

THE 15TH ANNIVERSARY OF THE FAMILY MEDICAL LEAVE ACT: ACHIEVEMENTS AND NEXT STEPS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

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C O N T E N T S

	Page
Hearing held on April 10, 2008	1
Statement of Members:	
Wilson, Hon. Joe, ranking minority member, Subcommittee on Workforce Protections	5
Prepared statement of	7
Additional submissions:	
Federal Register, 29 CFR Part 825, Family and Medical Leave Act Regulations: A Report on the Department of Labor's Re- quest for Information; Proposed Rule, Internet address	65
DOL's proposed rules change in the FMLA, dated February 11, 2008, Internet address	65
Statement of the National Business Group on Health	69
Statement of the National Coalition to Protect Family Leave	72
Statement of the Retail Industry Leaders Association	75
Letter, dated April 11, 2008, from the Society for Human Re- source Management to the Department of Labor, Internet ad- dress	76
Woolsey, Hon. Lynn C., Chairwoman, Subcommittee on Workforce Protec- tions	1
Prepared statement of	4
Additional submissions:	
Letter from the American Association of University Women, dated April 8, 2008	66
Statement of Witnesses:	
Cossette, Brenda, human resources director, on behalf of the Society for Human Resource Management	41
Prepared statement of	43
Hunt, Jennifer, flight attendant	36
Prepared statement of	38
Lasco, Chante, new mother	33
Prepared statement of	34
Lipnic, Victoria, Assistant Secretary for Employment Standards, U.S. Department of Labor	8
Prepared statement of	9
Ness, Debra, president, National Partnership for Women and Families	46
Prepared statement of	49
Schroeder, Hon. Patricia S., president & chief executive officer, Associa- tion of American Publishers, former Member of Congress	30
Prepared statement of	32

**THE 15TH ANNIVERSARY OF THE
FAMILY MEDICAL LEAVE ACT:
ACHIEVEMENTS AND NEXT STEPS**

**Thursday, April 10, 2008
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC**

The subcommittee met, pursuant to call, at 10:01 a.m., in Room 2175, Rayburn House Office Building, Hon. Lynn Woolsey [chairwoman of the subcommittee] presiding.

Present: Representatives Woolsey, Payne, Bishop, Shea-Porter, Hare, McKeon, Wilson, and Kline.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jody Calemine, Labor Policy Deputy Director; Lynn Dondis, Senior Policy Advisor for Subcommittee on Workforce Protections; Danielle Lee, Press/Outreach Assistant; Sara Lonardo, Junior Legislative Associate, Labor; Joe Novotny, Chief Clerk; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Alexa Marrero, Minority Communications Director; Jim Parette, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Hannah Snoke, Minority Legislative Assistant; and Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel.

Chairwoman WOOLSEY [presiding]. A quorum is present. The hearing of the Workforce Protection Subcommittee on the 15th anniversary of the Family and Medical Leave Act achievements and next steps will come to order.

Pursuant to Committee Rule 12(a), any member may submit an opening statement in writing, which will be made part of the permanent record.

And I now recognize myself, followed by Ranking Member Joe Wilson, for opening statements.

I want to thank everybody for coming today and attending this hearing on the 15th anniversary of the Family and Medical Leave Act that we will call FMLA. This legislation establishes a minimum labor protection to help working people balance their work and their family lives.

FMLA had been in the works for many years and had been before it was passed, and I am delighted that Representative Pat Schroeder, the mother of FMLA, is able to be here today to testify before us.

Welcome, Pat.

There is no question, Representative Schroeder, that you worked tirelessly on this benefit for working families, so we all know that your testimony is going to bring us up to date of where we have been and where we have yet to go.

The USA should be a leader in the world on these matters, our United States of America. Funny, we are not quite, we are not close, but we have a lot of work to do. But, at the current time, because we lag far behind other countries in providing family-friendly policies, such as paid leave, to our workers, we need to catch up, and we need to catch up fast.

However, in the 15 years since FMLA was passed, there has been some good news. Millions of workers have been able to utilize leave to care for the birth or adoption of a child—I hear that one over there—or to care for a sick child, or a sick parent, or to care for their own serious medical condition. Chante Lasco will testify today about her leave, why it was good, and how it could have been better. There are also many good employers, although not nearly enough, in this country who realize that family-friendly policies actually help, not hurt, their bottom lines.

And just this year, on a bipartisan basis, we passed the first-ever expansion of FMLA, and I am really proud to say that the expansion is the result of legislation introduced by Senator Clinton and Senator Dodd and myself to provide additional leave for workers to care for seriously injured service members. The genesis of this legislation was the Wounded Warriors Commission chaired by Secretary Donna Shalala and Senator Bob Dole.

The Commission recommended an expansion to FMLA because it understood that workers with family members in the military face additional challenges due to the conflicts in Iraq and Afghanistan, which have resulted—and we know that—in over 4,000 deaths and more than 30,000 injuries, with many service members being seriously, seriously injured—mentally and physically.

The new expansion provides these workers job-protected leave for up to 6 months so they can care for their wounded family member who have, as we know, sacrificed so much for this country of ours. This is important because, for the first time, family members other than the spouse, parent, or child can take off leave under the Family and Medical Leave Act.

In addition, the law also incorporates an important provision authored by Representatives Altmire and Tom Udall from the House that extends the 12 weeks of leave to families of service members who are deployed overseas for matters arising from their deployment.

Many members of the House and Senate are submitting comments to the Department of Labor on how to implement this expansion to FMLA.

Assistant Secretary Lipnic is here today, and I have to welcome you back because—Secretary Lipnic actually was a staff person working for Leader John Boehner when he was the Chair of this

committee, and this is her first time being on that side of the table. So we will be kind of nice to you. And I am sure Joe really will. And we all will because this is a really nice committee. But we welcome you. [Laughter.]

But, at the same time, we hope that you and the department will heed our suggestions to interpret the law in the broadest possible way so that it can be administered as intended because, although we are pleased to be expanding the military families' leave, work on behalf of all working families is far, far from completed.

More employers need to step up to the plate, and we need to enact other workforce protections that establish our country as a leader in this arena. This includes passing legislation providing for paid sick days, paid leave, equal pay for women, and other necessary benefits for working families, so they can bridge work and family, not have to choose where their allegiance is, at home or at work. They need not to make that choice, they need to be in both places, and we need to help them.

