i>Ragsdale v. Wolverine World Wide, Inc.</i> , 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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<b>Cases Decided After Supreme Court Decision in <i>Ragsdale v. Wolverine World Wide, Inc.</i> (March 19, 2002)</b>						
59 <i>Smith v. Duffie Ford-Lincoln-Mercury, Inc.</i> , 298 F.3d 955 (10th Cir. 2002)	2000	11/29/2002	10th Cir.	825.216(a)	Valid.	Regulation (providing that "[a]n employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment") is not arbitrary, capricious or manifestly contrary to the FMLA; the regulation permissibly shifts to the employer the burden of proving that an employee, laid off during FMLA leave, would have been dismissed regardless of the employee's request for, or taking of, FMLA leave.
60 <i>Parker v. Hanthemann University Hospital</i> , 2002 WL 31830647 (D. N.J. Dec. 18, 2002)	2000	12/18/02	D. N.J.	825.216(a)	Valid.	Regulation (providing that "[a]n employer must be able to show that the employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment") is valid; the court follows the Tenth Circuit decision in <i>Smith v. Duffie Ford-Lincoln-Mercury, Inc.</i> , 298 F.3d 955 (10th Cir. 2002), which placed the burden on the employer to prove that the employee, laid off during FMLA leave, would have been dismissed regardless of the employee's request for, or taking of, FMLA leave. The court determines that the Tenth Circuit approach upholds the validity and plain language of the regulation.
61 <i>Ruder v. Maine General Medical Center</i> , 204 F. Supp. 2d 16 (D. Me. 2002)	2001	8/10/02	D. Me.	825.110(b)	Valid.	Regulation (providing that "[i]f an employee is maintained on the payroll for any part of that week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer . . . the week counts as a week of employment") is valid and consistent with the purposes of the statute; the court holds that an employee may pass the one-year eligibility threshold of the FMLA while on vacation if he remains on the payroll and is receiving benefits during that vacation.

	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
62	<i>Russell v. Convergys Customer Management Group</i> , 2002 WL 32059744 (E.D. Tenn. July 10, 2002)	2001	7/10/02	E.D. Tenn.	825.110(d)	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 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 valid.
63	<i>Rocha v. Sauler Woodworking Co.</i> , 221 F. Supp. 2d 818 (N.D. Ohio 2002)	2001	8/30/02	N.D. Ohio	825.110(d)	Invalid.	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.
64	<i>Garley v. Ameriwood Industries, Inc.</i> , 2002 WL 31450544 (E.D. Mo. Sept. 12, 2002)	2001	9/12/02	E.D. Mo.	825.110(b); 825.110(e)	Invalid.	Regulation 825.110(b) (providing that "[i]f 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 . . . the week counts as a week of employment") is invalid to the extent the regulation can be read to render a regular employee who has worked only eleven months, three weeks and one day an eligible employee. Regarding regulation 825.110(d), the court follows Eighth Circuit precedent in finding that the regulation is invalid because it adds a non-statutory notice obligation upon employers and extends FMLA eligibility to otherwise ineligible employees.
65	<i>Dierlam v. Wesley Jessen Corp.</i> , 222 F. Supp. 2d 1052 (N.D. Ill. 2002)	2001	9/23/02	N.D. Ill.	825.220(d); 825.215(c)(2)	Valid.	Regulation 825.220(d) (providing that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA") is consistent with Congress's expressed intent and constitutes a valid and permissible construction of the statute. Regulation 825.215(c)(2) (providing that "[t]o the extent an employee who takes FMLA leave has met all the requirements for . . . bonuses before FMLA leave began, the employee is entitled to combine this entitlement upon return from FMLA leave [and thus] may not be disqualified for the bonus(es) for the taking of FMLA leave") is a reasonable and permissible construction of the statute.

	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
<b>2003</b>							
66	<i>Farina v. Compuscore Corp.</i> , 256 F. Supp. 2d 1033 (D. Ariz. 2003)	1998	5/23/03	D. Ariz.	825.208(c)	Validity not decided.	Court does not decide validity issue, but follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
67	<i>Phillips v. Leroy Somer North America</i> , 2003 WL 1790941 (W.D. Tenn. March 28, 2003)	2001	3/28/03	W.D. Tenn.	825.208(c)	Invalid.	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 absences being counted as FMLA leave) is invalid following <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002).
68	<i>Forst v. Williams WPC-J, Inc.</i> , 332 F.3d 316 (5th Cir. 2003)	2002	5/27/03	5th Cir.	825.220(d)	Validity not decided.	Court determines that the party challenging the regulation (stating that "employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA") did not present the challenge to the District Court and, therefore, the Court could not consider the issue on appeal.
69	<i>Donahoo v. Master Data Center</i> , 282 F. Supp. 2d 540 (E.D. Mich. 2003)	2002	7/29/03	E.D. Mich.	825.208	Invalid.	Court follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
70	<i>Dorst v. Interstate Brands Corp.</i> , 2003 U.S. Dist. Lexis 22200 (S.D. Ind. Sept. 30, 2003)	2001	9/30/03	S.D. Ind.	825.114(d)	Valid.	Court determines that the regulation (stating that substance abuse may be a serious health condition if certain conditions are met) is a reasonable interpretation of the FMLA and the regulation is entitled to deference.
71	<i>Russell v. North Broward Hospital</i> , 346 F.3d 1335 (11th Cir. 2003)	2002	10/2/03	11th Cir.	825.114	Valid.	Court determines that the regulation (requiring a period of incapacity of more than three consecutive calendar days) is valid and constitutes a permissible construction of the statute.
72	<i>Babcock v. Bell South Advertising &amp; Publishing Corp.</i> , 348 F.3d 73 (4th Cir. 2003)	2002	10/28/03	4th Cir.	825.110(d)	Valid.	Court determines that the regulation (stating that the determination whether an employee has been employed by the employer for at least 12 months must be made "as of the date leave commences") is reasonable in light of the purpose of the statute.

	Case Name	Year Case Filed	Date of Relevant Decision	Court	Specific Regulation	Court's Decision	Comments
73	<i>Whitney v. Wal-Mart Stores, Inc.</i> , 2003 WL 22961210 (D. Me. Dec. 16, 2003)	2003	12/16/03	D. Me.	825.208(b)(1)	Invalid.	Court follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
74	<i>Clader v. Winn-Dixie Louisiana, Inc.</i> , 2003 WL 22966364 (E.D. La. Dec. 16, 2003)	2003	12/16/03	E.D. La.	825.208(a); 825.301(c)	Invalid.	Court follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
<b>2004</b>							
75	<i>Thompson v. Diocese of Saginaw</i> , 2004 WL 45519 (E.D. Mich. Jan. 6, 2004)	2002	1/6/04	E.D. Mich.	825.208	Invalid.	Court follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
76	<i>Sims v. Schultz</i> , 2004 U.S. Dist. Lexis 341 (N.D. Ill. Jan. 8, 2004)	2003	1/8/04	N.D. Ill.	825.208	Validity not decided.	Court does not decide validity issue, but follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
77	<i>Miller v. Personal Touch of Virginia, Inc.</i> , 342 F.Supp.2d 499 (E.D. Va. 2004)	2004	11/2/04	E.D. Va.	825.208(c)	Invalid.	Court follows the Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.
78	<i>Harbert v. Healthcare Services Group Inc.</i> , 391 F.3d 1140 (10th Cir. 2004)	2003	12/13/04	10th Cir.	825.111(a)(3)	Invalid.	Court concludes that 825.111(a)(3) (defining the "work site" of an employee who is jointly employed by two or more employers) as applied to the situation of an employee with a fixed place of work, is arbitrary, capricious, and manifestly contrary to the FMLA.
79	<i>Bukla v. JC Penney Company Inc.</i> , 359 F.Supp.2d 649 (N.D. Ohio 2004)	2002	12/22/04	N.D. Ohio	825.208	Validity not decided.	Court does not decide validity issue, but follows Supreme Court's guidance in <i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 122 S. Ct. 1155 (2002), regarding how to enforce violations of the notice provisions under the FMLA.

The CHAIRMAN. Thank you.  
Ms. Dohnalek?

**STATEMENT OF LAURIE DOHNALEK, NURSE MANAGER,  
GEORGETOWN UNIVERSITY MEDICAL CENTER, WASHINGTON, DC**

Ms. DOHNALEK. Good morning and thank you for the privilege and the opportunity to be here today.

I am a nurse manager for blood and marrow transplant inpatient oncology, apheresis, and dialysis at Georgetown University Hospital, and—

The CHAIRMAN. Can you pull the microphone just a little closer to you?

Ms. DOHNALEK [CONTINUING]. And I have been a manager there for 12 years, 8 years in my current position. And I would like to say we are the only magnet hospital in Washington, DC.

I manage 75 full-time and part-time employees. Fifty of those are registered nurses. My experience with Family and Medical Leave goes back to its passage in 1993, and I would like to share some of my personal and professional perspectives with you.

I do believe that employees have responsibilities to themselves and their families, along with work obligations. The Family and Medical Leave Act supports this and, in theory, is the right thing to do. However, in my experience as a nurse manager, the implementation and components of the law can be confusing, cumbersome, and difficult for the healthcare employer, and may in fact jeopardize patient care and safety. The fact that a hospital is a 24/7 operation creates additional pressures on the organization due to this law. In a busy hospital setting, units must be staffed appropriately to ensure that patients are receiving the care they require by individuals who are trained and qualified to provide this.

In this type of setting, it is difficult to maintain the worker's secured position for 12 weeks. Most positions cannot remain unfilled for this amount of time. Although temporary help can provide a



short-term alternative, it is expensive and, typically, inefficient in a healthcare setting, especially when dealing with specialized and critically ill patients, which we do in many settings.

Staffing schedules made to ensure ratios that meet the needs of the patients are done well in advance. In healthcare there is rarely extra manpower, as many of you, I am sure, are aware. The loss of an employee directly affects patient care and impacts the entire team. In the Apheresis Center, for example, the nurses require 6 months orientation to care for a highly specialized patient population, so temporary help is not a solution there. The nurse-patient ratio is 1-to-1 and there are only two nurses that are employed under that budget. So if one nurse is out, then we are short 50 percent.

So it can take many hours to manually develop a staffing matrix that meets the needs of the patients and staff. If you ask most nurse managers what their biggest dissatisfaction is, it would be the lack of skilled, experienced, and capable staff. The Family and Medical Leave Act can add to this heavy load.

Thank you.

[The prepared statement of Ms. Dohnalek follows:]

PREPARED STATEMENT OF LAURIE J. DOHNALEK

Mr. Chairman and Roundtable participants, my name is Laurie Dohnalek. I am the nurse manager for the Blood and Marrow Transplant, Inpatient Oncology, Apheresis and Dialysis Services at Georgetown University Medical Center. I have been a nurse manager for 12 years and in my current position for 8. As the nurse manager I am responsible for the operational finances, personnel and quality of patient care on these units which includes 75 full and part-time staff and the scheduling of 50 registered professional nurses, and 25 nursing assistants and unit secretaries. My experience with the Family Medical Leave Act goes back to the date of its passage in 1993. I would like to share my personal and professional perspectives with you as I have dealt with this legislation as a nurse manager in an academic medical center.

**Family Medical Leave Act (FMLA): A Nurse Managers Perspective**

Employees have responsibilities to themselves, and their families along with work obligations. The Family Medical Leave Act supports this and in theory is the right thing to do. However, in my experiences as a nurse manager, the implementation and components of the law can be confusing, cumbersome and difficult for the healthcare employer and may in fact jeopardize patient care and safety.

The act itself can be somewhat vague in the following areas: who qualifies, what is the definition of family members and what is considered a serious health condition. If an individual is calling out sick frequently, it is the obligation of the manager to provide them with information on FMLA. Is this a time and attendance issue or a legitimate health issue? The implications of not adhering to the law are significant enough that the decisions are typically made in favor of the employee. It can also be difficult to make decisions for or with an employee not knowing basic information about the health problem, as it is protected under this law.

The fact that hospitals are a 24/7 operation creates additional pressures on the organization due to this law. In a busy hospital setting, units must be staffed appropriately to ensure that patients are receiving the care they require by individuals who are trained and qualified to provide what is needed 24 hours a day. For example, on the inpatient units, qualified experienced nurses must be able to respond to patients 24 hours each day. In this type of setting it is difficult to maintain the workers secured position for 12 weeks. Most positions cannot remain unfilled for this amount of time. Although temporary help can provide a short-term alternative, it is expensive and typically inefficient in a healthcare setting, especially when dealing with specialized and critically ill patients.

Overtime is another alternative but in an environment that is already struggling because of shortages of nurses and allied healthcare personnel, vacancies create a burden on already hard working staff and additional costs to the hospital. Under this scenario, which unfortunately is common, the hospital sustains a double loss.

First the loss of a trained and competent staff member and the financial burden of paying and training a temporary worker who may not be able to provide the level of care of the person he or she is replacing. In addition, the hospital must also pay for the employment benefits for the individual that is not working.

Intermittent Family Medical Leave (FML) and modified work schedules may be the most difficult to staff and time consuming to track. Staffing for a portion of a shift may be impossible and this period typically goes uncovered. This impacts patient care and safety. This also places undue burden on the system and colleagues. Other workers are entitled to their time away from work but may feel obligated to cover for the employee out on FML. Although the employee is requested to schedule leave at times that does not unduly disrupt operations and to notify the employer in advance, how can the organization be certain of this or control this? Covering for a certain time off, i.e. Mondays or extended periods is less cumbersome than intermittent short periods in a healthcare setting.

Staffing schedules are made to ensure ratios that meet the needs of the patients. In healthcare there is rarely extra manpower. The loss of an employee directly affects patient care and impacts the entire team. In the Apheresis Center the nurses require 6 months orientation to care for this highly specialized patient population so temporary help is not a solution for this department. In addition the nurse to patient ratio is typically 1:1. Although other unit staff will and do attempt to cover for manpower losses, the nurse manager is always concerned about the impacts on the patient care environment, and especially the health and morale of those who are assigned to the unit. Fairness to the employee and maintaining the integrity of the unit is not easy under these circumstances.

It can take many hours to manually develop a staffing matrix that meets the needs of the patients and staff, while assuring fairness. When staff are taken out of the schedule for any reason it creates chaos and additional costs for the organization. If you ask most nurse managers what their biggest dissatisfaction is, it would be the lack of skilled, experienced and capable staff. The Family Medical Leave Act can add to that heavy load.

The administrative time needed to manage this can be excessive. The time to track time off, paperwork, talking with physicians, coverage, human resource and employee health collaboration, and legal involvement may be extensive.

#### **Administrative Recommendations**

**Minimize ability to use intermittent leave.** There was an individual who was out intermittently, including Dr's appointments and sick time for several weeks. The employee frequently called out with insufficient time to obtain some type of replacement. On occasion she came to work and left shortly after arrival, complaining that she could not work due to her illness, leaving no one to do the job. She also came to work and did not meet job expectations due to her incapacitation. This was a secretarial position and she was the only one with the skills to completely fulfill the job requirements. When she was out, work was not done and items were not ordered. Staff were frustrated that this key position was unmanned and it impacted patient care. The scenario with a nurse is similar; however, the impact is far greater. Consider the affect of several staff out on FMLA and the impact to satisfaction and safety on many levels.

Reconsider intermittent leave and require a Dr's visit with each absence, although physicians typically meet the requests of the employee.

**Tighten up the definition of what constitutes "serious illness."** Originally the act was developed for things like chemotherapy treatments, radiation etc., now it is used for sick days. Example—A mother stated that she could not come to work because of the pollen and her child has asthma. Although it is well controlled, she said that he did not feel well and that the pollen count was high. The threshold of acceptance is on the employer rather than strict guidelines and expectations.

#### **Support Institutions in Managing the FMLA When Appropriate**

The FMLA is an example of understanding that health issues occur and that employees should not be penalized for these unforeseen events. However, changes to the act can be an opportunity to improve the balance that needs to be struck between the employer, as in the case of hospitals, and their needs for quality patient care and the employees who provide it.

The CHAIRMAN. Thank you.  
Mr. Lancaster?

**STATEMENT OF PATRICK LANCASTER, VICE PRESIDENT,  
CHIEF ADMINISTRATIVE OFFICER AND SECRETARY, AMERICAN AXLE & MANUFACTURING, DETROIT, MI**

Mr. LANCASTER. American Axle Manufacturing is a Tier 1 automotive supplier in the global automotive industry, which is undergoing a structural change caused by global competition, our customer demands for global pricing, and rising domestic production costs. We have 9,000 U.S. employees. All of our hourly associates are represented by either the UAW or the IAM. And on a daily basis we produce 17,000 axles, highly engineered products, and because of just-in-time deliveries our customers are dependent on us to produce those on time, every time.

We find the FMLA, as presently existing under the regulations, to be a cost driver. Under our collective bargaining agreements, we have sick leave, personal leave, and also 40 hours paid, no-fault, unscheduled attendance provisions in there. We have found that, historically, concerns about serious health matters were adequately addressed in the CBA. What we have found is that when we layer on top of that the effect of the FMLA, particularly as the regulations define some of these terms, it allows for unscheduled absences that we can't adjust for in terms of running our business, so it drives cost, and allows people to avoid discipline under the CBA attendance policy.

So we think this is a significant cost driver and is contributing to the loss of jobs in manufacturing and in the United States, as presently existing.

[The prepared statement of Mr. Lancaster follows:]

PREPARED STATEMENT OF PAT LANCASTER

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AAM's Collective Bargaining Agreement/FMLA Implications  
FMLA as a Competitive Threat to U.S. Manufacturing  
AAM FMLA Abuse Case Examples

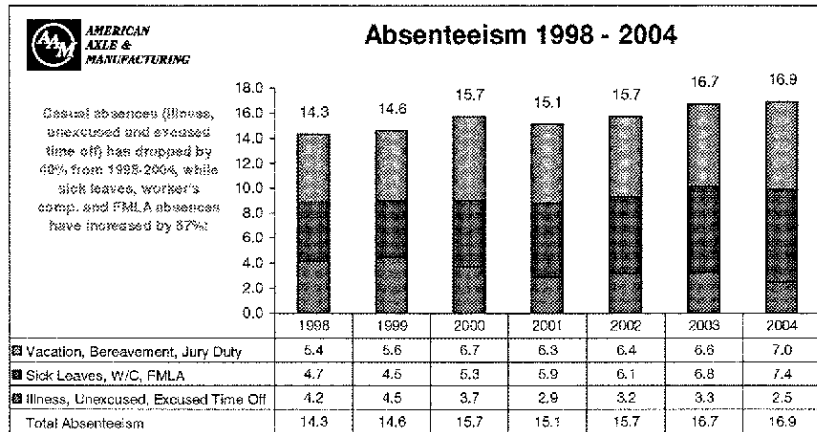
OVERVIEW

The U.S. automotive industry is undergoing a structural change caused by global competition, customer demands for global pricing and rising domestic production costs. One of AAM's domestic cost drivers is the significant increase in absenteeism caused by abuses of the Family Medical Leave Act ("FMLA"). In AAM's view, this abuse results from two primary areas of the FMLA: (1) the lack of effective guidelines regarding the definition of a "serious health condition," and, (2) the intermittent leave provisions. The interplay of these two very broad provisions of the FMLA allow employees to routinely obtain certification from a medical provider relating to an underlying chronic condition of the employee, parent or child for intermittent (and, therefore, usually entirely unscheduled) leave. The threshold definition of a "serious health condition" as interpreted through the DOL's opinions is so low that AAM estimates that at any time, at least 1/3 of all AAM employees could successfully obtain medical certification from a provider for an intermittent FMLA leave. In such circumstances, healthcare providers extend very broad certifications that allow employees to take leave for any reason and at any time and without prior notice. Thus, in the past 2 years, AAM has experienced exponential growth in the use of FMLA to cover tardy and "leave early" circumstances, in addition to a sharp increase in FMLA absences on Mondays and Fridays. These absences cannot be challenged or addressed through application of standard work rules or the "no-fault" absenteeism procedures that have been established at our domestic locations. As a result, abuse of FMLA leave has become the single largest "loop-hole" for abuse of un-

scheduled absenteeism. Exacerbating this situation is the difficulty of the FMLA mechanisms to challenge the opinion of a medical provider.

AAM'S ABSENTEEISM AND FMLA EXPERIENCE

• AAM currently operates seven (7) manufacturing facilities in the United States, all of which are represented by the UAW. Of those seven operations, five (5) of these facilities were part of the original asset transfer from GM. Two are located in Detroit, MI and two in the greater Buffalo, NY area. Historically, these four inner city facilities have been plagued by high absenteeism. Below are the composite absenteeism rates for the five facilities from 1998 through 2004.



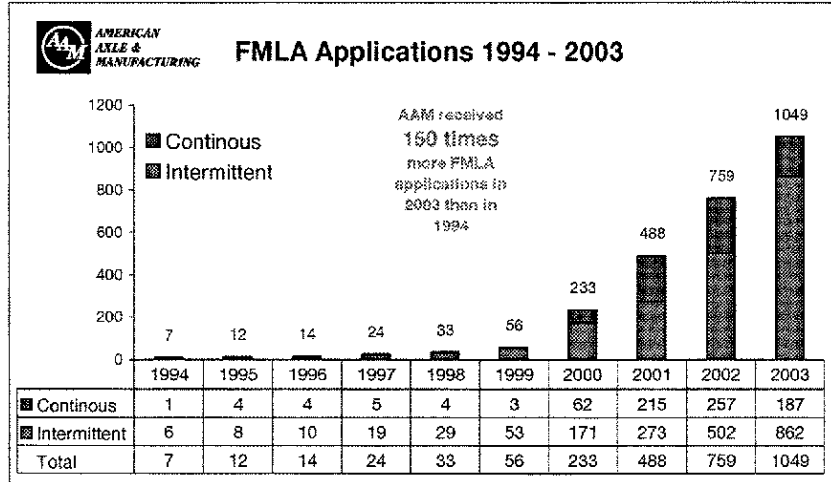
• Between 1998 and 2004, AAM aggressively pursued contractual modifications to negotiated attendance programs. These programs were modified with the intention of significantly reducing absenteeism related to “casual” time off—or unexcused, illness and excused days of absence.

• These attendance program changes have resulted in a 40 percent drop in the rate of such casual absences, as shown by the red bars above.

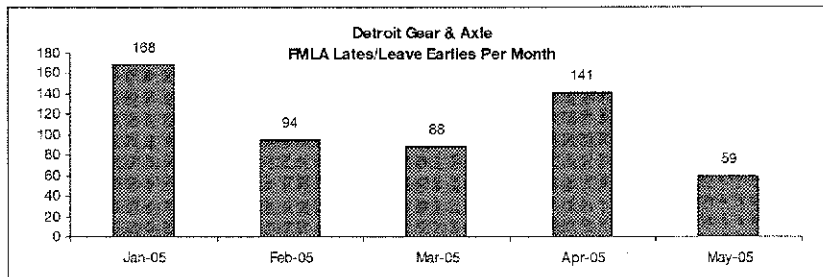
• During this same period of time, sick leave and FMLA use has exploded at AAM, as shown by the growth in the blue bars.

• Absenteeism in several of our plant locations has been directly linked to major sporting events. In 2005, the day after the Superbowl, absenteeism spiked to over 30 percent total absenteeism at Detroit Gear & Axle, up nearly 13 percent from “normal” absences.

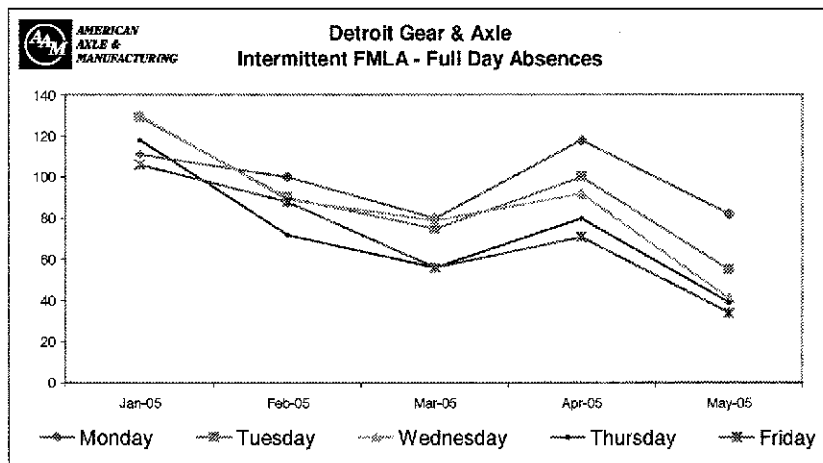
• FMLA use now accounts for 1 percent of all absenteeism at AAM. One percent of absenteeism is estimated to cost AAM \$8.1 Million annually.



- In 2003, approximately 1 out of every 5 hourly employees at AAM applied for FMLA.
- 84 percent of FMLA applications are approved, 16 percent of applications are denied.
- Intermittent FMLA use has climbed at a rate of increase five times as fast as FMLA use for continuous leaves.
- Several of AAM's local unions have conducted on-site classes at the union halls to "train" employees on the use of FMLA.
- Use of intermittent FMLA for tardiness and "leave earlies" from work has similarly exploded.



- At AAM's largest domestic manufacturing operation, Detroit Gear & Axle, on average in 2005, there are 110 occurrences of tardiness or leaving early due to FMLA per month. This is equal to approximately 6 employees calling in unscheduled tardiness or leaving early every work day of the month. These events are entirely outside the plant rules for reporting late for work.
- A recent example of the FMLA abuse was experienced just this past Monday, June 20th. On Sunday night, beginning at 9:00 p.m., the Detroit Pistons played in an NBA finals game, which went into overtime and ended at 1:15 a.m. on Monday morning. At Detroit Gear & Axle, unscheduled FMLA activity for 3rd shift (which starts at 10:00 p.m. on Sunday) and 1st shift (which starts at 6:30 a.m. on Monday) were severely impacted. Detroit Gear & Axle averages 22 call-ins on average for FMLA each Monday; for 3rd and 1st shift alone, on this date, there were 30 such call-ins.



- As shown above, AAM's experience with FMLA intermittent absences points to clear abuse. Intermittent FMLA absences tend to occur with much greater frequency on Mondays of each week, as shown by this data for 2005.

#### AAM'S COLLECTIVE BARGAINING AGREEMENT/FMLA IMPLICATIONS

AAM's collective bargaining agreements with the UAW provide numerous mechanisms for employees to apply for leave or time off for their own serious health condition or to provide care for family members. Below is a summary of those existing provisions:

**Sick Leave of Absence**—A sick leave of absence is automatically granted by AAM when the employee is known to be ill and it is supported by satisfactory evidence. When an employee submits documentation for self-care under FMLA the above mentioned contractual provisions is negated; by law, AAM must make such leave available and is left with little recourse to address whether or not such illness is supported by satisfactory evidence.

**Informal Leave of Absence**—An informal leave of absence may be granted for up to 30 days for personal reasons. In such case, AAM has the ability to evaluate the basis for the requested leave, and weigh this request against the needs of the business. With FMLA, no such ability exists for the employer to determine if the need for leave outweighs the needs of the company.

**Formal Personal Leave of Absence**—A formal leave of absence may be granted for 30 days to up to 180 days. Again, AAM has the ability to evaluate the basis for the requested leave, and weigh this request against the needs of the business.

**Vacation Time Off**—AAM provides for a minimum of 40 hours and up to 200 hours of vacation time off to employees, based on seniority. Forty (40) hours of this entitlement can be used without pre-approval for absences related to illness or personal business. The remaining vacation balance can be used by employees on a pre-scheduled basis to address care issues for family members.

**Location-specific Attendance Policies**—With its unions, AAM has negotiated successively tighter attendance policies. However, even the most strict attendance policy in place within AAM's domestic operations provides for a minimum of six (6) occurrences of either single day or consecutive day absences before a termination can take place (This description is stated in terms of a minimum because AAM's attendance programs vary in terms of number of steps in corrective action procedure and the "removal" period, or the period of time without absence that is required before the employee's record clears). These days are exclusive of any approved sick leave of absence, formal or informal leave of absence or vacation time off as described above. AAM's attendance policies are designed as "no-fault" procedures, yet the FMLA not only allows an employee to call-in an absence/late, but it gives them the ability to be off work for individual or consecutive days without being subject to the attendance policy. Each AAM location has identified FMLA as a major roadblock to their attendance programs' effectiveness.

## FMLA AS A COMPETITIVE THREAT TO U.S. MANUFACTURING

AAM has described our experience in managing the problem of employee absenteeism and has further described the provisions of our collective bargaining agreement that provide for numerous mechanisms for paid and unpaid time off to address employee or a family member medical issues. It is AAM's view that the FMLA, as written and interpreted, creates significant potential for attendance abuse, thereby increasing the already substantial competitiveness gap that domestic manufacturers currently face.

Country	Annual Working Days
Mexico	282
Brazil	264
India	249
United Kingdom	226
France	225
Germany	233
United States - AAM	229

Source: AAM estimates based on Mercer, Watson Wyatt Survey Data, 2004

## AAM FMLA ABUSE CASE EXAMPLES

## Detroit Forge—Saturday/Sunday FMLA Absences

- Employee has been certified for intermittent FMLA for care of her asthmatic child.
- According to AAM's contractual obligation to offer overtime work according to an "equalization list" Employee was offered and accepted overtime work for Saturday, June 11th. Based on her acceptance of overtime, other individuals on the overtime list were not asked to work.
- Employee called in FMLA 14 minutes prior to the start of shift, alleging absence due to care of daughter for asthma.
- The Employee's absence caused a shortage of manpower due to no absentee coverage scheduled on premium pay workdays.
- Other AAM employees voiced complaints to the union feeling disadvantaged by this employee having exercising her rights under the FMLA.
- Local union representatives have requested a waiver of the overtime equalization provisions for employees who have intermittent FMLA and to limit overtime availability for those employees with approved FMLA much like we do with employees that have medical restrictions.

## Buffalo Gear &amp; Axle—Serious Health Condition Definition Example

- Employee was attendance problem before he filed for FMLA.
- Employee was certified for FMLA intermittent leave for sleep apnea.

- Employee claims to have had this condition for years.
- Prior to his FMLA certification, the employee's absences from work were frequent, yet controlled through the absenteeism policy.
- Today, this employee is a habitual absentee problem using FMLA as the reason.
- No penalty in the attendance program.

#### Buffalo Gear & Axle—Friday/Monday Absences

- Employee certified for intermittent FMLA for “prenatal care”—no unusual circumstances with the pregnancy.
- Employee has shown a pattern of Friday/Monday absences.
- AAM's ability to challenge the need for this FMLA leave is limited to a 2nd Medical Opinion.

#### Buffalo Gear & Axle—Extended Weekends

- Employee was certified for intermittent FMLA for migraine headaches.
- AAM advised by other hourly employees that employee was taking trips to Florida for long weekends to visit a boyfriend.
- Employee called in for intermittent FMLA leave.
- Employee's vehicle was observed in airport parking lot.
- Employee admitted to traveling to Florida, yet claimed migraine headaches during trip.

#### Detroit Gear & Axle—Other Employment

- Two brothers working at AAM on opposite shifts, one on 1st, one on 2nd.
- Both certified for intermittent FMLA care of mother with breast cancer.
- One brother, assigned to first shift, called in intermittent FMLA so frequently that he exhausted his 12 weeks of leave.
- This employee was observed working at the Best Western Hotel as a 2nd shift manager.
- AAM could not take action against employee working a 2nd job at night and calling FMLA on 1st shift, because FMLA does not prohibit “moonlighting” and employee claimed he was providing care for mother on 1st shift.
- Yet, brother, also on intermittent FMLA was assigned to AAM on 2nd shift, and should have been available to care for mother during days.

#### Detroit Gear & Axle—Out of Town

- Employee certified for intermittent FMLA for pulmonary sarcoidosis.
- Employee called in for FMLA from a Las Vegas, Nevada phone number.
- Employee was denied FMLA for those days, however, 2nd medical opinion confirmed her need for intermittent leave.

#### Detroit Gear & Axle—Lates

- Employee certified for intermittent FMLA for care of mother due to Alzheimer's.
- Employee late for work at least 4 times per week.
- Employee's work schedule modified to minimize impact on operations and accommodate her mother's illness.
- Even with an adjustment in her schedule, she cannot arrive to work on time.

#### Three Rivers—Dr. Abuses

- One employee was overheard speaking to another employee. “Just go to Dr \_\_\_\_\_ and tell him that you are experiencing severe headaches. He may send you for some tests but they can't prove you are having them or not so he will sign the FMLA forms for you.”
- The reason the employee wanted time off was because of having problems finding a babysitter along with wanting a few days off to go to the flea market each month.
- The other employee was on intermittent leave for migraines and was coaching a co-worker how to get time off on FMLA.

#### Three Rivers—Serious Health Condition Disappeared After Exhaustion of 12 Weeks of FMLA

- Employee was certified for intermittent FMLA for migraine headaches.
- All paid vacation time was exhausted by AAM prior to granting unpaid FMLA.
- Employee took 2 to 3 days per week FMLA for the headaches, 12 weeks total of FMLA time was exhausted within 7 months.
- Now that the employee would be subject to the “no-fault” attendance policy, employee is attending work regularly.

The CHAIRMAN. Thank you.  
Ms. Alexander?



**STATEMENT OF MARIE ALEXANDER, CEO, QUOVA, INC.,  
MOUNTAIN VIEW, CA**

Ms. ALEXANDER. I am the CEO of a small company in California. We have about 57 employees. As everyone else has mentioned in a small company, it is quite tight. I have a very skilled work force. But what I have found is that being able to allocate resources and plan ahead, it has been no problem for us to be able to implement Family and Medical Leave and to be able to provide my employees the leave that they need.

We recently had someone that left out on maternity leave. I was able to allow her to leave. I was able to hire a skilled resource and, because it was unpaid leave, her benefits were covered, but with the person that I was hiring in, I didn't have to cover his benefits. And so it was a net to my business. As we managed through this process, at the end I was able to have not only one trained employee, but another person trained up during that process so that, as my business grew later, I was able to hire the temporary employee into a full-time position in the company. We do have the issue of having people that may call in and need a short period of time off. I do have resource constraints as well. And while it is not life-threatening, we do have 7-by-24 support that we have to provide to our customer base, so it is critical that I have the entire staff there. But at this point, it hasn't caused problems to my business. In fact, by managing it this way, it has actually contributed positively to my business.

The CHAIRMAN. Thank you.

Ms. Boyd?

**STATEMENT OF SANDRA BOYD, VICE PRESIDENT, HUMAN RE-  
SOURCE POLICY, NATIONAL ASSOCIATION OF MANUFAC-  
TURERS (NAM)**

Ms. BOYD. First, I think it is important to say that it is not at all inconsistent to support the FMLA and to feel that the FMLA has been positive in many ways for employees and employers, but to also appreciate that the regulations are flawed in important ways that maybe were not intended at the time but, through both the regulations, wage-hour opinion letters, and now case law, we are in a situation where these regulations do need to be looked at again.

We survey our members on a regular basis, and what we find is very consistent with what Mr. Lancaster discussed, and that is that manufacturers have three problems with the regulations. And again, it is important to stress that these are regulatory problems that were by and large created by the Department of Labor and are fixable by the Department of Labor without doing away with any important employee protections.

The first problem frequently mentioned in every survey is the definition of "serious health condition." I believe when Congress passed the statute there was a lot of discussion not just about the family side, which our members don't find very problematic, but there was discussion about health conditions as well. But for the most part, that discussion really did center around "serious"—meaning serious—and it is a little distressing now, 12 years later, to see case law on hangnails. I don't think that is what you in-

tended, and it certainly makes it more problematic to deal with the statute.

The second problem is the intermittent leave issue that has been raised before. Intermittent leave has to be given to employees in the smallest increment that the employer keeps time in. For many manufacturers, that is 6 minutes. Keeping time in 6-minute increments is an administrative burden beyond belief and it causes HR departments to have to have full-time staff just to track time. It is particularly troubling, given the very tight margins in manufacturing these days, when you have unscheduled leave. Intermittent leave is not as problematic when people plan ahead and when there is an ability to plan ahead. Obviously, not everything can be planned ahead, but the unscheduled leave is very troubling.

The third problem raised again and again are the notice provisions, which the U.S. Supreme Court, of course, in the *Ragsdale* case, has already overturned and told the Department of Labor to go back and revise that portion of the regulations at least.

But there are more flaws in the notice provisions beyond those that were identified in the *Ragsdale* case. Those have to do, really, with the hindrances on employers' ability to figure out what is going on with an absence. Is it consistent that somebody who has chronic headaches be gone disproportionately on a Monday or a Friday, or after a major sporting event? Is that the sort of expectation, you know, based on the illness that you see? You don't really have a lot of ability, and of course further complicated by HIPAA and some other things, to go back and to have these discussions with doctors and healthcare professionals to figure out what it is the employee might want and to make those kinds of accommodations.

Again, as someone else mentioned, there is probably a small, small percentage of the population that you have these particular issues with, but with very, very thin margins it becomes a real cost driver and is really problematic. I strongly believe that these are issues that can be fixed in very targeted ways through the regulatory process without harming the underlying protections of the act, which really have been important, I think, to American employers and employees.

#### PREPARED STATEMENT OF SANDRA BOYD

Beginning in the fall of 2002, the NAM has regularly asked its members for feedback regarding the Family and Medical Leave Act (FMLA). The initial request in the fall of 2002 was made in anticipation of a January 2003 stakeholders meeting with the Department of Labor (DOL) to discuss FMLA regulations in light of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, where the Court invalidated the penalty provision found in Section 825.700(a) of the regulations.

Administration of the FMLA is regularly identified as the number one human resource challenge by NAM members. NAM members frequently mention their overall support for the spirit and goals of the FMLA, many noting that they have had robust family and medical leave programs—often with more generous benefits—long before the FMLA was passed. While 12 years later the statute itself raises few questions, the implementing regulations are a different story. Many NAM members report being frustrated by the complexity of FMLA administration and the ease with which it can be abused. Members note that the FMLA was designed to allow for family leave after the birth or adoption of a child or to care for seriously ill family members—and that these family leave absences are almost never the problem. The main source of problems identified by employers is with an employee's own medical absences.

The inability of employers to manage FMLA absences—because of the way in which the regulations and DOL wage hour opinion letters have developed over the past decade—as they would other absences is a huge and costly frustration. In short, there are four major areas that are repeatedly mentioned by most, if not all, NAM members as problematic: definition of serious health conditions; intermittent leave; notice provisions and perfect attendance awards.

A summary of each of these issue areas and their impact is discussed below:

#### I. Serious Health Condition

The definition of “serious health condition” is regularly identified as the most problematic issue, with most NAM members agreeing that the regulations combined with DOL opinion letters on the subject have made almost any illness a qualifying illness. “Serious” no longer means “serious” as contemplated by Congress when the FMLA was passed. For example, one visit to a healthcare provider for a prescription and “incapacity” of more than 3 days qualifies as a serious health condition. While the statute may not have contemplated using the FMLA for common conditions like the flu and hangnails, the regulations have.

Manufacturers believe—as Congress did when it passed the statute—that the definition of “serious health condition” should not cover short-term illnesses where treatment and recovery are brief.

The overly broad definition of “serious health condition” is particularly problematic for individuals who have “chronic conditions.” The regulations define serious health conditions as including chronic conditions (and the period of incapacity need not be 3 days). Conditions such as allergies, migraines or other headaches, back problems, depression, asthma and diabetes are frequently identified as chronic conditions. Once employees have been diagnosed with these conditions, especially when combined with taking intermittent leave in short increments, the ability to manage absences is especially difficult.

#### II. Intermittent Leave

The high incidence of unscheduled intermittent leave (combined with the broad definition of serious health condition) is problematic for manufacturers. The unpredictable nature of intermittent leave creates scheduling and staffing issues and leads to increased cost and lost productivity.

Intermittent leave must be given in the smallest increments that the payroll system keep time in, which, for many manufacturers, means 6 to 10 minute increments. This creates a tremendous tracking and administrative burden for employers. Companies have noted that they have a population of employees that take their entire 12 weeks of FMLA leave—every year—6 minutes at a time.

Intermittent leave for unscheduled, chronic illnesses for employees has not only strained production schedules but it has soured employee morale. Non-scheduled FMLA intermittent leave frequently means that employers must over staff certain shifts (such as Mondays and Fridays where FMLA absences tend to be greatest), ask employees to fill in for other workers and require unscheduled overtime. It also compromises product quality and employee safety.

Some intermittent leave is anticipated and scheduled (such as physical therapy). This leave, even in smaller increments of time, are more easily dealt with because they are known ahead of time and the employer can make the appropriate scheduling changes.

#### III. Notice Requirements

Many manufacturers have noted that the burden of leave notification and designation is entirely one-sided with employees having little responsibility to inform the company of the reason for their absence, the expected length of the absence, and in the case of a chronic condition, what an employer can reasonably expect because of the condition.

The regulations further make it impossible for employers to have discussions and follow-ups with medical professionals about absences and the required forms do not give employers adequate information.

#### IV. Perfect Attendance Awards

The requirement that FMLA leave not count against an employee’s absence record for perfect attendance rewards is particularly irksome to manufacturers and has created morale problems for many. While employees who have been on leave for the birth or adoption of a child or for a serious medical condition should not be penalized for that leave, not allowing time actually at the job to count for “perfect attendance” often leads to perverse results. Some employers have discontinued or scaled back these awards as a result of the FMLA regulation and the impact on employee morale.

#### Impact of FMLA Regulatory Issues

Any one of the regulatory issues raised (definition of serious health condition, intermittent leave and notice) might be manageable for employers, but taken together with the strong job protection provisions of the FMLA, they have created a structure that does not allow employers to manage FMLA absences in the same way that other absences can be managed.

Because of the strong job protection provisions (which are entirely appropriate for those legitimately taking FMLA), employees with absence-related performance issues can hide behind the shield of the FMLA's protection to avoid discipline and termination. The notion that FMLA abuse problems can be managed is patently false under this regulatory scheme where the employers' hands are completely tied.

Under the current FMLA regime, companies cannot initiate any dialogue with employees or doctors. The only way employers can work with an employee to accommodate a medical issue (such as a shift change or change in work assignments) is if the employee initiates the conversation with management.

A number of manufacturers have reported the frustration (of both management and fellow employees) of having the same people who have habitual attendance issues being the biggest users of the FMLA—everyone in the team, facility and company know who they are. Employees in jeopardy of severe discipline for attendance infractions seek refuge in the FMLA. While the percentage of employees who abuse the FMLA may be small, their impact on cost, productivity and employee morale is enormous. Such gamesmanship undermines legitimate use of the FMLA by those for whom the benefits and protections were truly intended.