That is why I have introduced the Balancing Act, which puts into place a whole host of family-friendly policies, such as paid family medical leave, benefits for part-time workers, and additional leave for parental involvement activities, including attending to routine medical matters.

Senator Kennedy and Representative DeLauro have introduced the Healthy Families Act, which will provide workers with 7 days of paid sick leave to care for their own medical needs or the needs of a family member.

That is why Representative Bishop, a valued member of this subcommittee, along with Senator Clinton, has introduced H.R. 2744, The Airline Flight Crew Technical Corrections Act, which amends FMLA to make flight attendants and crew members eligible for FMLA if they have worked 60 percent of the employer's monthly hour or trip guarantee.

I am pleased that Jennifer Hunt, a flight attendant, is here to testify in that regard today. By telling her story, she will show us that it is very important to provide job-protected leave to others in her same position.

Lastly, let me say just a few words about the Department of Labor's proposed regulations to the FMLA. I was disappointed that without scientifically sound data, the department is proposing changes that will make it somewhat harder, if not a lot harder, on the workers and make it harder for them to utilize FMLA leave.

I was a human resources manager—and I will remind you of that throughout this hearing—for nearly 2 decades, and I know all about the issues that come up when workers need time off from work to care for family matters.

Over those years, it became very clear to me and the employers I worked for that it was important to help workers with these issues because we knew that when a worker's family life was in order, he or she was a much more committed, loyal, and focused employee.

So it was in the best interest of my companies, the ones I worked for, to give workers the leave that they needed, and these proposed regulations are a bit disturbing to me because they shift that balance more in favor of the employer than it was in the past.

So, unlike the Fair Labor Standards Act, from which the FMLA was modeled, these proposed changes will allow a worker to waive his or her rights under FMLA without the supervision of a court or the Department of Labor, and they will create more hoops for the worker to jump through in order to utilize a right to leave that is already enshrined in law.

Notice will have to be immediate and contain detailed information about the need for leave and, under the proposed rules, an employer—and not the employer’s doctor—could talk directly to the health care provider about the worker’s medical condition or the worker could be denied leave.

So these are just a few of the problems with the proposed rules. I, and other members, look forward to hearing from Assistant Secretary Lipnic on why the delicate balance that we have been able to achieve for 15 years needs to be upset at this particular time, when really what we need to do is be expanding FMLA and making it more positive for the workers.

We are looking for fairness, we are not looking for obstacles for workers, and we are here today to talk about that, and I am looking forward to hearing from all of you and to have the discussion that we need to have in this regard.

And now I yield to Ranking Member Joe Wilson.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections

I want to thank everyone for attending this hearing on 15th anniversary of the Family and Medical

Leave Act, legislation that establishes a minimum labor protection to help working people balance their work and family lives. FMLA had been in the works for many years before it was passed, and I am so delighted that

Representative Pat Schroeder, the “mother” of the FMLA, is able to be here to testify today. Welcome, Representative Schroeder. You worked tirelessly to pass this benefit for working families. And, as such, you and others testifying here today know how far we have come, and yet how far we have to go. The U.S.A. should be a leader in the world on these matters. But, at the current time, we lag far behind other countries in providing “family-friendly policies”, such as paid leave, to our workers. We need to catch up, and catch up fast. However, in the 15 years since FMLA was passed, there has been good news! Millions of workers have been able to utilize leave to care for the birth or adoption of a child, to care for a sick child or parent, or to care for their own serious medical condition. Chante Lasco will testify about her leave, why it was good and how it could have been better. There are also many good employers -although not nearly enough -in this country who realize that “family-friendly policies” actually help, not hurt their bottom line.

I am proud to say that the expansion is the result of legislation introduced by Senators Clinton and Dodd and myself to provide additional leave for workers to care for seriously injured servicemembers.

The genesis of this legislation was the Wounded Warriors Commission chaired by Secretary Donna Shalala and Senator Bob Dole.

The Commission recommended an expansion to FMLA because it understood that workers with family members in the military face additional challenges due to the conflicts in Iraq and Afghanistan, which have resulted in over 4,000 deaths and more than 30,000 injuries, with many servicemembers being seriously injured.

The new expansion provides these workers job-protected leave for up to 6 months so they can care for the servicemembers who have sacrificed so much for this country. This is important because, for the first, family members other than the spouse, parent, or child can take off leave under the FMLA.

In addition, the law also incorporates an important provision authored by Representatives Altmire and Tom Udall that extends the 12 weeks of leave to families of servicemembers who are deployed overseas for matters arising from the deployment.

Many members of the House and Senate are submitting comments to the Department of Labor on how to implement this expansion to the FMLA.

Assistant Secretary Lipnic, I appreciate your coming today, and I hope that the Department will heed our suggestions to interpret the law in the broadest possible way so it can be administered as we intended.

We are pleased that we were able to expand leave for military families, but of course our work on behalf of all working families is far from done.

More employers need to step up to the plate, and we need to enact other workforce protections that establish our country as a leader in this arena.

This includes passing legislation providing for paid sick days, paid leave, equal pay for women and other necessary benefits for working families, so they can bridge work and family.

That is why I have introduced the Balancing Act, which puts into place a whole host of "familyfriendly" policies, such as paid family medical leave, benefits for part-time workers, and additional leave for parental involvement activities, including attending to routine medical matters.

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By telling her story, she will show us that it is very important to provide job-protected leave to others in her same position.

Lastly, let me just say a few words about the Department of Labor's proposed regulations to the FMLA.

I was very disappointed that without scientifically sound data, the Department is proposing changes that will make it harder not easier for workers to utilize FMLA leave.

I was a human resource manager for nearly 2 decades, and I know all about the issues that come up when workers need time off from work to take care of family matters.

I found that it was important to help workers with these issues because I knew that when a worker's family life was in order, he or she was a better and more committed employee.

So it was in the best interest of my Company to give workers the leave they needed.

The proposed regulations disturb me precisely because they shift that balance in favor of the employer.

Unlike the Fair Labor Standards Act, from which the FMLA was modeled, these proposed changes will allow a worker to waive his or her rights under the FMLA leave without the supervision of a court or the Department of Labor.

And they will create more hoops for the worker to jump through in order to utilize a right to leave that is already enshrined in law.

Notice will have to be immediate and contain detailed information about the need for leave.

And under the proposed rules, an employer -and not the employer's doctor -could talk directly to the health care provider about the worker's medical condition or the worker could be denied leave.