#### Conclusion

The FMLA has provided important protections to employees, but the regulatory scheme has made it impossible for employers to manage absences effectively. A recent NAM study found that manufacturers face a 22 percent cost burden—including regulatory costs—as compared to our major foreign competitors ([www.nam.org/costs](http://www.nam.org/costs)). In an environment where manufacturers face fierce global competition, it is imperative that regulations implementing laws work as Congress intended and that unintended consequences be addressed expeditiously.

Modest changes to the FMLA regulation that would ensure that employers have the tools they need to effectively manage their workplaces are badly needed. Such changes will also strengthen the FMLA by ensuring that those entitled receive the benefits and protections of the FMLA. The NAM strongly encourages the Department of Labor to proceed with a notice and comment rulemaking on FMLA regulations and for Congress to support those efforts.

The CHAIRMAN. Mr. Payne?

#### **STATEMENT OF JEFFERY PAYNE, DIRECTOR, HUMAN RESOURCES, PALMETTO HEALTH, COLUMBIA, SC, ON BEHALF OF AMERICAN SOCIETY FOR HEALTHCARE HUMAN RESOURCE ADMINISTRATION**

Mr. PAYNE. Thank you, Senator, for having this hearing for the discussion of this issue.

I want to echo what Laurie had said from a healthcare perspective. I represent not just my hospital but the American Society for Healthcare Human Resources Association—a mouthful, but it is a personal membership group of the American Hospital Association.

I want to give an example of the impact of what FMLA is doing to every managed—critical care areas. We have two large hospitals in our system. Both hospitals have large OR areas, operating rooms. They do about 60 to 80 cases a day. The OR depends on a staff of one circulating nurse and two surg techs. If any one of those three people is missing, the surgery cannot go forward. And these aren't things that you can delay. These are surgeries that have been scheduled, some are life-threatening surgeries.

So first thing in the morning, if one of those three calls out, the nurse manager has to immediately pull someone from case no. 2 to fill in for case no. 1, and then case no. 2 has a hole. Then they

have to go for case no. 5 to fill in for case no. 2, and so on and so on. That is expected; absences happen. But truly, within one of our hospitals, with a staff of about 110 people, at one time 25 people had FMLA situations, mostly on an intermittent leave basis. So on a given day, the risk was that 25 people could call out and there was really little they could do about it except to scramble and cover it.

We would like to say that, as echoed, the continuous leave portion is not a problem. It is plannable, it is—you can anticipate it and you can cover for it. It is the intermittent portion, plus the “serious health condition” definitions, that really cause us concern.

[The prepared statement of Mr. Payne follows:]

PREPARED STATEMENT OF JEFFERY PAYNE

The American Society for Healthcare Human Resources Administration . . . ASHHRA . . . appreciates the opportunity to submit our statement for the record on the Family Medical Leave Act and its regulations. I am Jeffrey Payne, director of Human Resources at Palmetto Health in Columbia, South Carolina, and the chairman of ASHHRA’s Legislative Committee.

ASHHRA represents 2,900 human resource healthcare professionals who serve in 5,000 hospitals, healthcare systems and other health organizations.

Hospitals are, by their very nature, nurturing environments, filled with talented and dedicated people who are committed to curing and caring. As human resources professionals, we embrace the idea that to deliver high-quality, compassionate patient care, you need high-quality, compassionate staff. We further recognize that, to attract and retain this kind of person to our hospitals, we need to be the kind of workplace that embodies the very best employment and employee-relations practices.

Our workforce is predominately female in a society that still places primary child-rearing responsibility on the woman. We therefore have an obligation to recognize and respond to the needs of our workforce as they strive to balance their parental and domestic responsibilities with their professional lives.

The Family Medical Leave Act is, at its core, a very positive and affirming piece of legislation that supports working men and women as they try to balance work and home. Even before the legislation was enacted, it was the policy of most healthcare organizations to provide ample leave time when employees had to deal with a variety of personal and family medical issues. In many ways, the Family Medical Leave Act simply codified a long-standing practice in hospitals.

My own organization, Palmetto Health, has 9,200 employees, working in three member hospitals. We consistently strive to make sure our policies, procedures, and benefits help our employees thrive. And we have been successful: We are a 2005 winner of the South Carolina Family Friendly Workplace Awards.

But this success does not come without challenges. There is a well-documented national shortage of healthcare professionals in the United States. The U.S. Bureau of Labor Statistics projects that 1.1 million new and replacement nurses will be needed by 2012. We, like many hospitals across the Nation, are chronically in need of good people. For example, at any given time, we have more than 150 nurse vacancies, which for us equates to a vacancy rate of about 10 percent. Our experience is very typical, and we must do what we can to create an environment that attracts the best—and policies that assist employees in times of medical need are absolutely required.

That being said, we have to constantly weigh what we would like to do versus what we are able to do. We have to take a hard look at our staffing practices to ensure that we are able to meet patient demand. At the same time, we must be effective stewards of limited healthcare resources. After all, we are constantly “on” . . . our lights never go out . . . our buildings never go quiet. We function 24 hours a day, 7 days a week, 365 days a year. And the nature of our work demands that we provide a constant presence. The people we serve need us to be there to take care of them during the most critical and vulnerable moments of their lives.

While we agree with its general goal, the implementation of the Family Medical Leave Act, as it is currently interpreted, is often frustrating and difficult. Frankly, in many cases implementation of the act is making matters worse for our employees and our patients as well. We strongly support the primary provision—allowing employees to take time off for consecutive weeks to deal with medical emergencies such

as pregnancy and surgery. That is straightforward, and easy to deal with administratively. However, the intermittent leave provisions, and the current definition of serious health conditions are other matters altogether.

Quite simply, in a 24/7 work environment, the unpredictable and burdensome nature of the regulations can wreak havoc on employee staff scheduling. The result often hurts our ability to schedule patients and treatments. Also, the administrative burden of managing intermittent leave is significant. As an example: In my hospital, we have a staff of four full-time benefit counselors whose jobs are to advise our employees on a full range of benefit issues, typically having to do with health insurance. In reality, they spend the bulk of their time dealing with Family Medical Leave Act administration . . . communicating with the employees, supervisors, physicians and others about the intricacies of the act.

We urge Congress to work with the Department of Labor to refine the current regulations so that they are closer to the original intent of the Family and Medical Leave Act—to codify what many hospitals and healthcare providers have long provided for their employees in regards to balancing work and home life and medical leave. We believe that such refinements would better reflect the real world environment of today's hospital: a place that, despite often-shrinking resources, remains available every day of every week to meet ever-increasing demands for healthcare services. We don't need more red tape and regulation.

Mr. Chairman, we thank you for the opportunity to be here and we look forward to working with you in improving this valuable law.

The CHAIRMAN. Thank you.

Dr. Heymann?

**STATEMENT OF JODY HEYMANN, M.D., PH.D., DIRECTOR OF  
POLICY, HARVARD CENTER FOR SOCIETY AND HEALTH,  
CAMBRIDGE, MA**

Dr. HEYMANN. Thank you. I want to speak both as a physician trained as a pediatrician and as a policy analyst who for the past 12 years has led a research team at Harvard to examine the health, development, and well-being of families. We have done systematic studies of over 10,000 Americans from every State, every income level. We have also interviewed employers, childcare providers, healthcare workers.

First, the FMLA as a whole, I think the single thing I could say is it is one of the most important pieces of legislation in the past 25 years when it comes to health. There seems to be broad agreement of that. And because of the time, I am just going to briefly say critical to health of children, infants, the ability to take leave long enough that mothers are home for breast feeding cuts mortality substantially. Caring for sick children decreases the duration of their hospitalization, improves their health much more rapidly on a wide range of indicators.

It is also important to our labor outcomes. Before the leave, adults with health problems were 53 percent more likely to lose jobs. Low-wage workers whose children had health problems were 36 percent more likely. This is a central issue to their ability to stay at work.

So we have a lot of agreement that the FMLA is important. What makes it work? And I think here is where I would have something slightly different to say. I think that the current legislation and regulations are smart. They work for the health of Americans and for work places. Two points in particular: The definition of "serious conditions," we need to understand that there is less and less hospitalization, that as much as possible people are now treated on an outpatient basis, that hospitalizations themselves are decreasing in

length dramatically. The law covers this now well. It is important that we continue that coverage.

Chronic conditions are on the rise. That is the majority of what is affecting Americans now. Again, it covers it well. It is critical that that stay.

In terms of intermittent leave, many doctors visits, medical tests can be done in short visits. Allowing the smallest increment possible, the companies already keep track of. Not asking them to keep track of something smaller than they do but what they already keep track of is essential. Why? Because it allows the worker to miss as little work as possible, allows them to lose the minimum amount of pay, the employer to lose the minimum amount of time while meeting these health needs. Many appointments can be scheduled at the end of the day, the beginning of the day. That short amount of time is crucial.

I want to say two things quickly in response to a number of points that have been raised. One, the cost to firms. I think it is important to note that there have been national surveys by the Government of companies across the whole country, representative surveys. What did they find? Ninety percent of covered establishments found that the FMLA had either no effect or a positive effect on profitability and no effect or a positive effect on growth.

The last thing I want to say is about the healthcare setting, because that has been raised now by a couple of people. I think the essential point is we need healthy doctors and healthy nurses caring for patients. The last thing we need, I can say as somebody who has worked in hospitals, worked in clinical care, is somebody who is sick delivering that care. We see this in other industries as well. This has come up with food workers. The last thing we need is sick food workers going and spreading disease, and it has been shown.

In the past, it was used to justify the extremely long hours of residence—you know, 80, 100 hours-plus—that we needed somebody there to deliver care. But in fact, what was found was they were delivering bad care because they were so sleep-deprived. There is a complete parallel here. People who are sick, people whose parents and children are home seriously ill, are not able to give good care. They are not well enough, they are not focused enough on their work. We need to have the flexibility in the system so that they can be covered. That is essential, just as we have to cover epidemics, other emergencies that raise the amount. But we need somebody who is good on staff, and that allowance for leave is the way to keep them at work when they are able.

PREPARED STATEMENT OF JODY HEYMANN, M.D., PH.D.

Good morning Chairman Enzi, Senator Kennedy, and members of the committee. My name is Jody Heymann. I am on the faculty of the Harvard School of Public Health and Harvard Medical School. Thank you for inviting me to testify today. For the past 12 years, I have led a research team at Harvard University that examines how conditions in the United States are affecting the health, development, and well-being of children and families. Trained as a pediatrician and a policy analyst, I began this work when it became clear from individual families that the conditions parents faced in the workplace and in their communities were having a dramatic effect on the health of their children. In the past dozen years, I have conducted systematic studies involving over 10,000 Americans—from every State and across all income and demographic groups—to examine how widespread these problems are and what are the viable solutions.

You have asked each of us at this Roundtable to speak about our experience with the FMLA, ways family and medical leave might be improved in the United States, and what could be done to improve the lives of working families in America. I will address these in turn beginning with the FMLA.

As a physician and medical researcher, I want to first state that the FMLA is one of the most important pieces of legislation passed in the United States in the past 25 years when it comes to family health. Its current weaknesses consist primarily of the fact that it does not cover an estimated 40 percent of Americans and the fact that the leave is currently unpaid and thus practically unaffordable to too many of the 60 percent who are theoretically covered.

#### CURRENT STRENGTHS OF THE FMLA

The tremendous importance of family and medical leave grow out of its impact both on health and on the economic well-being of those who receive it. The health benefits are many. Just to cite a few of these: Women who are able to take maternity leave are more likely to be able to breastfeed for an extended period of time, and breastfeeding cuts infant mortality to a third of what it would otherwise be. The benefits persist throughout childhood and adolescence. Many studies conducted over the course of decades have demonstrated the importance of parents' involvement when their children are sick. When their parents are present, sick children have better vital signs and fewer symptoms; they recover more rapidly from illnesses and injuries. Furthermore, the presence of parents can shorten children's hospital stays by a third.

Similarly, elderly Americans who receive support from family members when sick have far better outcomes. Adults who receive support from family members when sick have substantially better health outcomes from such major conditions as heart attacks and strokes.

When working adults receive leave to stay home when they are sick, they are more likely to be able to care for themselves, to recover more rapidly and less likely to spread diseases to those they work with.

Addressing the interface between work and health is also essential to meeting the basic economic needs of Americans. In a national study of low-income mothers, we found that those who had health problems were 53 percent more likely to suffer job loss and those who cared for children with health problems were 36 percent more likely to suffer job loss. The FMLA with its guarantee of job-protected leave to care for one's own and family illness is an essential part of addressing this problem.

There are a number of important features of the FMLA in its current implementation, but it is worth mentioning at least two. First, the definition of serious condition has importantly been defined as including more than hospitalizations. Healthcare providers now provide less and less care in hospitals in order to save money. Many serious conditions are cared for at home. Moreover, it has been important that the regulations ensure that the FMLA covers serious conditions of relatively short duration. Today, when Americans are hospitalized it is generally for a short period of time. The average hospital stay has decreased from 8 days in 1970 to 5 days in 2001. The average hospital stay for adults with heart disease, clearly a serious condition, is only 4.6 days. Finally, it has been essential to the effectiveness of the FMLA that the definition of serious condition includes chronic conditions. The importance of chronic conditions is increasing as Americans survive more diseases that were once fatal.

A second essential part of the effective implementation of the FMLA has been the ability of Americans to take short-term intermittent leave as well as longer-term continuous leave. Many medical tests, treatments, and doctor's appointments require only short visits. By allowing leave to be taken in small increments, the current regulations enable employees to meet their own health needs and that of their family while minimizing the time lost to the employer and minimizing the pay loss to the employee.

#### HOW CAN THE FMLA BE IMPROVED?

Two things could be done to improve the FMLA. First, the actual and effective coverage needs to be increased. The majority of working Americans—across race, ethnicity, gender, education, and income—are caring for children, elderly parents, or disabled family members. The fact that approximately 40 percent of Americans are not covered by the FMLA has been recognized and is an enormously serious problem. Less well recognized is the fact that many Americans are not aware of the leave they could receive under the FMLA. Two mothers I interviewed illustrate this point. Both had children with asthma but neither realized the Family and Medical Leave Act covered their children's serious chronic condition. As a result, one child



was unnecessarily hospitalized when her mother went to work fearing she would otherwise lose her job and her family would be left destitute. And the other mother did lose her job when she sought to care for her child during a hospitalization. They represent only two of the millions of Americans who don't realize they are covered by the FMLA or what kinds of serious conditions are covered. Both educating Americans who are already covered by the FMLA about their rights under the law and extending the act to as many as possible of the approximately 40 percent of Americans who are not covered are critically important.

The second major recommendation I have for improving implementation of the FMLA is to develop ways to ensure that the leave is paid. Currently, the leading reason Americans do not take family medical leave is that they are not able to afford it. A national study found 78 percent of Americans could not afford to take the family and medical leave they needed. Not only is paid leave crucial to enabling a majority of Americans to receive the health benefits derived from full access to leave, but it is essential to the short- and long-term economic security of American families. The entire family benefits from parents' increased job security and consistent income. Implementing paid parental leave policies also provides economic returns to employers. Research has shown that having access to paid leave improves workers' performance on the job. Workplaces with paid parental leave policies experience lower job turnover rates, leading to lower recruitment and training costs and a higher level of productivity. Workers in more supportive workplaces are likely to have higher levels of job satisfaction that, in turn, increase their commitment to their company's success.

The overwhelming majority of countries from around the world already have paid parental leave of some form. Our study, *The Work, Family, and Equity Index: Where Does the United States Stand Globally?*, examines U.S. labor and family policy in a global context. In the case of maternity leave, we studied policies in 168 countries. One hundred and sixty-four of these offer paid leave to new mothers. This includes countries in every region of the world, countries with low unemployment and countries with high productivity. Ninety countries offer 14 or more weeks of paid leave to new mothers. Ninety-nine of the countries which guarantee paid maternity or parental leave for women provide 100 percent wage replacement for at least some portion of this leave. The United States is the only industrialized country not to guarantee paid leave to new mothers. Of the 168 Nations studied, the only other countries we found not to have paid leave for mothers were Papua New Guinea, Swaziland, and Lesotho. While not universal, paid leave for new fathers is also widespread. Forty-five countries offer some form of paid leave to fathers (parental and/or paternity); 27 of these countries offer at least 14 weeks of paid leave to men. Clearly the United States can afford to join so many other Nations around the world in providing these essential benefits.

#### THE HEALTHY FAMILIES ACT: AN ESSENTIAL ADDITION TO THE FMLA

While the FMLA provides important coverage for major illnesses, there are crucial health needs which are not covered by the FMLA such as when a 2 year old needs a parent to stay home with her because she has a 104 degree fever or a restaurant worker should stay home because he has infectious diarrhea. Because providing for 7 days a year of paid sick leave when needed for personal and family illness would make an enormous difference to the health of American families and their ability to keep their jobs, I hope this committee will hold hearings on the Healthy Families Act which was first introduced last year.

This bill fills a desperate need for Americans. Recent studies have revealed that 59 million American workers do not have a single day of paid sick leave and 86 million do not have any paid sick days that can be used to care for a child. Short-term paid sick leave is critical to the health of American working adults, their children, and elderly parents for several reasons. First, as noted previously, one of the largest factors affecting children's health is whether their parents can be involved in their care. When parents are involved in children's care, they have better health outcomes from both acute and chronic diseases, and their healthcare costs are lower because they spend less time in the hospital. Moreover, the single biggest determinant of whether working parents can care for their sick children is having paid leave. Parents with paid leave are five times as likely to be able to stay home with a sick child. Second, having leave to care for family members is equally important to those caring for elderly parents or sick or disabled adult family members. Third, having paid leave to address one's own health needs makes a difference to the health and welfare of all Americans. Those adults who have paid leave are significantly more likely to be able to keep their jobs and return to work after major illnesses. This is particularly important given that personal and family health problems are a lead-

ing cause of job loss. Our research has shown that workers with paid leave are 2.6 times more likely to return to work after a heart attack or angina. Moreover, short-term paid sick leave matters to employers because of the important ways in which short-term paid leave can limit the spread of infectious diseases in the workplace, improve productivity and decrease unnecessary absenteeism. To provide just one example, the spread of infectious disease at the workplace is the reason that the United States Centers for Disease Control and Prevention recommended Americans who have influenza—a disease that leads to 95,000 hospitalizations and over 35,000 deaths in an average year—stay home when they are sick.

The Healthy Families Act is superbly constructed to meet the essential health needs of working Americans and their families, at the same time as being readily achievable. As we report in our global study, *The Work, Family, and Equity Index: Where Does the United States Stand Globally?*, 139 countries around the world provide paid sick leave to employees. One hundred and sixteen countries provide paid leave for 10 or more days. Can the United States afford to provide sick leave benefits and still compete in the global economy? The answer is clearly yes. Most of the world already has legislation guaranteeing sick leave. Will it make a difference to the health of American children and adults alike in need of care? An enormous one.

#### CONCLUSION

In conclusion, the United States currently lags dramatically behind all high-income countries, as well as many middle-and low-income countries when it comes to public policies designed to guarantee that working families can care for their families' health and development. One hundred and sixty-four countries around the world guarantee paid leave to women after childbirth; the United States does not. Forty-five countries ensure that fathers either receive paid paternity leave or paid parental leave; the United States does not. One-hundred thirty-nine countries provide paid leave for short or long-term illnesses; the United States has no national policy regarding sick leave.

While it is essential to the well-being of middle-income families that solutions—including ensuring adequate working conditions for Americans and their families—be universal, developing policy responses is even more critical to the health and well-being of those in greatest need—low-income families and families with a child or adult with a serious health condition.

Thank you again for holding these hearings and for taking the time to move forward on these critically important issues facing working American families.

The CHAIRMAN. Thank you.  
Dr. Mulvey?

#### **STATEMENT OF JANEMARIE MULVEY, PRESIDENT AND CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION, WASHINGTON, DC**

Ms. MULVEY. Thank you for inviting me here today on this important issue. I would like to share with you some results of a recent survey that the Employment Policy Foundation did on the costs and characteristics of family leave. This is important because many of the Government surveys that were done were over 5 years ago. So this is more up-to-date data.

We found that, on average, 14.5 percent of employees took FMLA leave during the past year. And I will echo what people have said here. FMLA is a very valuable benefit, but one of the concerns that have been raised with FMLA is in the area of unscheduled intermittent leave. We found that intermittent leave is common among FMLA leave-takers, with 20 percent taking 1 day or less and 30 percent taking 5 days or less. But more importantly, nearly 50 percent of all leave-takers do not provide notice the day before leave is taken. This lack of notice makes it difficult for employers to adjust their other employees' work schedules and accommodate the unscheduled absence, leading to lost productivity, lost income, and other things.

Our survey also found that chronic health conditions accounted for 27 percent of leave-takers. This was much higher for certain industries—58 percent for transportation and 42 percent for telecommunications. There was some concern that workers are using FMLA for chronic health conditions that may not be serious health conditions.

In terms of cost, we estimate that FMLA costs employers \$21 billion a year. We believe this is truly a conservative estimate and does not include the administrative burden of tracking and complying with FMLA rules, nor does it include the secondary economic effects of declining profitability on economic activity. For some industries, this equals 2.5 to 3.5 percent of their compensation costs. At a time when employers are already facing ever-rising healthcare costs and mounting pension expenses, these costs can be quite burdensome.

Thank you.

The CHAIRMAN. Thank you.

Ms. Philips?