These are just a few of the problems with the proposed rules, and I and other members look forward to hearing from Assistant Secretary Lipnic on why the delicate balance that we have been able to achieve for 15 years needs to be upset at this particular time.

This is not fairness, just another obstacle to a worker being able to assert his or her right.

Mr. WILSON. Thank you, Madam Chairwoman.

And we are all delighted to have you return from your back surgery.

Chairwoman WOOLSEY. Thank you.

Mr. WILSON. We all wish you a speedy and complete recovery.

Chairwoman WOOLSEY. Thank you.

Mr. WILSON. I, too, would like to extend a warm welcome to our witnesses, particularly to the employees who will appear on the second panel. I look forward to hearing their testimony.

Medical leave has special meaning to me today. As I was arriving, I received a phone call from my oldest son, Alan. He is taking his wife, Jennifer Miskewicz Wilson, on the way to Lexington Medical Center, as we speak, for the delivery of their first son, Michael McCrory Wilson, and so this is an exciting time for our family.

My daughter-in-law, Jennifer Miskewicz Wilson, is much better known in the community than I am. She is a newscaster at the largest television station in South Carolina, a very humbling experience, and I do note that the company she works for has been very family friendly, following the law but even more. So it is an exciting day as we discuss this issue.

As you noted, Madam Chair, this past February marked the 15-year anniversary of the Family and Medical Leave Act, legislation that has made a significant difference in the lives of millions of working Americans. The FMLA has provided countless numbers of workers and their families with job security and some peace of mind during critical times.

Americans have used family and medical leave to care for the arrival of a newborn or adopted child or to tend to a parent's or child's serious illness. Still others, who have struggled with health problems or those of family members, have been able to tend to critical medical needs while holding on to their jobs, benefits, and some measure of economic security.

In fact, many employers go far beyond the requirements of the law, to ensure their employees have benefits above and beyond what is required under federal or state law.

It is my impression we will certainly hear firsthand from our witnesses that the law is working in the vast majority of cases the way Congress intended for it to work. But as those of us who serve in Congress know, things do not always end up working the way they were meant to work. Even with the best of intentions, there can be unintended consequences and problems that were not fully anticipated.

Despite the fact that the law has worked well for millions of workers, the FMLA is not without controversy among the employer community, worker advocates, and within the courts. It is well documented that certain provisions of the FMLA have created ambiguity and confusion over the years, benefitting neither workers nor their employers. In that regard, I would suggest that the administration has taken a step forward, not backward as some have claimed, to update the regulations to reflect and account for court rulings and statutory and regulatory developments that have impacted the functioning of the FMLA.

In particular, I would like to commend the Department of Labor for moving expeditiously on regulations to implement the newly enacted military family leave. Military families of military service members will now have one less burden, thanks to the first-ever expansion of FMLA, signed into law by President Bush in January of this year.

As a 31-year veteran of the Army National Guard and the proud father of four sons who are currently serving in the military—two

have served in Iraq—I am sensitive to the daily challenges faced by our military families. Indeed, no one in this room could find a more worthy goal than ensuring workers are not forced to choose between their job and caring for an injured family member who has served his or her country.

As part of its package of proposed rules, the department has asked for public comments on issues related to the new military leave provisions. With respect to the military leave provisions that took effect upon enactment in January, I would note the department has moved quickly to issue guidance to employees and employers regarding their rights and obligations. We welcome their efforts.

With that, I look forward to hearing the testimony from our witnesses and yield back the balance of my time.

[The statement of Mr. Wilson follows:]

**Prepared Statement of Hon. Joe Wilson, Ranking Republican Member,
Subcommittee on Workforce Protections**

Thank you, Madam Chairwoman. I too would like to extend a warm welcome to our witnesses, particularly to the employees who will appear on the second panel. I look forward to hearing their testimony.

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With that, I look forward to hearing the testimony from our witnesses and yield back the balance of my time.

Chairwoman WOOLSEY. Thank you, Mr. Wilson.

First of all, I would like to congratulate you on the upcoming birth of a new Scots kid.

Mr. WILSON. Scots-Polish.

Chairwoman WOOLSEY. Well, all right, but another Wilson can only be positive for your district and for this country. So congratulations to you.

For those of you who have not testified before us before, let me explain the lighting system. We have a 5-minute rule. Everyone, including members, is limited to 5 minutes of presentation and/or questioning. The green light is illuminated when you begin to speak. When you see the yellow light, it means you have 1 minute remaining. When you see the red light, it means your time has expired, and you need to conclude your testimony. We do not cut people off mid-sentence. You can be sure of that.

And now we will be proud to hear from our first witness, Assistant Secretary Victoria Lipnic. Assistant Secretary Lipnic is the Assistant Secretary of Labor for employment standards and has served in that position since the year 2002.

Prior to her appointment, she served as workforce policy counsel for this committee from the year 2000 to 2002. Before that, she was in-house counsel to the U.S. Postal Service, serving in that role from 1994 to 2000. From 1988 to 1989, Assistant Secretary Lipnic was a special assistant to the Assistant Secretary for Trade Development at the International Trade Administration, and from 1984 to 1988, she served on the U.S. Secretary of Commerce's staff. Assistant Secretary Lipnic earned her BA in political science and history from Allegheny College in Pennsylvania and her JD from George Mason University School of Law.

Welcome, Assistant Secretary Lipnic, and, as I said, be comfortable on that side of the table because we are good people up here.

STATEMENT OF VICTORIA LIPNIC, ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS, U.S. DEPARTMENT OF LABOR

Ms. LIPNIC. Thank you very much, Madam Chairwoman. Good morning. And I am so pleased to know that alumni status has its privileges with the committee.

Chairwoman Woolsey, Ranking Member Wilson, members of the committee, thank you for inviting me here today to testify about the Department of Labor's 15 years of experience in administering the Family and Medical Leave Act and to discuss the department's proposals issued earlier this year in February to revise the regulations under the FMLA. It is a pleasure to be with you.

In the time allotted, I thought I would summarize my testimony, and then I am happy to take your questions, and I would ask to have my full written testimony included in the record.

Chairwoman WOOLSEY. Without objection.

[The statement of Ms. Lipnic follows:]

Prepared Statement of Victoria Lipnic, Assistant Secretary for Employment Standards, U.S. Department of Labor

Good morning, Chairwoman Woolsey, Ranking Member Wilson, and Members of the Subcommittee. I am pleased to testify today about the Department of Labor's experiences in administering the Family and Medical Leave Act of 1993 (FMLA) and our recently published Notice of Proposed Rulemaking (NPRM). The FMLA provides America's working families with the ability to take job-protected leave for the birth or adoption of a child, because of one's own, or a family member's, serious health condition, and, only recently—in the case of military families—to care for our wounded warriors and to address qualifying exigencies arising from deployment. The recent expansion of the law to provide military family leave, along with the experience gained from fifteen years of enforcing the rights of workers to take job-protected leave and case law developments during this time, requires that the Department update its regulations to ensure the FMLA continues to work as well as possible.

When, on January 28, 2008, President Bush signed a bill to provide additional leave entitlements to military families, the Department fast-tracked publication of a proposal to implement these important new leave entitlements. The Department published its proposal in the Federal Register on February 11, 2008. A copy of the proposal is available at www.dol.gov/esa/whd and at www.regulations.gov.

The Department takes its commitment to servicemembers and their families very seriously, and because one of the provisions providing additional FMLA leave protection for military families cannot go into effect until the Secretary of Labor defines certain terms by regulation, we believe it is important to address those provisions completely and expeditiously. We have already reached out to the Departments of Defense and Veterans Affairs, as well as groups representing servicemembers and their families, to obtain their input. Our proposal will allow us to finalize these regulations as quickly as possible, thus ensuring that military servicemembers and their families receive the full protection of the FMLA when they need it most.

The Department's proposal is also another step in what has been an open and transparent process of reviewing the current FMLA regulations. Although there is broad consensus that the FMLA is valuable for workers and their families, there are a number of issues that workers, employers, and health care professionals have identified as needing to be updated in order to make the law work better for everyone. This should be expected as it has been almost 15 years since the Department's first interim final rule implementing the FMLA went into effect. Much has happened since then—numerous court rulings examining the Act and implementing regulations, and statutory and regulatory developments, such as passage of the Health Insurance Portability and Accountability Act (HIPAA) that directly or indirectly impact administration of the FMLA.

Background

By way of background, the FMLA generally covers employers with 50 or more employees. Employees must have worked for the employer for 12 months and have 1,250 hours of service during the previous year to be eligible for leave. As enacted in 1993, the FMLA permits eligible employees to take up to a total of 12 weeks of unpaid leave during a 12-month period for: (1) the birth of a son or daughter and to care for the newborn child; (2) placement with the employee of a son or daughter for adoption or foster care; (3) care for a spouse, parent, son or daughter with a serious health condition; and (4) a serious health condition that makes the employee unable to perform the functions of the employee's job. Recent amendments provide for taking FMLA leave to care for a covered servicemember with a serious injury or illness incurred in the line of duty and because of qualifying exigencies arising out of a servicemember's active duty or call to active duty status.

Employees may take FMLA leave in a block or, under certain circumstances, intermittently or on a reduced leave schedule. While the employee is on leave, the employer must maintain any preexisting group health coverage and, once the leave is over, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. An employee who believes that his or her FMLA rights were violated may file a complaint with the Department or file a private lawsuit in federal or state court. If a violation is found, the employee may be entitled to reimbursement for monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, court costs, and liquidated damages.

To implement the FMLA, the Department initially issued an interim final regulation that became effective on August 5, 1993. Except for minor technical corrections in February and March 1995, the Department's FMLA regulations have not been

updated since final regulations were published on January 6, 1995. Over the last several years, the Department has engaged in a thorough and deliberative review of the current FMLA regulations, taking into account both the Department's experience in administering and enforcing the FMLA and developing case law.

The Department hosted a series of stakeholder meetings in late 2003 and 2004. In December 2006, the Department issued a Request for Information (RFI) seeking comment on the public's experiences with the FMLA and the Department's regulations. In response to the RFI, the Department received more than 15,000 comments from workers, family members, employers, academics, and other interested parties. Many of the comments were brief emails with very personal accounts from employees who had used family or medical leave; others were highly detailed and substantive legal or economic analyses responding to the specific questions in the RFI and raising other complex issues.

After reviewing all the public comments in response to the RFI, the Department published a report in June 2007.¹ The RFI Report concluded that the FMLA is generally working well in the majority of cases. The FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to be absent for blocks of time while they recover from their own serious health condition or care for family members recovering from serious health conditions. The FMLA also seems to be working fairly well when employees are absent for scheduled treatments related to their own or a family member's serious health condition.

However, the Department also learned that the FMLA, like any new law, has had some unexpected consequences. While employees often expressed a desire for greater leave entitlements, employers often expressed frustration about difficulties in maintaining necessary staffing levels and managing attendance in their workplaces, particularly when employees take leave on an unscheduled basis with no advance notice. For example, the RFI Report indicated that time-sensitive industries, such as transportation operations (including local school bus systems), public health and safety operations (including hospitals, nursing homes, and emergency 911 services), and assembly-line manufacturers may be especially impacted by employees taking unscheduled, intermittent FMLA leave. Although taking FMLA leave intermittently is a statutory right, there is clear evidence that the use of intermittent leave disproportionately affects these types of industries.

The Department also learned from the RFI and a subsequent stakeholder meeting held in September 2007 with employee, employer, and health care representatives that the current medical certification process is not working as smoothly as all involved would like. Employers complained about receiving inadequate medical information from doctors, while employees and health care providers complained that the Department's certification process was confusing and time-consuming. It also appears that, despite much work by the Department, many employees still do not fully understand their rights under the Act or the procedures they must use when seeking FMLA leave.

These aspects of FMLA can have ripple effects that result in conflicts and misunderstandings between employees and employers regarding leave designation and protection. Without action to bring clarity and predictability for FMLA leave-takers and their employers, the Department foresees employers and employees taking more adversarial approaches to leave, with the workers who have a legitimate need for FMLA leave being hurt the most.

Based on 2005 data—the latest year for which data is available—the Department estimates that 95.8 million employees work in establishments covered by the FMLA, and about 77.1 million of these workers meet the FMLA's requirements for eligibility. Of these eligible workers, the Department estimates that approximately 7.0 million workers took FMLA leave in 2005, and about 1.7 million of those leave takers took some FMLA leave intermittently. About half the workers who take FMLA leave do so for their own medical condition and the rest take it for family reasons. Most workers taking FMLA leave receive some pay during their longest period of leave, and many receive full pay during the period they are on leave.