**STATEMENT OF PATTI PHILIPS, WORKING MOTHER AND FMLA BENEFICIARY, ATLANTA, GA**

Ms. PHILIPS. First of all, I would like to say thank you for giving me the opportunity to be here today. My name is Patti Philips. I am a working mother from Atlanta, Georgia. I work in a manufacturing plant of a large soft drink company. I have three daughters. And I was a beneficiary of FMLA. It was a godsend for my family.

In 1999, when my youngest daughter was 12, she was diagnosed with bone cancer. For 6 years, Stephanie fought. And FMLA meant to me that I was able to be there for Stephanie. We couldn't afford for me to not work; we needed both incomes. And more important than that, I was the insurance carrier. The costs were astronomical for what Stephanie went through, and there is no way that she could have gotten the quality care she got without our insurance. So I had no choice.

I used FMLA, and the most important part of FMLA to me was the intermittent leave, with all the different doctors, all the different treatments she had to go through. Some of them, radiation, only would take 5 minutes at a time. So I was able to use the intermittent leave and spend as much time as possible with Stephanie, which was important to me.

Last August, when Stephanie's cancer came back for the third time, we were told she was terminal. There was nothing else they could do. Again, we started—I used the intermittent leave again. We had palliative radiation. That was all we could do for her was to make her as comfortable as possible. I was able to just use small increments of time to be with her, and when she didn't need me, I was able to go to work. When I was at work, I was able to focus on my work and be a good, quality employee. When I was at home, I was able to focus on her.

After Christmas, we realized it was time for me to stay home. Stephanie didn't have much longer. Because I had been able to use the intermittent leave, I had enough time left that I was there with her the last 2 months of her life. She passed away on February 8th. I was able to be with her 24/7. We created wonderful memories,

something that I will always have because my daughter is no longer with me. And I want to thank you for FMLA.

Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Philips follows:]

PREPARED STATEMENT OF PATTI PHILLIPS

Good morning, Chairman Enzi, Senator Kennedy, and members of the committee. My name is Patti Phillips. I am here to share my experience with the FMLA as a mother, committed employee, and as a family breadwinner. I am also here to share this story for my daughter, Stephanie.

Six years ago, on New Years Eve, Stephanie felt a pain in her leg that wouldn't go away. Testing revealed it was a type of cancer called Ewing's Sarcoma. She was 12 years old, and she had cancer. That first year, she had chemotherapy, radiation, and surgery, all in 1 year. She was so brave, but it was brutal—brutal for her and agonizing for me, my husband, and our other two daughters, Shannon and Paige. But we made it through, and we were so thrilled because we thought we'd beat the cancer.

For 2 years, Stephanie was fine. And then a spot reappeared in the same place in her pelvis. In August of 2003, she had major surgery. The doctors took out the left side of her pelvis as well as other bones, and put in metal replacements. Again she seemed to be doing fine. Then, in August of last year, she felt a pain in her leg. Tests showed the cancer was back. This time, it had spread to her right leg and her right lung.

I have worked for a soft drink company as an inventory control specialist for 13 years and was eligible for FMLA. The first time, when Stephanie was first diagnosed and receiving treatment, I didn't take FMLA leave. FMLA is unpaid and our family needed my paycheck. I didn't know what was ahead.

Through that year of chemo, radiation, surgery, and everything, my husband and I struggled to care for her. I managed to be with her outside of work hours. I still put in a full week at work, but my supervisor arranged for me to start my day later, so I could be with her in the morning, and I would work later at night.

But, Stephanie was alone a lot. I used to cry all the way to work. I hated leaving her. The second time, when she relapsed, I promised her, "I will never leave you alone again."

I immediately signed up for FMLA leave and I used it. If I could have spent every second with her, I would have. But I couldn't because my husband lost his job and wasn't able to find another. We depended on my income and health insurance. Having FMLA leave meant that, when Stephanie needed me, I could be there for her. Because FMLA allowed me to take leave in small increments, when she didn't need me, I was able to be at work and bring in steady income.

On February 8th of this year, at 4:30 in the morning, after a restless night, Steph told her Dad and me that she was going to go try to get a little more sleep. She tucked her blanket under her chin and lay back down. For some reason, both her father and I woke up, together, exactly an hour later. We took one look at Steph and knew she was gone.

I miss Steph every day. But I take some comfort in the fact that I was there with her as she struggled with the pain and the treatments. I was part of her medical treatments and her care. I was with her at the end. We were with her. She wasn't alone.

The FMLA was a godsend.

Keeping my job meant that I was able to retain my health insurance. The FMLA protected my job and my family's health insurance. I don't know how Stephanie would have gotten the care she needed without health insurance.

Still, even with the insurance, our bills were astronomical. Without it, we would have lost the house, no question. We would have lost everything. FMLA was the only thing between us and bankruptcy. I saw people who ended up bankrupt. When your child has cancer, you start a kind of terrible journey. And on the way, you meet a lot of other families, traveling in this same kind of twilight world.

Many of these families had it harder than us because they didn't have the benefits of FMLA leave. They were confronting the tragedy of serious or terminal illness, and on top of that, they had lost their jobs and health insurance. They didn't know how they were going to pay their bills. They just had no money. In that one way, we were lucky.

When I heard that the FMLA might be scaled back, I just couldn't believe it. That law was the only thing between my family and the street! I am particularly dis-

turbed about the proposal that would force people to take leaves of a half-day at a time. I saved every bit of FMLA leave I could. If I had to be gone for only 2 hours—and often that’s all I needed—I could take 2 hours and head back to work right after. If I’d had to take half-days every time—time when Stephanie didn’t need me, time I wasn’t being paid for—that would have been devastating. I would have had to use up my FMLA leave too fast. I would not have had any time left at the end of her life.

There are already a lot of people out there who aren’t covered by the FMLA. I’ve seen what happens to these families, and I don’t think we should be talking about making it so that even more people aren’t protected by the law.

I participated in this Roundtable for Stephanie. I also want to help other families. Thank you for the FMLA. Thank you for allowing me to spend time with my daughter and not worry about losing my job. It meant the world to me and Stephanie.

I know it will mean just as much to someone else, too. Please don’t hurt other families who need the FMLA’s vital protections. I am hopeful that other families will have the same options that I had. Thank you.

Dr. Barbanel?

**STATEMENT OF CHERYL BARBANEL, M.D., MBA, MPH, FACOEM; PRESIDENT, AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE; CHIEF OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, BOSTON MEDICAL CENTER; MEDICAL DIRECTOR, OCCUPATIONAL HEALTH CENTER, BOSTON UNIVERSITY, BOSTON, MA**

Dr. BARBANEL. Hi. I wanted to let you know that I am very much appreciative of being here today. And in addition to working as chief of occupational and environmental medicine at Boston Medical Center at Boston University, I am actually here representing the American College of Occupational and Environmental Medicine, and I am president of that organization.

The Family and Medical Leave Act serves a very noble purpose, as we know. I won’t go into the details on that. But we also know there is abuse of the Family and Medical Leave Act by employers, employees, and physicians. In most cases, FMLA leave is temporary and employees get back to work. The problem with FMLA is the other times, when employees often, with intermittent leave and diagnoses that are chronic, such as migraine headache, for instance, or stress, take time off for other reasons and end up maintaining the sick roll for long periods of time, often indefinitely, contrary to the individual’s own mental state and benefit.

Employees are allowed to misuse FMLA, especially intermittent leave, and miss work without consequences as a result of physicians being too compliant with writing excuses in some situations. Such a misuse is contrary to the employee’s own functionality both at home and at work. We know in occupational medicine and from workers compensation that the longer the employee is out of work, the more likely the employee is to never return to work, often with a loss of job and economic stability. The employer has no opportunity to manage the employee’s absence. In ADA, you are allowed to give people light duty who are somewhat compromised but can still do the job, but in FMLA that is totally at the discretion of the employee.

The employer also has no way to intervene to direct the patient’s care. Many large employers have physicians who are able to identify expert medical care for employees. And rather than them running to get notes that are for other excuses, their stress or their

psychiatric problems could be better addressed if physicians by the employer were able to direct their care and help with their care.

The CHAIRMAN. Thank you.

Ms. O'Flaherty?

**STATEMENT OF SUSAN O'FLAHERTY, VICE PRESIDENT AND  
MANAGER, DISABILITY MANAGEMENT SERVICES OF BANK  
ONE, CHICAGO, IL**

Ms. O'FLAHERTY. Hi. Thank you for having me here. I work for JP Morgan Chase and I manage the Family and Medical Leave for 144,000 employees. It is a wonderful thing that we have, and we work well with our employees to do it. When it comes to family and medical leave, we—I am in both those sides of the world. I have my feet in both ends. We help the employees to get the family medical leave they need, teach them how to use it. We also work with the employers, we teach the managers of these employees how to work through the issues with the employees.

On both sides we have issues. I have assisted personally with somebody who was trying to get family medical leave to help take care of her sick mother. Both her and her sister are employees. And what happened is the physician refused to sign the paperwork, and the discussion—they called us because they will call us with issues to assist them. And so I ended up calling this physician and for 45 minutes discussing family medical leave and you need to fill it out, it is her job protection. She did so under duress, saying, “Well, I’ll do it this time.”

On the other aspect, we will talk to managers and say, “no, you can’t do this or, you know, you can’t talk against the employee for this.” And we will work with managers in both ends.

But we also have employees who have family medical leave. Intermittent is the one we hear the most problems with, not when somebody is out to take care of somebody for a long time. We hear the issues about intermittent. But again, it is not all intermittent. We will have employees that call and say to us, I have intermittent for my family member and I use it appropriately; however, I hear people talking in the cafeteria—and everybody talks even though you are not supposed to discuss issues, they will be talking about it. And they hear them saying, hey, I have a way to do this. If you need a day off, use your FMLA. And she said, I personally am offended because I use it when I need it for my mother. But I hear other people that don’t.

And we have a very hard way to get around and grab these people that are abusing it. And like we talked about, it is a wonderful thing; intermittent is wonderful. And for 95 percent of people who use it, it is appropriate. But it is that 5 percent that makes the biggest noise for companies, for employers, for the managers. How do we get around that and be able to tie that down to help everybody work with it?

[The prepared statement of Ms. O'Flaherty follows:]

PREPARED STATEMENT OF SUSAN O'FLAHERTY

Thank you for allowing me to participate in the Roundtable on the Family Medical Leave Act on June 23, 2005. My name is Susan O'Flaherty and I am Vice President of Disability Management for JP MorganChase.

I oversee the STD and FMLA administration for our over 140,000 U.S. based employees. In this capacity, we work with both the employees applying for FMLA and their managers and human resource business partners. We assist the employees in attempting to apply for the leave. For instance, I spent 45 minutes on the phone with the physician to convince her to fill out the paperwork for two sisters who are employed by JPMorganChase. Their mother was acutely ill and they needed intermittent family leave to assist her. The physician was refusing to fill out the paperwork for them. The physician was the mother's doctor and wouldn't fill out the forms because it was for the employees' FMLA leave. I explained the ramifications and the doctor did agree to fill out the forms and the sisters received their needed FMLA for their mother. We educate the employees and managers on FMLA.

FMLA provides important assistance to employees dealing with family and medical issues that may arise. It provides employees the ability to care for themselves or family members during a difficult period without fear of losing their job due to these circumstances. I do not hear complaints from managers around the continuous leave, such as caring for an ill parent, newborn care, etc. Even though it may be up to 12 weeks, they can manage and plan for the absence in these crises. The majority of difficulty and problems occur around the unscheduled intermittent leave.

The basic intention of intermittent leave is a good idea. With chronic conditions, there may be no warning or no need to see a physician for care of every episode of illness. The inherent problems with intermittent leave are that the definition of serious health condition is not well defined and lends to interpretation. The fact that a serious health condition can be defined by one visit to a physician and a prescription being given is too vague. You can literally go to a physician for acne, being given a prescription and be covered. This is because physician does not have to give a diagnosis for the leave.

We understand that employees may need to leave early or come in late due to a health issue for themselves or a family member. When employees inappropriately use this time it can be devastating to the morale and productivity of a work group. We have many employees who use up all their FMLA time to the minute. They know exactly the day and amount of time that they regain and on that exact day it rolls back in they automatically use that time again. This goes on year after year. One of the staff was explaining to someone their FMLA rights and the person came back to say, "I know I am entitled to 12 weeks off within a year, and I make sure that I use it every year since it is due me."

There is a unit that has a 10-minute waiver period on tardiness. This means that if they come in within 10 minutes of their designated start time it is not counted against them. There is an instance where an employee was seen by another employee driving into the parking lot, she looked at her watch and was over 10 minutes late. She picked up her cell phone called into her manager and said she was going to take an FMLA day for her migraines. She drove off.

Another common problem is the employees who request a vacation day. Sometimes the manager cannot give it due to so many people already are out that day. The day comes and the person calls in as a FMLA day.

The majority of FMLA absences are appropriate and are used by the employees to assist them in dealing with issues that arise. The fact remains that the 5-10 percent that are inappropriate can be counterproductive in a business and lend to morale and productivity issues.

I had an employee call once and just wanted to vent. She wouldn't give names but just wanted to tell someone. She said that she used intermittent FMLA and it was a "Godsend" for her to assist her elderly mother. She said that she only used it when she really needed it and was thankful for it. She said that it bothered her when she was in a lunchroom or bathroom and heard people talking about FMLA. They were saying that FMLA covers just about anything and you can get your doctor to write it so you can have off whenever you want to be off. You just call in and say it is FMLA and you can leave whenever you want. She said this offended her, as it reflects badly on the whole idea of FMLA.

We need a way to address the people who abuse it. Their co-workers take on the added burden. Their teammates may need FMLA for an appropriate reason and it affects morale when others abuse FMLA. We need to have some way to make sure that those who abuse it don't affect those who truly are in need. Just because it is only 5-10 percent doesn't mean we should just ignore the inappropriate use and let it go on without consequences.

In conclusion, FMLA is a valuable resource to achieve a work/life balance and assist people with getting through difficult times. We need to address vague and obtuse definitions and have some definite parameters and guidelines for legitimate use. It should be available to those employees who truly need it, but not inappropriately used just for the sake of being off 12 weeks a year. We truly want a work/

life balance, and a balance that is equal. To achieve this we need better definitions of what is covered under intermittent FMLA that are supportive of the employee's life outside of work and the sudden emergencies or issues that may require their time away from work; but we also need to have measures that are supportive of the work environment and the ability of managers and businesses to continue being productive. Thank you.

The CHAIRMAN. Thank you.

Normally, we would have an opportunity for a little bit of interchange at this point. But on the schedule that we are on, we won't be allowed under our time constraints to cover all the questions if we do that. So what I am going to do is combine the next two questions.

The remarks you have just given are akin to opening statements. I will remind you again that you can expand on any of the remarks you would have liked to have made or—I know that some of you have your cards up. If you have some things that you want to put in in response to things that other people have said, we will accept those for the record. And we want that information. We need that information. So if you would put that in writing—and I know that is a little bit more difficult.

And of course I would remind you that, by volunteering to be on this panel, which we greatly appreciate, one of the things that we hope that you will do is allow written questions to be submitted to you, too, because sometimes we will need a little bit more clarification on something that you have said. So when we quit today, we will leave the record open for another 10 days, which will allow you to expand on your remarks, but it will also allow members of the committee to ask some additional questions based on what you have said or, just because of your background, some things that might help us—some things that we might want to convey to the Department. So that is some of the uses that are made of this and why we expand it to a lot more people than we would normally be able to do at a hearing.

So I appreciate your cooperation on it. We will combine the two remaining questions so that we have time to get to any parts of that that you might want to comment on. And if you will keep your answers short, then we will be able to have, hopefully, some back-and-forth on this after we finish with as many people who would like to comment on it.

And you don't have to comment on everything. That is okay, too. I know that we invited you here because you are all experts in your area. I can tell from the comments that we have already had that there is some very diverse background here, some definite different viewpoints, and that is all very helpful. So I appreciate your participation.

The two remaining questions are—and again, I will mention that these three questions are ones that Senator Kennedy and I mutually agreed on to see how much information we could bring out to help us to understand and the Department to understand and see if anything can be done to improve it in any direction.

So the two remaining questions are, are there ways in which the implementation of the act might be improved? I know we have gotten into a little bit of that already.



And, given the importance of maintaining a work-life balance for all Americans, what do you believe are the most reasonable options to achieve the desired balance?

Since you raised your cards while I had my head down, it makes it difficult. But I know Ms. Boyd had her card up kind of as a response last time, so we will start with her while I sort this out and see how well my staff did.

Ms. BOYD. Thank you, Senator. Yes, the National Association of Manufacturers strongly supports the Department of Labor moving forward to look at the regulations, as they have indicated they may do in their regulatory agenda. We think that, as we have discussed, in three areas—"serious health condition," intermittent leave, and notice—that those are three areas—and nobody should be surprised that 10 years later we find flaws with regulations. That is why regulators go back and look and see how things are working and go back and ask for comment and redo them—the time is right now to do that again. And I suspect other panelists will want to talk about expansion, but that expansion on a currently flawed framework is a recipe for disaster. We need to fix those underlying regulations before we can have any discussions about other benefits that the act in the future may give to employees.

With respect to the third question, on work-life balance, obviously an important issue for all of us both as employees and employers. The best employers around have very vigorous work balance programs, whether that is providing compressed work weeks, flexible scheduling, on-site child care. There are numerous things that employers do, in part to incur a market advantage so that they become an employer of choice by providing employees work-life balance, and obviously those things should be encouraged. I think at some point, too, we need to look at our Depression-era labor laws and see if there are things that may inhibit employers from doing as much as they can do for their employees because we are still by and large, you know, working under labor laws that were passed postDepression and they may not work as well for two-earner families in this century.

The CHAIRMAN. Thank you.

Ms. Bravo?

Ms. BRAVO. Thank you so much. Don't touch the serious health condition, intermittent leave, or notice. I think Jody Heymann adequately spoke to this, and I have written materials on it. These are some things that need to be improved on implementation. A lot of the people who call the 9to5 800 number don't know their rights, and there are studies on this, how few people know their rights. And I appreciated Ms. O'Flaherty's comments about how, unfortunately, many managers are saying, "Well, if it is your mother, you can't do it; this is for new babies"—or something like that. DOL really needs to spend more energy on educating both employees and employers.

And on expansion, we need to cover more people for more reasons, and we need to make it more affordable. Laws aren't written for good employers. They will do the right thing. We have to make sure there is a floor and a protection. And just because—you know, we have a situation where people are being told you must work, you can't be on welfare, you have to be a good parent. And yet, as

soon as they are a good parent, because they have a sick child, they are fired. We have to make it so that if it is not a serious illness, thank God all kids don't get cancer, but they do all get strep throat and ear infections. And we need to have a law like the Healthy Families Act that Senator Kennedy has introduced that says you don't get fired for having these routine illnesses, either. That would give some protection.

We also need to be able to use family leave, for example, as a number of States have done, to let people be better parents and go to their kid's school activities. And there are children who tell us this.

And by the way, I want to say one other thing about the impact on kids. Nine-to-Five had a session where we came to tell our legislators people's stories about needed protection for sick days. And a woman told the story of her son, who was hit by a car, and didn't tell her because he knew she would be fired if she didn't go to work. She didn't know. She went to work. The other kid called. She went home, got fired, had to go on welfare.

I told this story to another girl who said, you know, my mother has never heard me say this, but when I was a kid—she was 21 at the time—when I was a kid, kids hear everything. We know everything that is going on. Every time I was sick I would say, Should I tell my mom? Will we have groceries this week?

We have to stop the situation where kids send themselves to school sick so their parents don't get fired.

Thank you.

The CHAIRMAN. Thank you.

Ms. Ness?

Ms. NESS. There have been a number of comments about intermittent leave and the definition of "serious health condition" and I have heard various proposals over the last several years about these conditions. I would just like to point out that some of these proposals would basically wipe out the ability of almost half of the leave-takers who have taken leave for medical leave because they have taken leave, for example, for conditions that maybe required treatment for under 10 days.

I think Jody Heymann pointed out something very important. Our medical system has changed dramatically. There are many breakthroughs. There are many reasons why leaves can be intermittent today and hospital stays are shorter.

And there are also a series of protections built into the law for employers that perhaps there is not as much understanding or familiarity about as there needs to be, so education may be in order here. But for example, when an employee has a need for foreseeable leave, 30 days notice is required. An employer has the right to know the reasons for the leave, to ask for periodic updates, to know the status, and to ask about the intent to return to work.

With respect to intermittent leave, if an employee requests an extension, if there has been a change in the way that the leave is being taken, if an employer suspects that there are changes that have occurred that would shed doubt on the original validity of the certification, they can request additional certification and they can request up to three different doctors' certification.

So perhaps part of the problem is that employers are not as well informed about the protections that are built in for them.

On the other hand, I think there are some protections that could be strengthened for employees. So for example, employees right now can be held responsible for their doctor being negligent in getting their certification to an employer. An employee could be fired if their doctor doesn't provide the appropriate certification. That is something we would definitely like to see improved.

We also think that in many cases the 30-day notice, which is required, can be an enormous burden on an employee because many employees don't know about the 30-day notice. And if it is not going to cause severe harm to an employer, perhaps there could be some more flexibility in the granting of leave, without the need for that 30-day notice.

So I think that there are ways in which the regulations perhaps can be improved for both employees and employers, but I also think that there is a great need for additional education.

I would say one last thing here, and that is that we have a country in which millions of workers every day are making untenable choices between their jobs and their loved ones that probably not one of us around this table has to ever make. Ellen mentioned the need for making leave affordable. We have almost half the work force in this country that doesn't have a single day of paid sick leave. And when you look at low-wage workers, that is three-quarters of the work force.