Although there are areas where the Department believes more data would be useful (e.g., the number of workers who have medical certifications for chronic health conditions), the targeted updates in the proposed rule are well-supported by the available data and case law developments and reflect recommendations made by stakeholders who have day-to-day experience with the FMLA. This experience is from the perspective of both leave takers and employers who must manage the taking of leave. The Department also is fully aware that its proposal does not address

¹ A copy of the RFI Report, as well as access to the public comments and RFI, are available at <http://www.dol.gov/esa/whd/Fmla2007Report.htm> and at www.regulations.gov.

all of the issues identified during its lengthy review of the FMLA. The Department believes that its proposal will allow the FMLA to function more smoothly for America's working families and their employers.

Turning to the specifics of the proposed rule, I want to reiterate that there is no question that the FMLA has been a benefit to millions of American workers and their families. The peace of mind that the FMLA brings to workers and their families as they face important and often stressful situations is invaluable. The Department's proposed rulemaking reflects this need. It has four main goals:

- To address the recently enacted military family leave provisions;
- To update the regulations to comport with current case law;
- To foster smoother communications among employees, employers, and health care professionals; and
- To update and clarify specific, problematic areas of the current FMLA regulations without limiting employee access to FMLA leave.

Regulatory Proposals to Implement the Military Family Leave Provisions

Section 585(a) of the National Defense Authorization Act for FY 2008 amended the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as the military family leave provisions of P.L. 110-181). Although the provisions of P.L. 110-181 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when signed into law by President Bush, the provisions providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective, in our view, until the Secretary of Labor issues regulations defining "qualifying exigencies."

The Department's commitment to ensuring the FMLA works well for everyone, including for military family members, is clearly demonstrated by the Department publishing its proposed rulemaking to implement the new military family leave entitlements just 14 days after the provisions were signed into law. The Department's proposal includes an extensive discussion of the relevant military family leave statutory provisions and the issues the Department has identified, as well as a series of questions seeking comment on subjects and issues that may be considered in the final regulations. Even before P.L. 110-181 was enacted, the Department began preliminary consultations with the Departments of Defense and Veterans Affairs and the U.S. Office of Personnel Management. OPM will administer similar provisions regarding leave to care for a covered servicemember for most Federal employees, except that the recent amendments to the FMLA do not authorize leave for family members of Federal employees to respond to a qualifying exigency relating to a family member's call to active duty status. The Department also has met with the National Military Families Association and a number of other military service organizations representing active duty, guard, and reserve servicemembers to discuss their views on the new military leave entitlements. As we explained in the NPRM, the Department anticipates that the next step in the rulemaking process, after full consideration of the comments received, will be the issuance of final regulations. The Department believes that this approach will allow it to ensure that America's military families receive the full protections of these new FMLA leave entitlements as soon as possible.

In the interim, the Department acted quickly to advise workers and employers of their rights and responsibilities under the new military family leave provisions. Because the statutory amendments did not provide an effective date, the day President Bush signed the National Defense Authorization Act of 2008 into law, the Department posted a notice on its website stating that the provisions in P.L. 110-181 providing for military caregiver leave were effective immediately. Further, because P.L. 110-181 amended the FMLA, the notice instructed employers to use FMLA-type procedures as appropriate (i.e., procedures regarding the substitution of paid leave and notice), until final regulations could be issued. While recognizing that the provisions of P.L. 110-181 providing for leave because of "any qualifying exigency" are not effective until final regulations are issued, the Department encouraged employers to provide this type of leave to qualifying employees immediately. Accordingly, thousands of military family members are currently eligible to take job-protected leave under the FMLA to care for a covered servicemember with a serious injury or illness, and others are being granted leave arising out of a family member's active duty status by their employers on a voluntary basis.

Congress's decision to incorporate the new military family leave entitlements into the existing FMLA statutory scheme, rather than as a separate leave entitlement,

necessitates that the Department consider changes to the FMLA regulations as a whole. Indeed, the language of the enacting legislation raises a number of difficult issues regarding how the new military family leave provisions should be interpreted in light of existing FMLA regulations. For example, statements by the sponsoring House Members of the amendment related to “qualifying exigencies” in P.L. 110-181 suggest that the intent of the amendment was that the parents of adult children be permitted to take FMLA leave, for instance, to attend farewell or welcome home ceremonies. However, applying the current FMLA definition of “son or daughter”—which Congress did not change when implementing the military family leave provisions—would mean that the only parents who would be able to take FMLA leave because of a qualifying exigency would be those who have a son or daughter serving on active duty who is either under the age of 18 or older than age 18 and incapable of self-care because of a mental or physical disability. Similarly, because Congress provided that military caregiver leave was available to the “spouse, son, daughter, parent, or next of kin of a covered service member,” the only sons or daughters who would be eligible to take FMLA leave to care for a seriously injured servicemember under the current FMLA regulatory framework would be those who are under the age of 18 or age 18 or older and incapable of self-care because of a mental or physical disability.

Other examples of the awkward interrelationship between the current FMLA regulations and the new military family leave provisions exist. For example, the military family leave provisions of P.L. 110-181 amended FMLA’s certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. FMLA’s certification requirements, however, focus on providing information related to a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember. Moreover, Congress did not explicitly require in P.L. 110-181 that a sufficient certification for purposes of military caregiver leave provide information regarding whether the covered servicemember’s serious injury or illness was incurred by the member in the line of duty while on active duty in the Armed Forces, or whether the serious injury or illness may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating, even though those criteria trigger in part the right to take FMLA leave to care for a covered servicemember. Furthermore, the FMLA provides that an employer may request a medical certification issued by the health care provider of the employee’s son, daughter, spouse, or parent in order to support a request for FMLA leave to care for a child, spouse, or parent with a serious health condition (29 U.S.C. 2613). Although the leave entitlement provisions of P.L. 110-181 permit an eligible employee who is the next of kin of a covered servicemember to take military family leave, P.L. 110-181 certification requirements appear to permit an employer to obtain a certification issued by the health care provider of the employee’s next of kin, rather than the covered servicemember.