We tell people they need to be good and responsible family members, but we put them in an untenable position of having to choose—about whether they have to sacrifice their family's economic well-being or take care of their family's personal and family and healthcare needs.

Thank you.

The CHAIRMAN. Thank you.

Mr. Payne?

Mr. PAYNE. Kind of responding to Ellen and to Debra. You are right in that good employers have been doing things all along that are good, and we are no exception. We had generous leave before the law was enacted. The law in a sense caught up to us in a lot of ways. We just recently won the Family-Friendly Workplace Award in our State.

But the intermittent aspect, really, is a problem. One of the suggestions, where I think some other clarification could come, would be with the 15-day notification, wherein the employee has 15 days to provide information back documenting that it is actually a serious health condition that would qualify for an intermittent leave. And our experience has been that—we have given 15 days, we have given 30 days, we have given 45 days and then we take an action, and then 2 days later the documentation appears, and gone—you know, talked legally with them and it is the law. FMLA did not support us enough. It was too vague.

And I agree, Debra, there needs to be more education because FMLA is so confusing. There is—you know, the joke is you talk to five lawyers, you get six answers on how to interpret the FMLA.

The CHAIRMAN. Thank you.

Dr. Mulvey?

Ms. MULVEY. Thank you. I would like to address question three on work-life. Work-life balance is very important. I have conducted a number of studies in this area that have evaluated the ways employers can help employees balance their family life, especially caregiving, with work.

Today employers are searching for strategies to attract and retain employees, especially amid an aging work force and a looming labor shortage. It is the looming war on talent you have heard about. My research has shown that work-life programs are very important in achieving this goal. Specifically, employers who provide flexible work schedules, generous paid leave for workers of all ages, and phased retirement and eldercare programs for older workers are more successful at retaining their top performing employees than those who do not. So employers who want to compete in labor markets will be addressing these issues voluntarily, without mandates. I would be glad to share my research with you.

The CHAIRMAN. Thank you. And we would appreciate that. And also appreciate the brevity. That was the record.

[Laughter.]

The CHAIRMAN. Ms. Boyd?

Ms. BOYD. I just wanted to clarify—Debra raised a couple of points. I think with respect to the Department of Labor potential rulemaking that there are a lot of ways to address some of these issues that both you have raised and that have been on the employer's side, and I don't think anybody around this table suggested one particular way. I certainly have never said that a serious health condition, you know, should be 10 days. So I think that is a misrepresentation of what we have been talking about.

I think that the way to proceed on this is to have the Department of Labor actually begin the rulemaking process. That is what a rulemaking is for. Let the public make comments, let them see what they get back.

And also, with respect to the surveys that have been mentioned before, too, those surveys are terribly out of date and we would like to see them perhaps redone, given the current environment and what we are hearing from employers.

Thank you.

The CHAIRMAN. My apologies, too, for going to somebody that already spoke before others got a chance to speak. We are having a little trouble with the list here, but I hope we get that corrected now. Thank you.

Ms. Dohnalek?

Ms. DOHNALEK. In a hospital setting, I think intermittent family medical leave and modified work schedules may be the most difficult to staff and time-consuming to track. Staffing for a portion of a shift may be impossible, and this period typically goes uncovered. This impacts patient care and safety, obviously. This also places undue burden on the system and on colleagues. Other workers are entitled to their time away from work, but may feel obligated, especially in a healthcare setting, to cover for employees that are out on FML. Although the employee is requested to schedule leave at times that do not unduly disrupt operations and to notify the employer in advance, how can the organization be certain of this or control this? Covering for a certain time off, perhaps

Mondays or extended periods, is less cumbersome than intermittent short periods in a healthcare setting.

So if we could minimize the ability to use intermittent leave because we need to consider the effect of several staff out on FMLA and the impact to satisfaction and safety on many levels. So reconsider intermittent leave and require doctor's visits with each absence, although physicians typically meet the request of the employee. Maybe a requirement to work in collaboration with the organization to schedule leave at the time that is least disruptive to the organization.

I think another thing that needs to be looked at is tightening up the definition of what constitutes a "serious illness." Originally the act was developed for things like chemotherapy treatments, radiation, etc, and now it seems that it is abused for sick time. The threshold for acceptance is on the employer rather than strict guidelines and expectations.

And one more thing that I would like to possibly be considered with the act is supporting institutions in managing the FMLA when appropriate. Institutions should not feel forced to make decisions in favor of the employee due to the legal implications.

The FMLA is an example of understanding that health issues occur and that employees should not be penalized for the unforeseen events. However, changes to the act can be an opportunity to improve the balance that needs to be struck between the employer, as in the case of hospitals and their needs for quality patient care, and the employees who provide it.

Thank you.

The CHAIRMAN. Thank you.

Ms. O'Flaherty?

Ms. O'FLAHERTY. In our company we do allow pretty hefty benefits. We do have a paid 12-week parental leave for both the primary caregiver and a week for the nonprimary caregiver—which is separate from the FMLA. It can run concurrently. We also provide an Acute Policy for acute treatment such as chemotherapy or radiation for the employee, and it is a paid—they work 60 percent of their time. That way they can intermittently be out, and we pay them their regular salary.

With all our benefits, we also still do have problems with intermittent leave. Again, it is a wonderful thing. What I would challenge people to look at is what can you do and what can we do besides getting the doctor's advice and going back for recertifications for those people who have issues. How can we challenge those people who are deemed by their fellow employees, because it not only affects the employer themselves, but their fellow employees who have to take up the slack. When they hear them talking about issues, what can we look at to kind of put our arms around that for their fellow employees also?

And I think that is one of the issues of intermittent. It isn't that it's bad, but how do we—that 5 percent causes the largest noise. And I think that is the thing we need to look at. What can we go around to do that?

For instance, somebody who asks for a vacation day and they can't have it because there aren't enough vacation days for everybody else using it that day, so they are not allowed to have it. So,

okay, you can't have a vacation day. They turn around and on that day they call in FMLA. And it happens numerous times and there is not a way to get around it. If there is a way to do it without harming the individual, without harming the employer and the other employees, to come up with a way to actually certify and see the difficult issues that go along there.

The CHAIRMAN. Thank you.

Ms. Willman?

Ms. WILLMAN. I think it is apparent from what everybody has said that we want the same thing here. We want employers to comply in good faith with the FMLA and the regulations, and we would like employees to do the same thing. And the way to deal with that is not expansion of the act, not until we have at least fixed the regulations where the problems are occurring. And I also think there is a perfect opportunity for a bipartisan effort here, since we all want the same thing.

The place to fix this is at the DOL. They came up with the regulations, that is where the problems are. If the problems aren't fixed there, they are going to be fixed by the courts. The disadvantage of having the courts fix the problems is that all of the stakeholders who are sitting in this room today will get no say in what the courts will do with those issues.

Right now, since Ragsdale, we have had over 100 cases that have cited to Ragsdale. There have been at least 12 regulations invalidated by Ragsdale itself which have never been fixed in the regulations—a reason in and of itself for the DOL to go back and change and eliminate all the categorical penalties in there.

In addition to that, we are now seeing the Federal courts of appeals, at least the 7th and 8th Circuits, have basically taken the position that the DOL exceeded its authority by allowing permanent leave for unscheduled intermittent absences. And I quote to you from the 8th Circuit case: "The FMLA does not provide an employee with a right to unscheduled and unpredictable but cumulatively substantial absences or a right to take unscheduled leave at a moment's notice for the rest of her career."

The problem with intermittent leaves is that the employee who stays home makes the medical determination on whether he or she can work that day. A doctor does not make that decision. The employee is not required to call the doctor, not required to see the doctor. The employee just has to pick up the phone and say I'm not coming in that day because I'm taking an FMLA day. And there is not much the employer can do to fight those types of abuses.

There are two things I think need to be changed in the act. One is to go back and look at the definition of "serious"—not in the act, in the regulations. I am sorry. The definition of "serious health condition" and focus on the word "serious." And also in the regulations, to remind the Department of Labor that the act itself starts out and says, "An Act to grant family temporary medical leave"—not permanent leave—"for chronic serious health conditions."

Thank you for the opportunity to share comments.

The CHAIRMAN. Thank you.

Ms. Alexander?

Ms. ALEXANDER. Thank you.

I think as I listen to the entire conversation—I just made some notes as I listened—and the way that I would approach problem-solving in building a business, and I think that when I hear that we are trying to make changes when it is working for 95 percent and we want to make these changes because we have 5 percent are abusing, and now we are going to affect the 95 percent by the changes that we would make, it concerns me. I think that there is a time where you step back before making these decisions and look at the comprehensive problem that we have. And the problem that we have is that we do have issues with work-family balance in our Nation at this point.

And I hear the numbers of measurements of what the FMLA costs. Well, from what I hear, those costs are the cost of illnesses in our Nation. It is the cost of having to take care of our families. We have chosen right now to implement the FMLA, but those costs would be there whether the FMLA was there or not. And so they are not true measurements of the costs of the way we chose to do it, and so I think we need to begin to review and say that if it is done in this manner, our cost is this in solving this problem; if we want to make a change, then let's have an improvement and show how that improvement improves or decreases the cost that this issue brings to our Nation.

So I think we are looking at the act itself and saying that the cost of it is the act. No, the cost that we are measuring is the cost of illness and the need to take care of our families. And so we need to separate those two.

I think the other thing that I would like to see is just for people to come together and, rather than look at the problems, let's find the places where this is working, let's find the examples where there are companies and industries that have made this work and made it work well, and see the things that can be learned from that and shared with others. Because at this point, we are looking at taking the problems and going and fixing them by changing regulations, rather than looking at the problem itself and trying to correct the problem.

The CHAIRMAN. Thank you.

Dr. Heymann?

Dr. HEYMANN. Thank you.

First, I want to briefly respond to the point that has been raised about addressing intermittent leave and serious health conditions. Specifically what I want to say is, while specific proposals haven't been raised in this forum, in other forums suggestions have been made that one thing that might be done is expanding the length required for intermittent leave and expanding the length required for a serious health illness. And so I just want to go on the record, and state my deep concerns about those, for two reasons.

One, intermittent leave, the importance of being able to take that brief amount of time. It is easier in a healthcare setting, it is easier in other work settings to cover somebody for an hour than a half day. We should never make people take longer unpaid leave than they need.

In terms of the duration-of-illness piece around serious health conditions that is currently part of the definition, I just want you to know that the average hospital stay right now for adults with

heart disease is only 4.6 days. The average hospital stay for children with asthma is 2.3 days. The average hospital stay of any kind decreased from 8 days in 1970 to 5 days in 2001. These are short. We need to make sure that these kinds of serious illnesses remain covered.

OK, so what can we do? We do think there are things that can be done to make it better. I just want to mention a couple of things.

First, I agree with what has been said by a number of people that more Americans need to know about their rights under FMLA, particularly those who have family members with serious chronic conditions. I have spoken with mothers whose children have been hospitalized with asthma because they didn't take the day off from work, thinking they would have to lose their job and had no choice. I have also spoken to mothers who lost their job when they did take that day to care for a child in the hospital with asthma, a condition that affects 9 million children. There is confusion out there. There is a lack of knowledge about coverage and we need to make sure, particularly, that those families who have one of the millions of children with the chronic condition know about their rights under the FMLA.

Second thing we could do, we need to begin to discuss and address paid parental leave. Nobody here has cited any concerns about how parental leave is working under the act. The main problem with it is the lack of pay. Right now, the leading reason Americans can't make use of the FMLA is they can't afford it, 78 percent of Americans say they don't do it because they can't afford it.

We studied laws in 168 countries around the world. One hundred sixty-four of them guarantee paid leave for mothers when they have children. One hundred sixty-four. every single industrialized country, but, you can tell by that number, most of the countries in Africa, Asia, Latin America, Europe, wherever you look. Who doesn't besides the United States? Papua New Guinea, Lesotho, and Swaziland. That is it. So one of the things we really have to do is start thinking about paid parental leave.

The last piece I want to mention, to your third question, what else should we be considering, the Healthy Families Act was introduced last year, a way to give short-term paid sick leave. Many companies already do this, as has been mentioned. But half of Americans do not have that. Having paid sick leave, parents who have it are five times as likely to be able to care for their children when they are sick. Adults who have it are 2.5 times more likely to be able to keep their jobs when they are sick, and return to work. It is essential, and we need to cover the 59 million Americans who currently don't have it.

Again, this is something that, by all global standards, exists very broadly. One hundred thirty-nine countries already provide for this, and it is something we could do. I would hope that the committee would take seriously the Healthy Families Act or similar legislation to guarantee short-term paid sick leave.

Thank you.

The CHAIRMAN. Mr. Prybutok?

Mr. PRYBUTOK. Thank you. As many panelists have mentioned, I believe that the definition of serious health condition needs to be reviewed and made more clear. Particularly for a small company



who cannot afford an HR professional and lawyers. When regulations are unclear and nonspecific, it presents a burden and a problem.

Regarding the FMLA, we really have not had that significant a problem with it at our current size, but I do believe that it should not affect employers of 50 employees. I think that is too small. I think the threshold should be increased because of the costs to employers.

Relative to the work-life balance, we operate in a very competitive business environment. All businesses that I interface with talk about the difficulty in hiring and retaining quality employees. Consequently, a natural consequence of the competitive business environment is—and due to low unemployment in the United States and a robust economy—is the need to be flexible with benefits, to be competitive in the benefits that are offered, and we see more and more movement toward that flexibility.

The concern we have, as some of the panelists have raised, as far as increasing the coverage of FMLA and increasing mandates is that as you increase mandates and remove the flexibility of manufacturers to administer benefit policies, employers are going to acquire the least-cost method of meeting the benefit mandate. What is going to happen also is they are going to tend to reduce their employee rolls to an absolute minimum, utilize temporary workers. We believe it is going to potentially lead to increased unemployment, decreased productivity, and the final analysis is we look across the ocean and we will have the European experience. And I do not think that is good for business; I do not think it is good for the employees.

The CHAIRMAN. Thank you.

Mr. Lancaster?

Mr. LANCASTER. Yes, our suggestion on this issue is that when a collective bargaining agreement exists, such as ours, that provides for sickness, provides for sick leave, and has an attendance policy, that agreement should govern in this situation, particularly when it goes beyond what is provided for in the FMLA, and ours does in terms of paid leaves.

In any event, some other suggestion is that the liberal definitions that exist in the regulations need to be tightened up to prevent the abuse. We think that the Department of Labor has gone far beyond the intent of Congress here. In fact, due to the liberal definitions in the regs, we feel that one-third of all of our associates could qualify for FMLA leave at any time and without prior notice, which would just make it impossible for us to run our business.

The intermittent leave provision that presently provides leave without notice is very difficult for us to deal with. We also need to provide for verification of health issues in some meaningful, realistic way. Currently there are 48 hours to challenge; doctor notes are not required; second opinions are not practical. So there are a lot of problems with the ability to verify. Currently we see FMLA intermittent being used for tardies, to justify tardies, and leave early from work situations. Our people are very well aware of the FMLA because there is instruction that goes on by the union on this.

In terms of costs, the costs that we see, when people do not show up for work we have a manpower shortage. We cannot get our production done in the 5 days. We have to schedule overtime, time and a half. So that is a real cost to us, not just the cost of the medical problem.

Thank you.

The CHAIRMAN. Thank you.

Ms. Bravo?

Ms. BRAVO. I just wanted to say two things. I appreciate that there are best-practice employers who do the right thing. When the Family and Medical Leave Act was passed, two-thirds of covered employers—two-thirds—had to change one or more provisions because they were not already complying, and mainly it meant they were not letting fathers take leave, they were not letting adoptive parents take leave, they were not letting people take leave for the serious illness of a family member.

Second, I appreciate that employers need flexibility. There is a certain flexibility they should not have, and that includes firing someone because they have a chronically ill child or ailment of their own.

Thanks.

The CHAIRMAN. Thank you.

Ms. Ness?

Ms. NESS. I would like to second something Ms. Boyd said, which is that we are desperately in need of some more up-to-date objective research. I am sure if our coalition went out and did a select survey of our constituents, we would get a very different perspective on the Family and Medical Leave Act. It has not been done since the year 2000. I think it is time for us to once again survey a representative sample of employers and employees so we can better understand what is working and what is not.

From the latest research we have, we have numbers in the high 80s and 90s, both from employers and employees, saying that it is working. And, again, I think that a lot of the questions that have been raised today about the lack of clarity in the regs are questions which could be benefited from additional education.

I will close by saying that the support for policies that would make our Nation more family friendly goes across the board. It is not a red State or a blue State issue. If you survey people, every demographic group, every economic group, every part of this country, people talk about the need to support our families and to not have people in this untenable position of having to choose between their loved ones and their jobs. They need to be able to take care of both.

So I would urge this committee to encourage the Department of Labor to take on some new research in this area.

The CHAIRMAN. Dr. Mulvey?

Ms. MULVEY. Thank you. I would like to say a few things.

The costs that we have talked about are not the costs of illnesses, but they are the costs of lost productivity, lost profits, and replacement labor. And in terms of the way surveys are done, our survey did cover half a million workers, and our prevalence numbers were very similar to the 2000 survey, and our duration numbers were

very similar. So we are confident that we are capturing the right characteristics.

And one quick thing about the international issue. Many of the countries that are providing generous paid leave in Europe also have very poor economies and high unemployment rates. So that is a path that I do not think we want to go down.

The CHAIRMAN. Thank you.

Dr. Heymann?

Dr. HEYMANN. I just want to respond briefly on the cost issue in two ways.

The first is just to say simply those countries that have far greater benefits than the United States are most of the countries in the world. As a result, there are many of these countries that happen to have very low unemployment, lower unemployment than we do. Many have high productivity. There are some with high unemployment and low productivity. But it is clear when you look at the countries involved and you look at the numbers, there is no link to unemployment or to productivity among these.

The second thing I want to talk about is the cost that we really have not talked about here, which is the very high cost when we do not do enough. And those are the unnecessary hospitalizations. I mentioned the asthma case. That is just one of many. The unnecessary illnesses that occur when we have the spread of infectious diseases. The U.S. Centers for Disease Control and Prevention argued that people should not go to work this year when they had influenza. Why? Because it leads to over 90,000 hospitalizations, and 36,000 deaths a year. It has a tremendous economic cost from lost work. And yet people go to work because they have no choice. So there are enormous costs to us for doing nothing.

Thank you.

The CHAIRMAN. Thank you.

Ms. Alexander?

Ms. ALEXANDER. Just two quick points. Thank you for calling on me.

I still look at the point that you can have on any given day or at any given time a number of people that need to be out for various reasons, and I have actually reviewed this with our head of HR; that in reviewing the FMLA, you know, we could have someone in a small company where all of a sudden I have four people that need to be out. But as we reviewed it, we quickly recognized the fact that it was not the FMLA that required them to be out. It was because of what just happened in their life, and that would happen regardless whether the FMLA was there or not. And so that is not what is causing these issues. It is the things that people have to deal with in their life, and that is something that I am going to have to address with my company and with how I am going to run it.

The other thing that I would say is that when we talk about the loss of productivity, we keep talking about the loss of productivity because someone is out, and we are not addressing as Patti talked about or what I have personally experienced or what I see with my employees, is the loss of productivity where someone is at work for those hours because they could not afford to leave, but their mind is not with me. Their mind is on the fact that their child is there

and they need to be with them. Or, you know, we mentioned a migraine headache, whether it is covered under this or something else, if someone has a migraine headache, if they leave for an hour and take the proper medication, I have lost them for an hour. If they do not, I have lost them for 8 hours to 3 days because of the treatment of that migraine which has progressed too far at that point. And so there is loss of productivity by not allowing these intermittent leaves to take place.

The CHAIRMAN. Thank you.

Mr. Lancaster?

Mr. LANCASTER. Thank you. As I mentioned, American Axle is in the globally competitive automotive industry, and anything that drives U.S. production costs jeopardizes U.S. jobs. I would like that to be taken into account.

Also, something that has not been discussed here is the cost driven by the poor morale of workers who see the abuses. And we have had situations where hourly workers have come to us to complain about abuses by their coworkers. And, in fact, we have tried to address those, but because of the law of the State, even when we found an abuse, there is not much we could do about it.

Third, I would like to point out that in terms of balance of work life and personal life, in terms of our schedules of annual working days per year, we start with 365 days. We back out weekends, 17 paid holidays, and then 3 weeks, which is the average vacation time. That brings us down to 229 working days in the United States. We have a very small operation in India; they have 249 working days. Our operation in Brazil has 264 working days. Our operation in Mexico has 282 working days.

The more days we allow people not to come to work, it just jeopardizes our ability to compete and drives these jobs offshore.

The CHAIRMAN. Thank you.

Ms. Dohnalek?

Ms. DOHNALEK. For the record, I would like to respond to the statement that it is easier to cover a half-day in a healthcare setting than an entire day. I disagree with that. That does not tend to be my experience. It is much more difficult to cover a half or a portion of a day than an entire shift.

The CHAIRMAN. Thank you.

Ms. Marsden?

Ms. MARSDEN. Yes, thank you. I would just like to make a couple of comments in regard to, again, a request to take a look at the intermittent leave periods of time, and to suggest that it needs to be greater than just 6 minutes. We need to be able to get a handle on it from the standpoint of someone who is taking it, and I have had this happen on a continuous basis for—you know, year after year. One-hour increments to me seems like it would be something that should be looked at. And we have sick leave provisions—many employers do—for parents to be able to take time to go take their children to the doctor or for minor cases. And so I would like that to be looked into.

I would also like to have the “serious health condition” better defined. Again, I would like to make that statement clearer. I don’t think it is there. It is difficult to administer this leave without doing that. And I think we need to provide assistance to the doc-

tors regarding the form that they have to fill out. I feel like that form is very onerous when they take a look at it. They go through and put very cryptic remarks. You cannot read it most of the time. And so I would suggest that perhaps the form needs to be made more user friendly.

Thank you.

The CHAIRMAN. Thank you.

Ms. Ness?

Ms. NESS. Since we have been talking a lot about costs, I just want to raise another arena of costs. We have over 300,000 bankruptcies in this country that occur every year due to people having unpaid leave during a period of illness. It leads to loss of pay, loss of job, loss of health insurance. It sets people off on a cycle of economic disaster. Every 30 seconds somebody in this country files bankruptcy in the aftermath of a health problem.

When we began our work to advocate for family and medical leave, we heard many of the same arguments that we hear today. We were told it was economically unviable. We were told we were crazy, that this was just not consistent with the way we do things in this country. We implemented Family and Medical Leave. The economy never did crash. And I think while there are costs associated with implementation of Family and Medical Leave, the research that needs to be done should also look at the costs associated with not having it. And long before we ever enacted this law, there were many, many companies in this country who were providing family and medical leave benefits far more generous than this law, and they were doing it because it made good business sense.

Thank you.

The CHAIRMAN. Thank you.

Dr. Barbanel?

Dr. BARBANEL. I want to just talk about the "migrating diagnosis" in Family and Medical Leave. Somebody might come in with a musculoskeletal problem and then that gets better, and then they are comfortable with being out of work so many days a week or all week, and then they cannot go back because they have the stress problem. And then you try to unwind that and find out whether the person is being adequately treated, to the extent somebody will tell you that, and then that diagnosis is that the person needs 1 day off from work on a Friday. And it is a continually evolving thing for employees that misuse the Family and Medical Leave Act.

The CHAIRMAN. Thank you.

Mr. Payne?

Mr. PAYNE. Thank you. I just wanted to kind of respond and reiterate speaking from a healthcare setting, and, Marie, I understand from some companies that it is not the issue that it is in healthcare, but it is a tremendous issue. You have to understand, we are stressed for staff to begin with. We have 9,000 employees, about 2,000 nurses. On any given day, I have 200 nursing openings that we have been struggling to fill for months. So we already are working with temporary staffing and shifts that go unfilled. And when you couple that with chronic intermittent call-ins, it is a problem. And they do call in first thing in the morning without any

prior notice. They will give us the proper 2 hours before the shift starts, but that means they are not there for that day.

The intermittent aspect of it, what we have been advised is that when someone—when you get the initial medical certification, you cannot have a discussion. You can ask for a second opinion. But once the intermittent diagnosis kind of goes on and you are 6 months into this intermittent thing, your ability to then renegotiate with the doctor is very limited. That is how we have been advised, and we are pretty certain that is good legal advice. And that is frustrating because we feel that management feels powerless and hopeless and deeply frustrated by what is often perceived as abuses of the system.

The CHAIRMAN. Thank you.

Ms. Philips?

Ms. PHILIPS. I just wanted to restate how necessary the FMLA was for my family. Like I said before, it was a godsend for us. We are just now getting back on our feet. FMLA, yes, is unpaid. I used everything else possible because we needed my salary. But, more importantly, as I said, we had to have the insurance. Without the FMLA, I don't know how my family would have survived.

Another important part of treatment for your child when they are ill like this is stability in the family, and that is the one thing that the FMLA gave us, was stability and peace of mind so we could focus on helping our daughter.

Thank you.

The CHAIRMAN. And, Ms. Boyd, for the concluding statement. [Laughter.]

Ms. BOYD. That is a lot of pressure, Senator Enzi. Just a couple of quick points.

Back to intermittent leave, and this may be a little bit of a wrap-up of what people have said before, and that is that it is unrealistic in all settings to think that somebody can be 6 minutes or 10 minutes late or 15 minutes late and that everything will just begin then when they show up. Obviously in healthcare, you need people to be there when they need to be there. The same is true in a production setting and manufacturing.

It is part of the problem with having unscheduled intermittent leave, that those small chunks of time where people can just show up continuously tardy is problematic. It means a shift does not begin on time, and it means you have to cover in some other way.

I think what we are really talking about from the employer perspective, when we look at these regulations, is that there is a real management challenge that was not, I think, intentional when the regulations were written. But when you combine this very broad definition of "serious health condition," the ability to take time off for chronic conditions in very small amounts of time, and not having a lot of ability to do the follow-up, that you really cannot manage an absence if you suspect that there is something going on other than a real legitimate absence. You cannot ask the same questions that you would ask in a situation where somebody was just calling in for sick leave. And we know it is a very small percentage of the population, but there is enough of a percentage of the population that it causes disruption in workplaces that use the FMLA as a shield to prevent discipline and to protect their jobs.

That is problematic, and it should be really problematic—and I think we have heard a little bit about the morale issues—for people who use the statute properly. It undermines the legitimate use of the statute to have that small percentage of the population being able to use it improperly. And that is the very targeted, tiny issue that employers would like to see addressed in the regulations. I think it can be done without undermining the basic protections of the statute, and that ought to be our goal.

Thank you.

The CHAIRMAN. Thank you, and I want to thank all of you who took the time out of your day and your lives to provide us with information. We have got a lot to digest, and I assume that we will get more.

I want to particularly encourage those of you who had some statistics to submit those because I was not a fast enough writer to get them. I suspect that my staff did a much better job than I did, but those numbers are always helpful. If any of you want to expand on comments that you made or comment on comments that others made, we would appreciate your submitting that.

I would mention that Senators Kennedy and Dodd are submitting statements for the record, and all members of the committee may be asking you some clarifying questions, and I would appreciate it if you would answer those as quickly as possible so that we can make them a part of the record. And we will be sharing all of this with the Department of Labor as well. So we have kind of used up our allotted time today. I do want to thank all of you for taking the time to participate. I particularly know how long it takes to get here from Gillette.

[Laughter.]

The CHAIRMAN. I make the trip to Wyoming most weekends. I only get to Gillette about once a quarter because I have to get all over the State.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Millions of hard-working men and women are facing an increasingly impossible choice today between the jobs they need and the families they love. The percentage of two-parent families in which both parents work has doubled since 1970; more than 10 million single parents are struggling to balance their jobs and their family obligations; and nearly 21 million full-time employees are also caregivers for elderly relatives.

The delicate balance between work and family becomes especially difficult when a new child arrives or a medical emergency strikes. I learned this first-hand when my son was diagnosed with cancer and lost his leg in 1973. Months of difficult treatment followed, and he had the good fortune to become cancer-free and return to a full life. I was fortunate enough to be able to take the time I needed to be there for him.

In 1993, with the strong support of the National Partnership for Women and Families and many others, Congress enacted the Family and Medical Leave Act. In the 12 years since then, the act has been a significant success, enabling more than 50 million Americans to take time off when they needed it most without fearing the

loss of their job. These enormous benefits to working families have come with little cost to businesses. A Labor Department report in 2000 found that the act has had a positive or neutral effect on 90 percent of businesses' profitability and 84 percent of businesses' productivity.

Despite its success, however, the act is now under attack by opponents who are calling on the Department of Labor to undercut its critical protections. They want to narrow the definition of "serious health condition." The current regulations allow for job-protected leave when an employee needs more than 3 days of treatment and recovery, and it's a fair and reasonable requirement. If the opponents' current proposal had been in effect over the last 12 years, it would have excluded 25 million workers who used the act for serious illnesses such as acute appendicitis, heart attacks, strokes, hernia repairs, and pneumonia.

Opponents also propose a change in the intermittent leave regulations, which could force employees who require frequent, short treatments—such as for chemotherapy, dialysis, occupational and physical therapy, or pre-natal visits—to exhaust their leave. It would burden employers with additional administrative costs as well.

These changes would be flagrantly inconsistent with the needs of today's workers and would eliminate much-needed flexibility. Surely, Congress and the Administration should not undercut the act when the problem of the work-family balance is now taking a heavy toll on working families. Instead, we should be building on the act's success by expanding it. The current act does not provide protection to employees in firms with fewer than 50 employees. It also does not allow leave when parents need time to be more involved in their children's schools. I have co-sponsored the Family Medical Leave Expansion Act, S. 282, which Senator Dodd has introduced to address both of these issues.

As employees try to balance work and family, they also need paid time off for everyday illnesses and preventive care, such as annual check-ups, or when their child is sick with a cold, or when an elderly parent needs to be taken to a doctor. To deal with these problems, I have introduced the Healthy Families Act, S. 932, which would directly benefit 66 million Americans by guaranteeing workers 7 paid sick days a year to meet their medical needs and those of their family members.

[The prepared statement of Senator Dodd was not available at time of print.]

The CHAIRMAN. This has been very helpful, and it does make sense for all of us to periodically review how the laws that are enacted are actually in effect, and that is one of the requirements that our committee has, is to provide oversight over the jurisdiction that we have. And, of course, we have jurisdiction in health and education and labor and pensions, and besides that, we have 38 re-authorizations we are supposed to do in those areas by the end of September. So our committee has one of the biggest workloads, but we are trying to delve into these areas where we need to know more and we need to share more and we need to educate people more. And you have made a tremendous start on that today.



I think there was a good deal of common ground here today and just a lot of outstanding comments and suggestions. And all of us recognize that for employees it has been a great benefit to be able to take time off to address their own or family members' health needs. It is a good benefit. But from what I have heard today, we can make it better.

Thanks for your comments and I express that on behalf of the entire committee. Thank you for being here today, and I appreciate the great participation from spectators, too.

[Additional material follows.]

## ADDITIONAL MATERIAL

### RESPONSE TO QUESTIONS OF SENATOR ENZI BY PATRICK LANCASTER

*Question 1.* You testified that obtaining second opinions during the medical certification process is not practical. Please explain why and what alternatives you would propose.

Answer 1. The FMLA prohibits employers from obtaining a second opinion from a healthcare provider that is “employed on a regular basis by the employer.” 29 U.S.C. § 2613(c)(2). The Department of Labor’s (DOL) regulations have interpreted this provision very broadly to mean, not just that employers cannot use company doctors or nurses actually employed by the employer, but also that the “employer may not regularly contract with or otherwise utilize the services of the healthcare provider furnishing the second opinion unless the employer is located in an area where access to healthcare is extremely limited. . . .” 29 C.F.R. § 825.307(b). In addition, in situations where the health of a family member is involved, obtaining second opinions for family members of employees is very burdensome given the fact that employers do not maintain family members’ addresses and telephone numbers, or the wide geographic network of physicians necessary to conduct evaluations on such family members for second opinions.

There are several problems with the broad restriction on who can be used for second opinions:

1. DOL has unreasonably expanded the prohibition beyond that which was contemplated in 29 U.S.C. § 2613(c)(2);

2. Large employers, like American Axle & Manufacturing, Inc. (“AAM”), typically administer hundreds and sometimes thousands of FMLA leaves each year. It is overly burdensome to require such employers to engage the services of a large number of different healthcare providers for the purpose of seeking second opinions for multiple FMLA leaves;

3. The availability of a tie-breaking third opinion by a healthcare provider selected jointly by the employee and employer provides adequate protection to the employee;

4. The DOL’s regulation is vague in that it does not specify what is meant by “regularly contract with or otherwise utilize.” Does this mean that using the same specialist for second opinions on two or three employees is not permissible? Or is it 10, 12, or 20? There is no reasoned basis, given the availability of the tie-breaking third opinion, for requiring an employer to find a different healthcare provider every time it seeks a second opinion about alleged serious health conditions that may be similar in nature. Yet that is what the DOL regulations arguably require.

The solution to this practical problem is simply to follow the express language of the statute. Preclude employers from using healthcare providers they actually employ but not otherwise restrict their selection of healthcare providers in the general marketplace.

*Question 2.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in almost all situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

Answer 2. With all due respect, I do not agree that the FMLA has been largely successful and has worked in almost all situations, nor do I believe that this was the consensus of the Senate Roundtable. I also do not agree that regulatory changes should not be made.

Although the FMLA has certainly achieved its objective in providing large numbers of employees with the opportunity to take job-protected leaves when facing serious health problems or life-altering events such as the birth of a child, it has achieved this objective by imposing a huge administrative and cost burden on employers and by creating an incredible labyrinth of regulations that are rife with opportunities for missteps even by the most conscientious of employers and for abuse by employees.

The most difficult aspect of the FMLA to administer is intermittent leaves. The problem of administering intermittent leaves is exacerbated by the DOL’s broad definition of what constitutes a serious health condition. As a result, most of the abuse experienced by AAM has come from intermittent leaves. Employees receive medical certification regarding intermittent conditions such as migraine headaches, chronic back pain or asthma, conditions that are notoriously difficult to observe, and then use the availability of intermittent FMLA leave to come to work late, leave work early or take casual absences without any penalty under the attendance program established in the collective bargaining agreements with the unions that represent

all of AAM's hourly employees in the United States. The same is true for some employees who obtain intermittent leaves to care for family members with allegedly serious, but intermittent, health conditions. Because the DOL's regulations prohibit employers from requiring such employees to obtain an excuse from a healthcare provider whenever they take intermittent FMLA leave—something employers have historically requested of employees who miss work—or to obtain an effective recertification of the serious health condition (an employer is not allowed to get a second or third opinion when seeking a recertification or to seek a recertification more often than every 30 days), the employer has no effective way to ensure that employees are truly missing work for a reason that qualifies as FMLA leave.

The regulatory changes I and others suggested at the meeting were not designed to limit the rights of legitimate FMLA leave-takers. They were intended to avoid opportunities for abuse and to make the path to compliance easier to follow for employers. The only leave-takers who would be affected by the types of changes that ought to be made in the FMLA regulations are those who are not entitled in the first place to the job-protected time off they are taking.

*Question 3.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

Answer 3. No. It is clear that DOL's present FMLA regulations far exceed the intent of Congress. Large numbers of employer and employee groups have provided considerable feedback regarding the FMLA that can and should be used to address the problems with administering leaves under the statute. There is no need to waste time and money on yet another study and allow further abuse and additional cost. The DOL's 1995 and 2000 studies were far out of step with what we at AAM have experienced in attempting to administer the FMLA.

*Question 4.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

Answer 4. AAM does not have compiled statistics on how often second and third opinions or recertifications are used. Unfortunately, particularly in the case of intermittent leaves, the safeguards available to employers to curb abuse are largely illusory. As indicated earlier, employers have no effective means of verifying that the reason an employee is late for work or intermittently missing days of work is because of the serious health condition for which they were certified perhaps months ago. The recertification process is typically a waste of time and money because the employer cannot challenge the recertification through second and third opinions under the DOL's current regulations. Employers also cannot seek medical excuses that verify the need for time off. What typically occurs is that an employee calls in and states that he or she needs to take an FMLA day because of a headache. Unless we stumble upon the employee at the golf course or at a softball game, AAM cannot effectively verify the employee's need for intermittent time off on that particular day. Even when we do find instances with the appearance of abuse, employees may still claim they were suffering from a serious health condition at the time based on the regulations liberal definitions of a serious health condition. Given the burden, expense, and litigation risk that is posed by challenging these call-ins (i.e. re-certifications), and the fact that such challenges are largely ineffective, AAM's hands are tied if the company suspects that an employee is abusing his or her leave rights.

*Question 5.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you have a solid understanding of your rights and responsibilities under the FMLA as an employer? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

Answer 5. There is no need for additional employee education. The FMLA posting requirements coupled with aggressive informational and coaching campaigns by unions have made most employees at companies like AAM well aware of their rights and the loopholes available under the FMLA. At AAM, the UAW has educated the hourly workforce on the FMLA. Unfortunately, the dissemination of this information has also led to considerable abuse, as employees have regularly used FMLA leave as an excuse for casual absenteeism under AAM's jointly agreed upon and administered union/management attendance program.

The DOL should simplify the regulations in accordance with Congress' legislative intent when Congress enacted the FMLA. It is astonishing that the FMLA regulations are considerably longer and more confusing than the regulations administering the Americans with Disabilities Act (ADA). The DOL must do a better job of coordi-

nating those regulations that also impact rights under the ADA and State workers' compensation statutes. In most instances, the DOL leaves it to the employer to figure out which regulations (FMLA, ADA or workers' compensation) provide the greatest benefit to employees and to then apply the regulation that provides the greatest benefit. If the manager is wrong, the manager could be held personally liable under the FMLA. The DOL needs to anticipate more of those scenarios in which potential conflicts between statutes can occur and advise employers what to do.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY SANDY BOYD

*Question 1.* In its March 30, 1993 Comments submitted to the DOL, NAM stated the following:

"Serious Health Condition should be interpreted as a disabling condition when medical leave is taken for an employee's own illness, and as requiring an absence of no less than 2 weeks. Any truly serious condition would likely require at least 2 weeks anyway."

At the Senate Roundtable, you denied taking a position on the required length of absence qualifying an employee for FMLA leave. Has NAM changed its position on the correct eligibility requirements? If so, what specific changes does NAM propose? Please provide statistical evidence that your proposals improve the regulations without harming FMLA-leave takers under the current regulations.

Answer 1. After the FMLA was passed in 1993, DOL issued proposed regulations for notice and comment. The regulations were finalized in 1995 and since that time employers subject to the FMLA have been covered by those regulations which define seven different ways (inpatient care and continuing treatment) in which an individual can qualify for having a serious health condition. Manufacturers continue to be concerned with the broad definition of serious health condition as defined by the regulations and expanded by wage and hour opinion letters. Our concerns, post-final regulation, for the past decade, have focused on the fact that "serious" no longer means "serious" and that even colds, flu and hang nails qualify for FMLA protection.

*Question 2.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in almost all situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

Answer 2. The vast majority of panelist agreed that the FMLA has worked well with respect to the "family" portion of the FMLA. There was much less agreement on the "medical" leave portion, especially for employees' own absences. Instead, a variety of panelists discussed the problems with the overly broad definition of serious health condition, the use of intermittent leave in small increments for unscheduled absences and the difficulty in managing absences once FMLA protection is invoked. A number of witnesses discussed the disruption, cost, loss of productivity and impact on employee morale when fellow employees use the FMLA improperly. I am confident that relatively modest changes to the FMLA regulations could provide employees with the protections to which they are entitled while allowing employers to better manage their workplaces.

*Question 3.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

Answer 3. Research on this subject should be conducted on a regular basis and additional research is always useful. However, there is already a body of research available (not to mention the fact that the Supreme Court has struck down a portion of the FMLA regulation and other circuit courts have conflicting views on other portions of the rule) that supports DOL moving forward with a notice and comment rulemaking. The call for additional research should not be used as a way to avoid or delay DOL from beginning a rulemaking.

RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY JEFF PAYNE

*Question 1.* Assuming that no employer would want a sick employee handling patients, how would you propose the regulations address concerns about under-staffing while simultaneously protecting employees with chronic serious health conditions? How do you handle under-staffing that occurs when employees have minor illnesses?

Answer 1. The healthcare environment is radically different than when FMLA was first promulgated 12 years ago. Manpower shortages facing healthcare today did not exist in 1993. Those shortages will, by all estimates, continue to exist and indeed be exacerbated for the remainder of this decade and beyond. Today's reality: finding capable, qualified staff is difficult and results in many unfilled positions.

When you couple open positions with an employee's chronic absenteeism, you create intolerable stresses on a patient care unit.

A hospital's first priority is to insure the safety of the patient is not compromised. The ability to successfully deal with chronic absenteeism is essential to that goal. In non-FMLA instances where an employee has a poor attendance record, the attendance record in question is carefully scrutinized and dealt with through disciplinary policies and procedures where appropriate. Most hospitals use a "no fault" attendance policy—e.g. regardless of why any absence occurs, the absences are counted and compared against the policy standard.

Chronic intermittent absences resulting from approved FMLA leave, however, can only be addressed through attempting to cover the absence with temporary staff or from an in-house float pool. Using temporary staffing replacements for daily absences is challenging and expensive. Often called "per diems", these premium-priced replacement employees are also themselves in short supply, and therefore not a realistic option on which a hospital can depend. In addition to "per diems" hospitals often rely on longer term temporary workers. Many hospitals will pay premium bonus dollars (separate and apart from overtime pay) to employees who agree to work over, or who work in a unit where chronic openings exist.

These "travelers" are also expensive, and require significant lead time and complex competency assessments before they are allowed to work. Travelers, together with per diem nurses and bonus pay can quickly drive up healthcare costs. Eventually the patient shares in paying those additional costs incurred by the hospital.

Another option used by hospital is "in-house float pools"—groups of nurses who are assigned daily to cover openings throughout the hospital. Creating an in-house float pool is also difficult because of chronic staff shortages. In sporting terminology, in many cases, the bench with available replacement players is virtually non-existent.

It's not just a nursing issue. One hospital I know reports that fully 75 percent of their staff in their Respiratory and Environmental Services department is FMLA certified. That hospital is experiencing well over 100 percent occupancy of their beds, and so support personnel, like Environmental Services are absolutely crucial. Chronic absences from intermittent leaves impact those department's ability to provide vital support services.

Hospitals need maximum flexibility to respond to chronic intermittent absenteeism in order to provide safe and effective patient care.