These are not easy questions to answer, and they present a number of drafting challenges to meet the needs of military families they were designed to address. The Department raised all of these issues in its NPRM on February 11, 2008 (73 FR 7876). Now that the record is about to close for the rulemaking, we look forward to the input we expect to receive from the regulated community and public as to how to make these new entitlements work within the underlying FMLA regulations as Congress intended (just as we received many thoughtful comments in response to our Request for Information). Given the difficult choices that must be made regarding how to interpret the military family leave statutory provisions, the Department believes that its approach provides the fastest mechanism for these new leave entitlements to be fully implemented. Addressing these important questions regarding the military family leave provisions along with other needed updates to the FMLA regulations will allow the Department to integrate fully the military family leave entitlements with the procedures employees and employers follow for requesting and granting other types of FMLA leave. This approach makes sense for both employees and employers, neither of whom would be served by having to follow completely different rules depending on the type of FMLA leave requested. Importantly, no military family can be denied caregiver leave during the rulemaking process as those provisions are already in effect.

Regulatory Proposals to Address Intervening Court Decisions

Since the enactment of the FMLA, hundreds of reported federal cases have addressed the Act or the Department’s implementing regulations. In many cases, these decisions have created uncertainty for employees and employers, particularly those with multi-state operations. The Department anticipates that our proposed rule will bring clarity to these issues and reduce uncertainty for all parties.

The most significant of these decisions is the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). *Ragsdale* ruled that the "categorical" penalty for failure to appropriately designate FMLA leave under the current regulations was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave, and was contrary to the statute's remedial requirement to demonstrate individual harm. Several other courts have invalidated similar categorical penalty provisions of the current regulations. The proposed rule removes these categorical penalty provisions, while making clear that an employee who suffers individualized harm because of an employer's actions remains entitled to a remedy under the statute.

The Department also is proposing changes to address a court of appeals ruling that the regulation that establishes standards for determining whether an employer employs 50 employees within 75 miles of an employee's worksite for purposes of FMLA coverage (the 50/75 standard) was arbitrary and capricious as applied to an employee working at a secondary employer's long-term fixed worksite. See *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004). The current regulation provides that, when two or more employers jointly employ a worker, the employee's worksite is the primary employer's office from which the employee is assigned or reports. The Department proposes to change the standard for determining the worksite for FMLA coverage purposes in a joint employment situation from the primary employer's location in all cases to the actual physical place where the employee works, if the employee is stationed at a fixed worksite for at least a year.

The Department also is proposing to address the possibility of combining non-consecutive periods of employment to meet the 12 months of employment eligibility requirement. In *Rucker v. Lee Holding, Co.*, 471 F.3d 6, 13 (1st Cir. 2006), the First Circuit held that "the complete separation of an employee from his or her employer for a period of [five] years * * * does not prevent the employee from counting earlier periods of employment toward satisfying the 12-month requirement." Based on the Department's experience in administering the FMLA, the First Circuit's ruling in *Rucker*, and comments received in response to the RFI, the Department proposes to provide that, although the 12 months of employment generally need not be consecutive, employment prior to a break in service of five years or more need not be counted. Although employers are certainly free to do so, so long as they uniformly apply their policy. Periods of employment prior to longer breaks in service also must be counted if the break is occasioned by the employee's National Guard or Reserve military service, or was pursuant to a written agreement concerning the employer's intent to rehire the employee. The Department believes that this approach strikes an appropriate balance between providing re-employed workers with FMLA protections and not making the administration of the Act unduly burdensome for employers.

Many RFI commenters asked the Department to clarify the current regulation's provision that states, "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Federal circuit courts have disagreed as to whether this language means an employee and employer cannot independently settle past claims for FMLA violations (e.g., as part of a settlement agreement), as opposed to meaning that an employee can never waive his/her prospective FMLA leave rights.²

The proposed rule clarifies that employees may settle claims based on past employer conduct. The current regulation's waiver provision was intended to apply only to the waiver of prospective rights, and the proposed rule amends the provision to reflect explicitly this intention. The Department's position has always been that employees and employers should be permitted to agree to the voluntary settlement of past claims without having to first obtain the permission or approval of the Department or a court.

The Department also is proposing to change the current regulatory requirements regarding the interaction between FMLA leave and light duty work. At least two courts have interpreted the Department's current regulation to mean that an employee uses up his or her 12-week FMLA leave entitlement while working in a light duty assignment.³

These holdings differ from the Department's interpretation of the current regulation, which provides that, although the time an employee works in a voluntary light duty position counts against the employee's FMLA rights to job restoration (i.e., the

² Compare *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), petition for cert. filed, 75 U.S.L.W. 3226 (Oct. 22, 2007) (No. 07-539) with *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003).

³ See *Roberts v. Owens-Illinois, Inc.*, 2004 WL 1087355 (S.D. Ind. 2004); *Artis v. Palos Community Hospital*, 2004 WL 2125414 (N.D. Ill. 2004).

employee's restoration right lasts for a cumulative period of 12 weeks of FMLA leave time and light duty time), the employee's light duty time does not count against his or her FMLA leave balance.⁴

The Department is proposing changes to ensure that employees retain both their full FMLA leave entitlement and their right to reinstatement for a full 12 weeks while in a light duty position. If an employee is voluntarily performing light duty assignment work, the employee is not on FMLA leave and the employee should not be deprived of future FMLA-qualifying leave or FMLA job protection while performing such work.

Regulatory Proposals to Foster Better Communication Between Employees, Employers and Health Care Providers

The comments to the RFI indicate that, despite the extensive outreach done by the Department over the years and the widespread use of FMLA leave, gaps in the knowledge about FMLA-related rights and responsibilities remain. The Department believes that a key component of making the FMLA a success is effective communication between employees and employers. However, it appears that many employees still do not know their rights under the law, how the FMLA applies to their individual circumstances, or what procedures they need to follow to request FMLA leave. This lack of understanding may contribute to some of the problems identified with the medical certification process and with employers' ability to properly designate and administer FMLA leave. Accordingly, the Department is proposing a number of changes to the FMLA's notification and certification processes. These changes are intended to foster better communication between workers who need FMLA leave and employers who have legitimate staffing concerns and business needs.

The proposed rule consolidates all the employer notice requirements into a "one-stop" section of the regulations. The proposal also imposes increased notice requirements on employers so that employees will better understand their FMLA rights and the FMLA leave available to them. The proposal further seeks to improve the accuracy and completeness of communication by extending the time for employers to send out eligibility and designation notices from two business days to five business days.

In addition, the proposal specifies that, if an employer deems a medical certification to be incomplete or insufficient, the employer must return it to the employee, specify in writing what information is lacking, and then give the employee seven calendar days to cure the deficiency. These changes will help ensure that employees are not denied leave because they did not understand how much leave they had available or what additional information their employer needed in order to approve the request.

The Department also believes that employees must do all they can to inform their employer as soon as possible when FMLA leave is needed. The lack of advance notice (e.g., before the employee's shift starts) for unscheduled absences is one of the biggest disruptions employers identify as an unintended consequence of the current regulations. Although the current regulation provides that employees are to provide notice of the need for FMLA leave "as soon as practicable under the facts and circumstances," the rule has routinely been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if notice could have been provided sooner.

The Department proposes to maintain the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case, but is eliminating the so-called "two-day" rule. Absent an emergency situation, the Department expects that in cases where an employee becomes aware of the need for foreseeable FMLA leave less than 30 days in advance, it will be practicable for employees to provide notice of the need for leave either on the same or the next business day after the need for leave becomes known. For unforeseeable leave, the Department expects that, in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave at least prior to the start of their shift. The proposal also provides, as does the language of the current regulation, that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence (except one that imposes a more stringent timing requirement than the regulations provide). The Department believes that these changes reflect a common-sense approach that better balances the needs of employees to take FMLA leave with the interests of employers and other workers.

⁴ Wage and Hour Opinion Letter FMLA-55 (Mar. 10, 1995).

The Department also is proposing changes to the medical certification process in order to address concerns heard from employees, employers and health care providers—all of whom agree that the current system is not working as smoothly as it could. In addition, the passage of HIPAA and the promulgation of regulations by the Department of Health and Human Services that provide for the privacy of individually identifiable health information,⁵ provide additional reasons for the Department to reexamine the process used to exchange medical information under FMLA.

The proposal improves the exchange of medical information by updating the Department's optional medical certification form and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification. Comments to the RFI suggest that, in practice, it may be difficult to provide sufficient medical facts without providing the actual diagnosis. However, the Department does not intend to suggest by including such language that a diagnosis is a necessary component of a complete FMLA certification.

The Department also believes that HIPAA's privacy protections for patient (employee) health information have made some of the requirements in the current FMLA regulations unnecessary. Thus, in lieu of the current regulation's requirement that the employee give consent for the employer to seek clarifying information relating to the medical certification, the proposed rule highlights that contact between the employer and the employee's health care provider must comply with the HIPAA privacy regulation. Under the HIPAA Privacy Rule, the health care provider of the employee must receive a valid authorization from the employee before the health care provider can share the protected medical information with the employer.

The proposed rule also makes clear that, if authorization under HIPAA is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient. In addition, as long as the requirements of the HIPAA health information privacy regulations are met, the proposal permits an employer to contact an employee's health care provider directly for purposes of clarification and authentication of a medical certification form. As under the current rules, however, employers may not ask health care providers for additional information beyond that required by the certification form. The Department believes that these changes will address the unnecessary administrative burdens the current requirements create and, in light of the extensive protections provided by the HIPAA privacy regulations, will not impact employee privacy. It has always been the case, as the statute allows, that employees must provide a complete and sufficient medical certification if requested to do so by the employer, and that failure of the employee to comply with the request jeopardizes the employee's FMLA protection.

The Department also believes that clarifying the timing of certifications will improve communications between employees and employers. The proposal, therefore, codifies a 2005 Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The proposal also clarifies the applicable period for recertification. Under the current regulations, employers may generally request a recertification no more often than every 30 days and only in conjunction with an FMLA absence, unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed. Because many stakeholders have indicated that the regulation is unclear as to the employer's ability to require recertification when the duration of a condition is described as "lifetime" or "unknown," the proposal restructures and clarifies the regulatory requirements for recertification. In all cases, the proposal allows an employer to request recertification of an ongoing condition at least every six months in conjunction with an absence.

In addition, the Department is proposing two changes to fitness-for-duty certifications. The current FMLA regulations allow employers to enforce uniformly applied policies or practices that require all similarly situated employees who take leave to provide a certification that they are able to resume work. Under the current regulations, however, the certification need only be a "simple statement" of the employee's ability to return to work. The Department believes that an employer should be able to require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, as long as the employer has provided the employee with appropriate notice of this requirement. Second, the proposal would allow an employer to require a fitness-for-duty certification up to once every 30 days before an employee returns to work after taking intermittent leave when reasonable job safety concerns exist. The Department believes that these two changes appropriately balance an employer's duty to provide a safe work environment for everyone with the desire of employees to return to work when ready.

⁵ 45 CFR Parts 160 and 164 (referred to as the "HIPAA Privacy Rule").

Other Regulatory Proposals

The Department is proposing a number of additional targeted updates to the current FMLA regulations to resolve ambiguities and problematic workplace consequences, without limiting employee access to FMLA leave. A few of the more important updates are discussed below.

The Department is proposing to provide guidance on two terms in the current regulatory definition of a serious health condition. One of the definitions of serious health condition requires more than three consecutive calendar days of incapacity plus “two visits to a health care provider.” Because the current rule is open-ended, the Tenth Circuit has held that the “two visits to a health care provider” must occur within the more-than-three-days period of incapacity. See *Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1323 (10th Cir. 2006). Rather than leaving the “two visit” requirement open-ended, the Department proposes that the two visits must occur within 30 days of the beginning of the period of incapacity, absent extenuating circumstances. By clarifying that the period should be 30 days, the Department believes it is providing greater FMLA protection than the stricter regulatory interpretation offered by the Tenth Circuit.

Second, the Department proposes to define “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year. The Department is aware that some employers have defined this term, which is currently undefined in the regulations, narrowly to the detriment of employees. At the same time, other employers have expressed concern that the current open-ended definition does not provide sufficient guidance to employers who must approve or disapprove leave and risk making the wrong decision. The Department believes a reasonable solution is to define “periodic” as twice or more a year, based on an expectation that employees with chronic serious health conditions generally will visit their health care providers at least that often, but they might not visit them more often, especially if their conditions are fairly stable.

The Department also proposes changes to the current regulatory requirements for perfect attendance awards when an employee is on FMLA leave. The Department proposes to allow an employer to disqualify an employee from a perfect attendance award because of an FMLA absence. However, an employer would not be permitted to disqualify only those individuals on FMLA-qualified leave and allow other employees on equivalent types of non-FMLA leave to receive such an award without violating the FMLA’s non-discrimination requirement. This change addresses the unfairness perceived by workers and employers as a result of allowing an employee to obtain a perfect attendance award for a period during which the employee was absent from the workplace on FMLA leave.