*Question 2.* The majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in the vast majority of situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

*Answer 2.* We support in general the FMLA law. As mentioned before, in the healthcare arena the FMLA provisions in most cases simply codified existing hospital leave practices. FMLA's continuous leave provisions, while a challenge to staffing, can be managed and planned. However, the intermittent leave aspects create problems—the no-notice absences, as mentioned in other statements, wreak havoc with staff scheduling. Where I work, our experience has been that about 45 percent of all of our FMLA leaves of absences are intermittent. (Another ASHHRA board member reports her hospital's intermittent percentage is at 65 percent!). Our labor attorney reports that her billing activity shows fully 40 percent of her time with us is spent in dealing with FMLA issues. The intermittent leave provisions need to be reviewed.

*Question 3.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

*Answer 3.* Yes.

*Question 4.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

*Answer 4.* As with most hospitals, my organization strives to balance the employee and employer's rights, and uses most of the safeguards available. However, the law still contains enough ambiguous language to cause significant frustration.

For example, an employee's failure to produce required/requested documentation within the 15 day window stipulated by the law does not have clear repercussions. Rather, the regulations on that point are vague. Consequently, we feel we have no choice but to give multiple 15 day extensions. In that instance, clear and unambiguous language should be inserted stating a failure to produce documentation within the time limit can result in the intermittent leave not being approved.

Like most hospitals, my organization uses medical re-certifications as a significant tool. Almost half (45 percent) of the leaves of absence we process are of the intermittent variety, and that is where we most often request re-certifications. Below is a summary of the variety of ways my organization utilizes FMLA safeguards. These methods are similar to other facilities and hospitals:

- Re-certifications—The requirement for a re-certification is dependent on what the physician has indicated on the original certification document.

- Often the physician does not indicate how long a leave is anticipated for the particular ailment. Based on our experience, we have created a list of common diagnoses and ailments, and associate with each of our own guidelines for determining the length of the leave of absence as well as requiring re-certifications.

- In other words, for some medical situations we state the absence is approved for 90 days, and requires a recertification every 30 days during that time, while others we state the absence is approved for 45 days with no requirement for a recertification and for yet others we may say the absence is an indefinite intermittent situation which requires re-certifications every 6 months.

- We as a matter of practice do not ask for second opinions, even though we know it is an option, because of the administrative hassle and the cost involved. We are concerned with an equal application of the law, and feel if we ask for a second opinion for one employee, we'd need to do that as a matter of routine for all employees similarly situated, and that would be very difficult and costly to administer.

- If a manager suspects abuse, typically we:
  - Meet with the manager to compare records (departmental versus benefits). We analyze the absences for suspicious or unusual patterns or frequency.

- Contact our labor attorney and review the data.
- Ask for a re-certification if appropriate.
- Sometimes we sponsor departmental meetings to discuss FMLA issues and procedures.

The fact that intermittent leave can be taken in small increments of time has compounded the difficult—in accurately determining how much of an employee's FMLA time has been used. In theory this should help hospitals safeguard against an employee taking more FMLA than allowed—and yet the sheer difficulty in tracking intermittent leaves in such small increments can render it virtually useless as a safeguard.

*Question 5.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you have a solid understanding of your rights and responsibilities under the FMLA? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

*Answer 5.* In almost all cases, hospitals have become FMLA experts out of necessity. The complexity of the law and the significant impact created by the intermittent leave portion has caused us to dig deeply into the nuances and subtleties of the law to determine our responsibilities and our exposure. Most hospitals rely on retained counsel for guidance, and those firms, too, have become FMLA experts.

Despite our knowledge, the law continues to confuse due to its utter complexity. My organization is as sophisticated and educated as any on FMLA issues. Our four full-time benefit counselors are each in their own right FMLA experts. Yet even still, for example, we struggle with process issues; who needs to do and say what, when between the employee, the manager and the benefit counselor to insure that we are in compliance with the law, but safeguarding against abuse.

As with most hospitals, we educate our management and staff as best we know how. FMLA issues are included in management training sessions and seminars. Bi-weekly and quarterly newsletters run recurring articles about the FMLA process. Employees receive detailed packets of instructions once they have applied for FMLA through their benefit counselor.

However, employees also receive information from outside the organization from a variety of sources, and not all of the information is accurate. For example, some employees continue to labor under the impression they are the ones who make the determination as to whether or not their situation meets FMLA guidelines.

And despite how much time we have spent educating our management team and our employees, we continue to see and hear misperceptions and misunderstandings about the basic law, especially when it comes to issues surrounding intermittent leave. For example: a large hospital in Ohio reported recently that 400 of the total 1,200 nurses on staff had received information and had actually gotten medical certification with the understanding that FMLA could be used to avoid overtime. It took a lot of time and energy to work through and reeducate the staff about this misperception.

What can help? Clear and concise language that gives clear interpretations from the Department of Labor (not interpretations from third-party vendors).

RESPONSE TO QUESTIONS OF SENATOR ENZI BY MARIE ALEXANDER

Good morning, Chairman Enzi, Senator Kennedy, and members of the committee. My name is Marie Alexander. I am the President and CEO of Quova, Inc., a small business in the geolocation technology industry based in the Silicon Valley. I have 55 employees. They run the gamut from high paid executives to those who are entry-level.

*Question 1.* What has been your own experience, or that of your company, with the FMLA and its regulations?

*Answer 1.* I have employed workers in companies ranging from 25 to 10,000 employees, in industries ranging from mental health to entertainment to high tech. My focus over the last 20 years has been on building small entrepreneurial companies into large corporations. In my experience as an entrepreneur, a business owner, and an employer of long-standing, the FMLA is good for business.

If I have an employee with a child or family member with a serious illness, and this employee is unable to be with that family member when needed, they are distracted at work and their productivity suffers. In contrast, if they are allowed time to take care of that family member, their productivity increases. They know what they have to accomplish and—sometimes by working at home, or working extra hours, or skipping lunch, or working exceptionally hard—they get it done. And in the end I have an extremely loyal employee.

If I have a seriously ill employee who comes to work, that worker's productivity suffers. In addition, a sick worker often spreads illness to other workers which in turn leads to further loss in productivity. Seriously ill employees cannot be as productive as they would otherwise be when in good health. When employees are ill at work, I am paying for lower output; this results in a direct cost in wages. I could of course fire a sick employee. If I were to do so, however, I would have replacement costs: the severance pay for the fired employee, the downtime from the lack of someone in the position, the time spent recruiting and hiring a new employee, the recruiting fees, the training fees, and the lower productivity of a newly hired employee. Allowing an employee to either take the leave they need, whether extended or intermittent, is far less costly to my business.

If I have someone who abuses my policies or policies established by law, like the FMLA, I have the ability to terminate their employment. I may have the expense of documenting and proving abuse, but that cost is far less than the cost that comes with allowing someone who is abusing my trust and my policies to stay within my employ. The FMLA allows for termination. It is not designed to protect those who abuse policies; it is designed for those who are productive workers within my employ. Moreover, when an employee asserts a right to FMLA and I believe they do not qualify for it, the law provides a number of employer safeguards in these situations. For example, I can require a doctor's certificate—actually, three certificates, from three different doctors, if I choose.

If I create an environment in which my employees can balance their work/life needs, then I get exactly out of the relationship exactly what I put into the relationship: loyalty and commitment. This loyalty exists not only between the employee and the company, but also among employees. Work/family policies like the FMLA engender an environment of respect and support between employer and employee, and among employees. When employees see that you, as an employer, are supportive of them, they mirror that same behavior back. If they see that you will not tolerate abuse, then they will not abuse.

Loyal employees plan and work with you to ensure that the needs of your business are being met. Many years ago, I was a manager at an amusement park. One Friday afternoon, an employee reporting to me arrived as expected and performed his job, completing "set up" so that we could open the park that evening. His set up included putting bags in the trash cans, cleaning up excess water on the streets, putting new sand in the cigarette butt cans—none of this actually critical to the success of an amusement park. Nonetheless, he had responsibilities and he made sure he met them. Once his tasks were completed, but before his shift was over, he called me and explained that he needed to leave. "My father is a police officer," he explained, "and he was shot this morning." I told him that he could of course have the time off, and that I would have someone cover for him. When I told him that I hoped his father would be o.k., his response was "I guess I should have said my father was a police officer; he died this morning." Most employees are committed to their jobs and take their commitments seriously.

Good managers and employers have few problems with unnecessary unscheduled leaves of absence. The positive employee morale that is associated with FMLA and other family leave benefits has made absence control a mutual responsibility. Employees are fully aware of the benefits with which you provide them and appreciate the attention to their needs that go with these benefits, and in return, they don't want to put you, the employer, in a jam with a last-minute absence.

I would like to share another story with you. I recently had an employee take maternity leave. After using up all sick and paid vacation leave, the young woman took 80 unpaid days of leave (16 weeks). (She received pay for 12 of these weeks through the California State Disability Insurance (SDI) and California's Family Paid Leave Insurance (FPL) programs). I hired a temporary replacement during her leave; this employee turned out to be terrific. When the young woman returned to work, I had two people that were trained for that position—a wonderful benefit to my business. I was able to take on the temporary worker, someone who now already had the skills for the job, as a permanent employee. With very little planning, we were able to turn an employee's leave into something positive for two employees and for the company as a whole. Ultimately there was no negative financial impact to Quova. On the contrary, we came out ahead.

On any given day, I anticipate that some of my employees will need time away from their jobs—for illness and for time to care for their family. As an employer, I plan and take this into account and build it in to my business model. Illness or the need to care for a ill family member is inevitable at different points during a workers' life and will cause people to miss work. Yes, there may in some instances be a loss in productivity which relates back to these illnesses, but medical leave and the FMLA are not the root cause of the productivity issue, illness is. FMLA is merely the mechanism through which employees are protected. The FMLA provides basic provisions for employers to meet employees' needs.

*Questions 2 & 3.* Are there ways in which the implementation of the act might be improved? Given the importance of maintaining a work/life balance for all working Americans, what do you believe are the most reasonable options to achieve the desired balance?

*Answers 2 & 3.* First, I would like to address the changes proposed by some groups to the regulations on intermittent leave and serious health condition.

I understand that some groups are proposing a change to the FMLA that would require employees who need intermittent leave to take that leave in half-day increments rather than shorter increments now specified in the regulations. This proposal would actually hurt business by reducing productivity. By allowing the increments of FMLA to be as short as needed by the employee the law limits the leave's impact on the company. If I must require an employee needing intermittent leave to take a minimum of 4 hours leave, when that employee needs to take only an hour away from their job, this will negatively affect my business. No smart business owner would support this proposed change.

I also understand that some groups are proposing a change to the FMLA's definition of serious health condition which would, in the end, exclude many seriously ill workers from coverage under the law. I find this proposal quite troubling. To succeed, businesses need loyal, productive employees. This means providing employees with the leave they need to address serious illnesses they or their families face.

Part of the argument for this change seems to be that guidelines on serious health condition are unclear and that employers feel that this leads to some employees unfairly receiving FMLA leave. In my experience, the FMLA provides clear guidance on how to determine whether your employee has a serious health condition. It also provides satisfactory employer safeguards instances when disagreements arise. For example, I can require that an employee provide a medical certificate from a doctor that they meet the conditions of the definition. I am not a doctor; if a doctor reports that my employee has a serious chronic condition, I will work with the doctor's assessment and provide my employee with the necessary leave. I will plan as best as I can. And if it changes dramatically and I suspect abuse, I have other protections under the law. As an employer, I see no benefit to my business in a narrowing of the definition of serious health condition. On the contrary, doing so will only limit the many benefits of FMLA leave to employees, families, and employers.

#### IMPROVING THE FMLA

The FMLA could be improved if employers were encouraged to share stories of success, ask questions, and learn the basics about the FMLA. An effort to educate employers about their employer protections and employees about their rights would be an improvement. There is a great deal of ignorance which exists on the part of employees as well as employers surrounding the FMLA. Before any changes are



made, perhaps more people should know what it really is. Proposals thus far indicate that employers and employees need to be educated about the law, not that the law needs to be fixed.

Research should also be conducted to identify viable support systems for small companies so that they can more successfully provide work/life benefits to their employees while maintaining business efficiency. One example of such a support system which would be reasonably inexpensive is a system of affiliate networks for matching temporary employees with companies affected by an increased need for employee absence related to work/life balance issues.

The FMLA could be improved by lowering the threshold of employees required for an employer to be FMLA eligible. I think it is possible for companies that are smaller than the defined requirements to provide this important benefit to employees. However, there are small companies for whom this could cause a detrimental effect. Therefore, it would be important to provide a provision when the size is decreased through which a company could file for exemption—but only when they could adequately prove a negative impact on the company. With this said, I do believe that most employers will experience no negative impact.

The FMLA could be improved by including partial wage replacement for employees on leave. Currently California employees receive partial income via short-term disability and family leave insurance pools. Paid leave is incredibly important to the economic stability of my workforce. Paid leave insurance pools like California's help take the burden of individual employers and are inexpensive for business owners. We need more policies like California's short-term disability and paid family leave.

#### RESPONSE TO QUESTIONS OF SENATOR ENZI BY SUSAN O'FLAHERTY

*Question 1.* At the Roundtable, you stated that the FMLA has worked well in 95 percent of situations where employees need to take FMLA leave, but that 5 percent of employees abuse it. Is there any statistical evidence for these figures, or were you simply using them to make the point that the FMLA is appropriately utilized in the vast majority of situations?

*Answer 1.* The percentage that I used was to make the point that FMLA is appropriately utilized in the majority of situations. It may be a smaller percentage of cases, but I think because there is a significant issue being brought forward by employers of all types of business and of all sizes, it should be addressed. It was apparent that unscheduled, intermittent leave and the loose definition of serious health condition are the parts of the regulations that cause administrative difficulties for employers and morale problems for other employees.

*Question 2.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in almost all situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

*Answer 2.* At the Roundtable it was clearly demonstrated that the majority of problems with FMLA are around the loose definition of serious health condition and the use of unscheduled intermittent FMLA. Both of these problems need regulatory clarification. Changes should be made to clearly define and outline what is proper usage and what can be done to limit abuse. The abuse is problematic for employers, but also can have a negative effect on the other employees who work with someone who abuses it. These changes and alterations should not affect those who use it properly. Clear definitions and guidelines are never a detriment, but an enhancement.

*Question 3.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

*Answer 3.* I would support regulatory clarifications of the definition of serious health condition and the use of unscheduled intermittent FMLA leave. In addition to these needed regulatory clarifications, I would support research that should include not just analysts who look at studies and reports, but include people who actually administer and work with the FMLA. People who actually understand it from an application and administrative viewpoint.

*Question 4.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

*Answer 4.* We do not have many problems or concerns with continuous FMLA leaves. The biggest problem we have in this respect is falsification of a document. On average we have one a month that has been altered. We do go to the provider

and they will work with us to say that no one from their office filled out the forms. Second and third opinions work the best with continuous FMLA leaves, if you have issues that are of concern. We do a small percentage of second opinions. I have not seen a third opinion in the recent past. For intermittent leave, second and third opinions are not as useful. Since it is an intermittent or chronic condition, the employee is not usually ill when they attend the second/third opinion. The exam is based purely on subjective history from the employee or first physician. Recertification is what we use for possible problems with intermittent leave. What we hear numerous times from employees as we are recertifying is the following statement: "go ahead and recertify, my doctor will approve anything that I want." To investigate alleged abuse, we require the managers to give the FMLA unit the pattern they suspect of abuse. We tell them it cannot be just a hunch or one individual day that just happened to occur. The managers have to give the FMLA unit the days of the week and the dates and hours used over a 30-day period. This way we can look at the information we had on approval to see if it truly is an alleged abuse or just a manager's reaction. If we determine that it appears inappropriate, we begin the recertification process. In the case of those employees who request a vacation day and are turned down by their manager, and then on the day in question call in and take an FMLA day we try another stance. On these, since there probably is no lingering pattern at that time, we cannot deny the day as who is to say they happen to have their medical problem suddenly incapacitate them on that exact date. We do, however, speak to the employee afterwards and say you had the FMLA day as requested. We tell them that we do understand and we try to give the employee the benefit of the doubt, however, we let them know that we are aware that they had earlier requested a vacation day that could not be granted on that day. We explain to them appropriate and inappropriate use of FMLA.

*Question 5.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you have a solid understanding of your rights and responsibilities under the FMLA as an employer? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

*Answer 5.* I think education is valuable. We frequently provide education to both employees and managers. Both employees and managers call the FMLA unit for questions and assistance. I think that the medical community could also use education regarding FMLA. Some physicians and their offices lack a true understanding of their part in FMLA and how it affects their patients and their patient's jobs. We have had physicians' offices refuse to fill out paperwork for employees. We have had to call the provider and discuss FMLA with them to get them to fill it out. We also have providers that let the employees themselves fill out the medical paperwork and then they just sign it. We have a solid understanding of our rights and responsibilities under FMLA. We constantly work with our human resource legal department for updates regarding any issues on FMLA, and they provide training for the staff. The staff that administers the FMLA determinations is sent to trainings and seminars to keep current. Our employees have the standard notifications, but we are also here to help them when they need assistance in dealing with different aspects of FMLA.

Besides speaking as an "employer", I am also an employee myself. I am a nurse, I am a mother of a child with asthma, and I have an elderly mother who is a cancer survivor. I am attuned to the necessity of FMLA, but I also see people who use FMLA as just a way of getting an extra 12 weeks off a year. We try to assist those who are in need of FMLA get the protection they deserve. We also try to manage and educate those who allegedly use it inappropriately, as this negatively impacts on those who do need and use it appropriately.

#### RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY CHERYL BARBANEL

*Question 1.* Assuming that no employer would want a sick employee handling patients, how would you address concerns about under-staffing while simultaneously protecting employees with chronic serious health conditions? How do you handle under-staffing that occurs when employees have minor illnesses?

*Answer 1.* Understaffing as a result of FMLA leave for a chronic medical condition can be staffed by accounting for additional necessary staff if knowing that the person will be out intermittently or for a continuous period of time. Intermittent leave for health conditions is more difficult to staff for especially when taken without notice. This often leaves the remaining staff with additional responsibilities. In some highly specialized areas we are sometimes able to get additional coverage at high

prices with temporary employment agencies specializing in highly trained individuals.

*Question 2.* During the Roundtable, you stated that there is “employee, employer, and doctor abuse.” Please explain what you mean when you say that there is “employer abuse” of FMLA. Please also cite examples of this abuse and to what extent the regulations provided sufficient remedies for addressing it.

*Answer 2.* I am representing the American College of Occupational & Environmental Medicine. In that role I have learned from my colleagues that early on after the introduction of the FMLA rule some employers had denied claims around intermittent leave for chronic medical conditions, which has been remedied at this time.

Employers would be helped by a better definition of what defines a serious medical condition. In certain employees as one condition is resolved another one emerges to take its place resulting a shortened work year on a continuous basis. It is also very difficult to track intermittent leave especially in the short intervals allowed.

*Question 3.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in the vast majority of situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

*Answer 3.* When FMLA works well, I am usually not involved in the cases. The area that needs improvement is intermittent leave for minor medical conditions that are temporary, but often go on indefinitely. I think that changes can be made that will allow employers to intervene in managing illness as they are allowed to do in workers’ compensation by directing care in some instances so that the employee is directed to more effective care. Right now the employer is left on the outside with virtually no ability to direct care. In many instances the primary care provider is being directed by the patient to write the excuse note and at risk for losing the patient and capitation payment if he/she does not do it.

We know from many studies the important benefits of work. We know that the longer someone is out of work that the less likely they are to return and be permanently disabled. By the time someone is out of work for 3 months they have only a 50 percent chance of ever returning to the job. Those out of work for 12 months have only a 1–2 percent chance of ever returning to work. Patients can begin developing a disabled mind set after as little as 2–4 weeks off and this seems to be more related to conditions that are diagnosed by the patient reporting rather than injuries that have a defined course of recovery.

Fewer than 10 percent of work-related injuries require a person to take more than a couple of days off from work according to a survey of occupational physicians. This contrasts with the 24 percent of injured workers who receive temporary disability benefits. This suggests that up to 80 percent of temporary medical leave is unnecessary.

One study on workers compensation claims showed that 25 percent of workers’ compensation claims accounted for 97 percent of all costs. The high cost claims are not all severe injuries, but are musculoskeletal claims, often minor, but end up with prolonged absence from work without objective findings.

The term delayed return to work is applied to patients with prolonged recovery that is disproportionate to objective clinical findings. These patients suffer physical, emotional, and financial hardship as a result of their absence from work. Many factors that appear to be predictive of recovery are non—biologic. It appears that the interaction of the worker in the work environment such as job satisfaction, and perceived stress, is key. There are a number of psychological factors including personality traits, perceptions of the social environment, and attitudes or beliefs about illness, as well as history of psychiatric diagnoses and history of sexual abuse that have been correlated with delayed recovery. Underlying depression is often an important etiologic factor in delayed recovery.

Delayed recovery usually involves chronic pain, although other subjective symptoms such as fatigue or paresthesias may also occur. Management may be difficult.

Current evidence suggests that understanding delayed recovery, chronic pain, and disability requires a biopsychosocial model, which reflects a complex interaction between physical, emotional, social and economic variables.

Social and psychological forces can counteract the desire to get better and reinforce the disabled role. An individual is likely to amplify and cling to a symptom (a behavior known as somatization) if the disabled role results in secondary gain. Three types of secondary gain occur: sympathy, attention, and support (including financial); being excused from responsibilities, obligations, duties, challenges, and ability to influence important people by virtue of their acceptance of the individual

as sick/disabled. **This is amplified by any system that awards benefits contingent on proving disability.**

Somatization is a common reflection of emotional distress and present with a pre-occupation with an unconscious exaggeration of physical symptoms. Somatization explains much of what physicians name "non-specific pain" in the low back, neck, hand and chest. It is estimated that 50–70 percent of patients with a psychiatric disorder present with somatic (physical) symptoms that obscure the diagnosis (most commonly depression) from the physician's point of view.

Differentiating malingering from a patient with symptom magnification and chronic illness behavior is difficult and both have inconsistency between history, physical examination and performance of standardized tasks.

*Question 4.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

Answer 4. Yes

*Question 5.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

Answer 5. The only case we were successful in was a case where the employee asked for leave for a death of the same person twice. There was no second opinion in the case. At my other employer only one case is recalled that a second opinion was requested in the last 10 years. It is difficult in assessing FMLA cases because the employer does not have the ability to have full information regarding the alleged medical condition claimed. In most cases the employers will not know what the diagnosed medical condition is and even if they did there is no definition of a serious medical condition or anyway to manage the condition as is allowed with workers' compensation claims. Employers are reluctant to investigate claims due to this lack of information. The path for refuting an FMLA claim is onerous, expensive and risky both in terms of its effect on the employee-employer relationship and litigating in the absence of full information.

Once a claim is litigated the resolution is usually delayed and during this time an employee is not motivated to return to work because of concerns that working will adversely affect the claim. The employee is evaluated by multiple physicians who offer a wide variety of diagnostic tests, which tends to reinforce the employee's belief that there is something wrong. There is a tendency for the employees to amplify their subjective complaints when they view the physician as having administrative power to determine their benefits. The observation that patients often recover quickly after their case is settled provides further evidence that current compensation laws foster disability.

One of the major areas of abuse is claims of stress. Doctors cannot explain why a person needs to take time off from work due to stress. There is no scientific basis in a stress claim to suggest that time off is effective treatment. If there are work related issues that are the cause of some of the stress, they tend not to get resolved as the employer never gets direct information on the exact nature of the claim.

*Question 6.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you have a solid understanding of your rights and responsibilities under the FMLA as an employer? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

Answer 6. There is sufficient employee and employer information regarding FMLA, but there needs to be better definition as to what constitutes a serious health condition for an employee or their family members under FMLA and an opportunity for employers to direct medical care in some instances. The law is a noble law in its intention, but it needs to be tightened up to prevent malingerers from abusing the system, and misdiagnosis and inappropriate treatments.

Treating physicians need education in return to work. Physicians are often not trained in disability prevention and management. When patients have chronic physical complaints physicians typically focus on the physical complaints and ignore the non-medical factors that may be fostering illness behavior. Ignoring the psychosocial determinants of illness, the untrained provider prescribes more time off from work. This common therapeutic pattern may actually prolong recovery and reinforce the sick role. If treatment goals are focused on alleviation of symptoms rather than on functional capacity, there is an increased risk that the patient will begin a downward spiral from anger and helplessness to depression and withdrawal, loss of identity, and finally into the sick role and chronic disability.

Physicians need to:

1. Determine specific psychological and behavioral issues related to the patient's pain behavior and disability.
2. Provide insight on aspects of the patient's history and current situation with bearing on the delayed recovery.
3. Recommend appropriate treatment goals and interventions.

#### References

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#### RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY LAURIE DOHNALEK

*Question 1.* Assuming that no employer would want a sick employee handling patients, how would you address concerns about under-staffing while simultaneously protecting employees with chronic serious health conditions? How do you handle under-staffing that occurs when employees have minor illnesses?

Answer 1. In covering for short term illnesses of less than a ½ day (i.e., Dr's appointments, etc.) many times the other members of the staff absorb the additional work. Patient care is a priority, at times, other tasks/accomplishments (i.e., Management documentation, etc.) are postponed to meet the immediate need. To staff for intermittent, full day absences, other staff will be asked to work additional shifts which may include overtime shifts. Another option may be agency nurses or utilizing staff from other departments/units if there is extra. Long term absences may be covered by a "traveling" nurse with a contract agreement. Most of these options carry the burden of increasing costs and decreasing quality along with uncertainty. Given the nursing shortage there is typically hours of administrative work to possibly obtain the additional manpower needed to meet basic staffing requirements.

*Question 2.* During the Senate Roundtable, you stated that nurses require 6 months training to care for specialized patients. Do you agree that FMLA helps retain trained and valuable employees?

Answer 2. Yes, I agree with that statement, but it does come with a price. The other staff may get frustrated and this could lead to turnover.

*Question 3.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in almost all situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

Answer 3. I don't know who the significant number of FMLA leave-takers are. If the significant numbers are intermittent FMLA leave-takers than I feel that changes need to be made to the existing regulations that will ease the employer's burden of accommodation.

*Question 4.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

Answer 4. Yes, I would.

*Question 5.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

Answer 5. We have all requests for medical FMLA reviewed by our Employee Health Office. We do not routinely ask for second opinions but Employee Health may ask the employees physician for a clarification on a certain issue. If abuse were suspected we would ask for a second opinion.

*Question 6.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you, as an employer, have a solid understanding of your rights and responsibilities under the FMLA? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

Answer 6. I would agree that education on FMLA is always beneficial. As an employer we believe we have a good understanding of our rights and responsibilities. Employee's rights are discussed at orientation, in the Employee handbook and in our Human Resources Policy Manual. We also have educational sessions directly and indirectly related to FMLA for managers.

RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY JANEMARIE MULVEY

Thank you Senator Kennedy for your questions regarding the Employment Policy Foundation's recent study entitled "The Costs and Characteristics of Family and Medical Leave." My responses below are intended to supplement my earlier oral and written testimony for the FMLA Roundtable on June 23, 2005. Since some of the questions are interrelated, I am addressing them together.

*Questions 1 through 3.* Relate to the size and statistical significance of the sample and the relationship of EPF findings to Department of Labor 2000 study.

Answers 1 through 3. EPF Response: The Employment Policy Foundation FMLA survey was based on responses from 110 companies analyzing the behavior of 500,000 workers. The intent of the EPF survey was to develop preliminary data regarding the prevalence and duration of FMLA leave especially with respect to unscheduled intermittent leave. This information was intended to contribute to the current discussion regarding potential changes to the FMLA regulations. Thus, we believe our findings should be used to justify additional research and discussion in this area.

The Department of Labor study estimated the prevalence, duration and use of intermittent leave through a telephone survey of 2,558 workers. The key difference in these surveys was that we asked employers the characteristics of their leave takers, rather than general qualitative information about FMLA compliance. The 2000 DOL Employee survey asked employees directly. Their survey represented prevalence across a population and not for a given firm.

Interestingly, our findings regarding prevalence, duration and use of intermittent leave are not substantially different from the 2000 study where comparable. In terms of duration, we asked for average (and not median) leave duration for company and the DOL study captured median duration. While these are not directly comparable, averages do tend to exceed medians due to outliers. However, our prevalence numbers are in fact lower which suggests we are underestimating, not overestimating the extent of the FMLA leave. (See Table 1.) Thus, our study possibly underestimates and not overestimates the costs of this leave to employers.

TABLE 1: COMPARISON OF EPF FMLA FINDINGS WITH THOSE FROM 2000 DOL STUDY

	EPF 2004 (Employer Survey)	DOL 2000 (Employee Survey)
Prevalence of FMLA Leave .....	14.5 .....	16.5
Duration .....	Average 14.5 days .....	Median 10 days
Intermittent leave .....	30% (< 5 days) .....	27.8% (repeatedly taking leave for few hours or few days)
	20% (1day or less) .....	

*Questions 4 through 8.* Relate to the estimate of costs of replacement labor and productivity.

Answers 4 through 8. EPF Response: Our cost estimates include both the direct costs of continuation of health benefits and net replacement costs of labor. GAO and others recognize these costs as potential direct costs. Nevertheless, economists often include indirect costs such as those associated with lost productivity for workers who are not replaced. We also include these lost productivity costs into our estimates.

Our replacement cost represents the dollar difference between the costs of hiring temporary labor (which costs more than regular full-time employees because of administrative costs paid to staffing firms) relative to the wage of the workers taking leave. This wage is based on average wages by industry. This difference represents the replacement cost. Thus, EPF's study does account for employers not paying a leave-taker's wage (if the leave is unpaid).

Productivity measures are based on the economist's definition of the ratio of output for a given industry divided by hours worked and calculated for those workers who take leave. This data is derived by industry using data from Bureau of Economic Analysis (BEA). While there are studies showing that workers who come to work sick or preoccupied cost employers in terms of lost productivity, it is illogical to conclude that if they do not come to work the employer experiences a gain in productivity (or productivity savings) because the employer gains no additional output from them taking leave. In either case, the employer still experiences lost productivity.

It is important to note that we do not account for possible productivity differences that occur between replacement labor and permanent workers. Studies show that temporary employees who are thrust into a new environment are not as productive as permanent workers are, who have had sufficient tenure and training from their employer.

In addition, EPF's cost estimates are conservative because they do not include the administrative costs of complying with FMLA, which could be rather steep. A recent WorldatWork survey found that most organizations are spending between 30 minutes and 2 hours of Administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second and/or third opinion. In 2002, EPF estimated an average annual expenditure of \$825,000 per employer, totaling \$203 to \$247 million for the administrative costs of complying with FMLA.

Our costs also do not include the indirect economic or multiplier effects that would account for the total effect of FMLA leave on the Nation's economy. These effects could nearly double the provided cost estimates.

*Question 9.* Asks how we account for workers who take leave for serious health conditions regardless of FMLA coverage.

Answer 9. Our study only accounted for employees who took FMLA Leave.

*Question 10.* Asks how we measured the cost of "abuse."

Answer 10. Abuse occurs when individuals use FMLA leave for health conditions that are not "serious," as that term is defined in the statute and the regulations. This leave is frequent in nature, short-term and unscheduled. My written testimony does not estimate the cost of abuse. During my oral testimony, I stated that anecdotal evidence suggests that much of the unscheduled absences are abuse. The EPF study shows that 27 percent of FMLA leave are for chronic health conditions (that may or may not be "serious.") Further, the EPF study measures the prevalence of unscheduled absences. Most notably, it found that over 50 percent of leave takers did not give notice a day before leave is taken. This lack of notice makes it difficult for employers to adjust their employees' work schedules to accommodate the leave taker's schedule.

The \$21 billion cost necessarily includes any instances of abuse, because it includes all FMLA leave taken.

Thank you for inviting me to participate in this hearing.

#### RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY ROBERT PRYBUTOK

*Question 1.* You proposed raising the eligibility requirements above the current level of 50 employees. Since the passage of the FMLA, some jurisdictions, such as Oregon (25 employees) and Washington, DC (20 employees), have lowered their eligibility requirements and have not reported any significant problems with those levels. Why do you support a change in the eligibility requirements, and what statistical evidence do you have that such a change is needed?

Answer 1. As a small company we are flexible in administering employee leave requirements and would do what is required regardless of FMLA legislation, as we had done prior to FMLA impacting our business. The primary reason to change eligibility requirements from 50 to 100 or more employees is to remove the administrative burden associated with FMLA legislative requirements. A more significant problem with FMLA documentation is with intermittent leave and documenting intermittent leave. We do not have statistical evidence available to support this change however our experience is that small companies do not have HR duties assigned to a dedicated individual. Typically, our experience is this does not occur until companies approach or exceed 100 employees.

The exposure that small companies face is with potential legal suits over FMLA that cannot be adequately defended without detailed documentation.

A compromise may be to have FMLA apply to small companies but only burden larger companies with the administrative record keeping requirements.

*Question 2.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in almost all situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

Answer 2. This question cannot be answered without an understanding of the statistical history of who are the significant numbers of FMLA leave takers. It appears from comments at the conference, intermittent leave presents the most difficult management and administrative burden to all companies. It appears from comments that a compromise on intermittent leave would be to allow leave to be taken for

some reasonable “increment” of work that would be defined by the company, independent of the smallest unit of time captured by a company's payroll system. There also appears to be issues with employees who call out in the morning to care for dependents or themselves. It is unclear what documentation is required under FMLA for these situations. Additional documentation and a modification of the work interval for intermittent leave could be defined as a “negative impact” to FMLA leave takers but not necessarily negative to the FMLA program or its administration.

*Question 3.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

*Answer 3.* We would support a comprehensive and independent research on FMLA that would be utilizing current data.

*Question 4.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

*Answer 4.* We have not experienced excessive abuse of FMLA. There has been no need to request second opinions, third opinions or re-certifications. Prior problems with the FMLA involved employees not returning to work. The company has created guidelines for requesting leave. Employees are required to provide 30 days notice for leave such as birth, or planned medical treatment. A leave grant for medical conditions must be supported by written medical evaluation and submitted to the human resources representative.

*Question 5.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you have a solid understanding of your rights and responsibilities under the FMLA as an employer? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

*Answer 5.* FMLA, as the law is written, is very difficult to understand for the average businessperson. English interpretation with case examples is a practical approach to our understanding of the law. Although we feel we understand the law, when we are in doubt about certain aspects we contact legal counsel. We provide information about FMLA to our employees during our new employee orientation. We also provide a company information manual that includes information on FMLA and we post required Federal posters that outline the rights of employees. A brief orientation coupled with the brevity of information posted does not ensure employees understand both their rights and responsibilities under FMLA. Typically when a FMLA issue arises re-education and clarification is required.

#### RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY JAMIE MARSDEN

*Question 1.* You commented on the difficulty that physicians have with the DOL Medical Certification Form. What specific difficulties have you observed? What improvements to the forms would you propose?

*Answer 1.* I would clarify in stating that the process to obtain timely certification regarding an employee's serious health condition from healthcare providers is difficult. The DOL certification form itself is several pages long and is often submitted incomplete to the employer. In these circumstances, it often lacks sufficient information regarding the employee's condition and need for leave. If the healthcare provider would complete the certification form legibly and accurately, it would be possible for employers and human resource professionals to confidently grant employees' leave requests.

In addition, the form itself should be updated and revised as it is outdated. I would suggest that the form be available on-line for the healthcare provider to complete all required fields. It could then be printed and signed so that the employee could submit the form to the HR department.

*Question 2.* The vast majority of panelists at the Senate Roundtable agreed that the FMLA has been largely successful and has worked in almost all situations. Do you agree that regulatory changes should not be made that would negatively affect significant numbers of FMLA leave-takers?

*Answer 2.* The Family and Medical Leave Act is an important law that provides vital protections. I agree that the family leave provisions of the regulations have worked very well and have benefited millions of employees and their families nationwide. The medical leave provisions of the regulations tell a different story. These regulations are confusing and easily misunderstood. In addition, there are two con-



flicting DOL Wage and Hour Opinion Letters (1995 and 1996) and nearly 70 judicial decisions that have questioned the validity of the regulations. This makes clear that it is necessary to review and clarify the existing framework so that medical leave achieves the same promise that family leave already has.

*Question 3.* Would you support comprehensive, methodologically rigorous, independent research on the FMLA that would update the 1995 and 2000 DOL studies?

Answer 3. The DOL survey should be updated in an unbiased manner, yet should not be used as a tool to further delay the rulemaking process. The DOL has more than enough evidence, anecdotal and otherwise, to execute a rulemaking. Since 1995, nine Congressional hearings have provided clear evidence that a review of the regulations is necessary. In addition, the 2002 Supreme Court case in *Ragsdale v. Wolverine Worldwide Inc.* invalidated the penalty provision found in Section 825.700(a) of the regulations.

*Question 4.* Please discuss your use of existing FMLA employer safeguards. In what percentage of cases do you request second opinions, third opinions, and re-certifications? Please also explain the procedures you use to investigate alleged employee abuse of FMLA.

Answer 4. Second opinions provide limited assurance that the employee is using their leave for its intended purpose. There have been times where I've sought a second opinion when concerns of abuse arise. However, our organization very rarely seeks second opinions. On average, I believe it is a very low percentage of cases (estimated <1 percent) and third opinions are never sought. Our human resource department is very small, and in order to seek second opinions, a significant amount of staff time and resources are required to find the appropriate doctor to conduct a second opinion. The City of Gillette, Wyoming does not have a doctor that it uses regularly. Doctors in our area, like in many other areas, are very busy and often times the only specialist available to the City of Gillette is the healthcare provider that the employee has already seen. Also, in a small community such as ours, doctors know each other well, so in order to obtain an objective second opinion, I must look outside the city to the nearest community, which is 125 miles away. Second opinions, if sought, are costly, and only add to the normal costs for my organization because of the expenses associated with the employee's travel to and from this location.

Re-certification is typically the most frequent request my organization makes. Requesting clarification on what is written on certifications of health from the primary healthcare professional occurs in perhaps one out of ten cases. Re-certification is usually associated with our policy that employees provide documentation if there is a change in condition or the employee plans to return to work.

I do not believe that second and third opinions are adequate tools for identifying employee misuse of leave. Most often, allegations of employee abuse arise after the condition has been certified by a healthcare provider. After FMLA "job protected" leave has been granted, it is very difficult for the employer and the human resource department to question the manner in which the employee is using the leave.

Normally, indications of inappropriate use of FMLA leave come from other employees who see and/or communicate with the employees taking FMLA leave. This often occurs if employees come into contact with each other outside the workplace. Many times it comes directly from the employee when they discuss how they utilized their leave after they have returned to work. It is still difficult to verify employee misuse of FMLA leave, especially when the organization learns about misuse after the fact and employers have very few avenues to pursue if abuse is discovered after-the-fact. In addition, due to Health Insurance Portability and Accountability Act of 1996 privacy concerns, the willingness of the healthcare provider to share any information with an employer is very limited, even with the employee's permission.

I have used various procedures to investigate potential abuse including interviewing other employees regarding their concern that an employee is abusing FMLA leave, requesting an employee to provide re-certification, and counseling an employee on FMLA leave.

Unfortunately, I have found that employees who have documented performance problems and face disciplinary action are those who most frequently misuse FMLA leave. FMLA becomes the formula to protect the employee's job. Employees seek this avenue because employers are fearful of taking any adverse employment action against employees while they are on FMLA leave. Other employees recognize those who take advantage of the system, creating morale issues in the workplace. As a human resource professional acting on behalf of my organization, I often feel my hands are tied and no avenue, within the regulations exists to adequately resolve these types of issues.

*Question 5.* Do you agree that more employer and employee education is needed to guarantee successful implementation of the FMLA? Do you believe that you have a solid understanding of your rights and responsibilities under the FMLA as an employer? How do you educate your workforce about the FMLA? Do your employees know their rights and responsibilities under the FMLA?

Answer 5. Training opportunities are always beneficial, but training alone does not resolve or curtail employer and employee confusions or employee misuse of FMLA leave. The only solution is for the U.S. DOL to issue narrow regulatory corrections that allow employers to manage absenteeism.

As a human resource professional with more than 9 years of experience, I have a strong understanding of employer responsibilities and the rights entitled to employees under FMLA. The organizations that I have served during my career have made it a priority to ensure that I had sufficient training and education regarding the FMLA and its regulations. However, the regulations themselves do not provide clear guidance and are in need of clarification.

My organization provides employees with written materials as well as notifications of rights when requests for FMLA leave are made. Supervisors receive periodic training on their obligations under the law. Our policy is that when an employee has been out for 3 days, written notification is sent to inform them of their potential eligibility for this leave. We again include notification of the employee's FMLA rights and responsibilities. We also have a system in place to keep employees informed as to the status of their leave. We actively encourage employees to contact HR when they have questions regarding FMLA leave. Many employees who have never used FMLA leave often seek assistance from our department.

AMERICAN ORGANIZATION OF NURSE EXECUTIVES,  
WASHINGTON, D.C. 2004,  
June 23, 2005.

Hon. MICHAEL B. ENZI,  
*Chairman,*  
*Committee on Health, Education, Labor, and Pension,*  
*U.S. Senate,*  
*Washington, D.C. 20510.*

Hon. EDWARD M. KENNEDY,  
*Ranking Member,*  
*Committee on Health, Education, Labor, and Pensions,*  
*U.S. Senate,*  
*Washington, D.C. 20510.*

DEAR CHAIRMAN ENZI: On behalf of the over 4,800 members of the American Organization of Nurse Executives (AONE) we welcome the opportunity to participate in the June 23rd Roundtable entitled: "The Family Medical Leave Act: A Dozen Years of Experience." Our representative for this important discussion is Laurie J. Dohnalek, RN, MBA, CNA. Ms. Dohnalek is an experienced Nurse Manager for the Blood and Marrow Transplant, Inpatient Oncology, Apheresis and Dialysis Services at Georgetown University Medical Center, Washington, DC. In her 12 years as a Nurse Manager, Ms. Dohnalek has been responsible for the implementation of the Family Medical Leave Act and has first hand knowledge of the difficulties of trying to balance the health and family needs of her employees against the patient care demands of a highly specialized critical care unit.

The majority of AONE's membership of registered professional nurses are leaders in the day-to-day management and delivery of direct patient care services. In this position, we are able to see first hand both the benefits and difficulties of providing Family Medical Leave to employees in a healthcare environment that is faced with critical shortages of registered nurses and allied health professionals.

Thank you for the opportunity to contribute to this valuable discussion. We look forward to assisting you as you attempt to improve this legislation for those who administer it and the millions who benefit from it. Should you have additional questions, please contact Jo Ann Webb RN, MHA, Senior Director of Federal Relations and Policy at [jwebb@aha.org](mailto:jwebb@aha.org) or 202-626-2321.

Sincerely,

MARILYN A. BOWCUTT, RN, MSN,  
*AONE, President.*  
PAMELA A. THOMPSON, MS, RN, FAAN,  
*Chief Executive Officer.*

[Whereupon, at 11:55 a.m., the committee was adjourned.]