Finally, the Department also proposes to update the regulation addressing the substitution of accrued paid leave for unpaid FMLA leave. The proposed updates reflect the trend of employers providing employees with “Paid Time Off” (PTO), instead of reason-based leave (i.e., sick leave, vacation leave). The revisions also respond to comments indicating that an unintended consequence of the current regulation (which has been interpreted as prohibiting employers from applying their normal leave policies to employees who are substituting their paid vacation and personal leave for unpaid FMLA leave) is that employers may be encouraged to scale back their provision of paid vacation and personal leave. Such leave policies are more generous than what is required by the Act. The proposed update also is consistent with how the Department’s enforcement position on this issue since 1995. Since then, in a series of opinion letters, the Department has recognized that an employee’s right to use paid vacation leave is subject to the policies pursuant to which the leave was accrued.⁶

The proposed rule applies the same requirements to the substitution of all forms of accrued paid leave. Under the proposed rule, an employee may elect to utilize accrued paid vacation or personal leave, paid sick leave, or paid time off, concurrently with FMLA leave when the employee has met the terms and conditions of the employer’s paid leave policy. The Department also believes certain safeguards for employees are necessary. Therefore, the proposed rule clarifies that an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that he or she remains entitled to unpaid FMLA leave even if he/she chooses not to meet the terms and conditions of the employer’s paid leave policies.

⁶Wage and Hour Opinion Letter FMLA-75 (Nov. 14, 1995); Wage and Hour Opinion Letter FMLA-81 (June 18, 1996); see also Wage and Hour Opinion Letter FMLA-61 (May 12, 1995).

Conclusion

Fifteen years ago, Congress recognized that maintaining a careful balance between the legitimate rights of employees and employers in the workplace was the key to making the FMLA a success. Today, after 15 years of experience in administering and enforcing the FMLA, the Department is pleased to report that the FMLA is generally working well in the majority of cases and has succeeded in allowing working men and women to better balance family needs and work responsibilities. However, the Department also knows that the FMLA has not worked well in every case as evidenced not only by responses to the RFI but also by the various court decisions that have overturned specific provisions of the current rule.

It is time to make targeted changes to the current FMLA regulations, and, at the same time, implement the new law providing leave for the families of military servicemembers. We look forward to reviewing the comments on the NPRM.

Thank you for the invitation to appear before this committee. I will be happy to answer any questions you may have.

Ms. LIPNIC. I will say at the outset, having worked with our enforcement personnel over a number of years at the Labor Department and having talked with many of them around the country, I have observed that few laws generate the kind of support and desire to make sure the law is working properly as does the FMLA, not that we do not take all of our statutory responsibilities seriously, but because this is a law that everyone can relate to, I think there is a special place reserved for it in the department's administration of its many laws.

I also want to say at the outset that this rulemaking issued in February includes, as you both noted, an extensive discussion of the new leave entitlements for military families that were signed into law by President Bush on January 28. The department takes its commitment to service members and their families very seriously, and because one of the provisions providing additional FMLA leave protection for military families cannot go into effect until the Secretary of Labor defines certain terms by regulation, we are moving as expeditiously as possible.

We have reached out to the Departments of Defense and Veterans' Affairs and the Office of Personnel Management, as well as groups representing service members and their families, to obtain their input. Both before the comment period on this rulemaking and during it, we invited a number of the military family and service organizations to meet with us to help us better understand the unique needs of these service member families.

While our proposal asks a number of very difficult questions that must be addressed in the rulemaking process, we believe this will allow us to finalize these regulations as quickly as possible, thus ensuring that military service members and their families receive the full protection of the FMLA when they need it most.

To that end, the department approached this rulemaking in a very careful, deliberative, and very transparent process. We began a review of the regulations in late 2002, holding stakeholder meetings that year and the year following, with more than 20 groups representing employers and employees.

In December 2006, recognizing that we needed some fresh thinking on the issues, we published a Request for Information, seeking public comment on many aspects of the regulations and also asking for more information and data from the public's real world experiences administering the FMLA over the past 15 years. We had an

enormous response to that record, more than 15,000 comments, which culminated in our publishing our report on the Request for Information in June of 2007.

Our goal in publishing that report was to do a number of things: first and foremost, to allow the record to speak for itself, and, secondly, to, as we said at that time, allow all parties to engage in a fuller discussion of the issues presented in those comments. The comments we received were from workers, family members, employers, academics, and other interested parties. Many of the comments were brief emails with very personal accounts from employees who had used family or medical leave. Others were highly detailed and substantive legal or economic analyses responding to the specific questions in the Request for Information and raising other complex issues.

We had a chance to brief the Education and Labor Committee in a bipartisan fashion on that report last June, and we very much appreciated the opportunity to do so.

And, of course, we have also reviewed our own enforcement experience and our policies over the past 15 years, as well as the enormous body of case law that has developed during that time. A number of things were clear to us from the record developed in response to the request for information: first, the tremendous value of the law to workers; second, that the FMLA is generally working well; and, third, that like any new law, especially one that borrows concepts from other laws, there have been a number of unanticipated consequences to the law's use and how it has operated in workplaces around the country. One thing that was very clear to us from the record is that not all workplaces experience the FMLA in the same manner.

There is broad consensus that the law is valuable for workers and their families. There are also a number of issues that workers, employers, and health care professionals have identified as needing to be updated in order to make the law work better for everyone. This should be expected as it has been almost 15 years since the department's first interim final rule implementing the FMLA went into effect. Much has happened since then. Numerous court rulings examining the act and the implementing regulations, statutory and regulatory developments, such as passage of the Health Insurance Portability and Accountability Act that directly or indirectly impacts administration of the FMLA.

As we said in the RFI report, the FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child and in allowing employees to be absent for blocks of time while they recover from their own serious health conditions or to care for family members recovering from serious health conditions. The FMLA also seems to be working fairly well when employees are absent for scheduled treatments related to their own serious health conditions or that of a family member.

Employers often express some frustration, however, about difficulties in maintaining necessary staffing levels and managing attendance in their workplaces, particularly when employees take leave on an unscheduled basis with no advance notice. For example, the RFI report indicated that time-sensitive industries, such as transportation operations, public health and safety operations, in-

cluding hospitals, nursing homes, emergency 911 services, and assembly line manufacturers may be especially impacted by employees taking unscheduled intermittent FMLA leave.

I see that my time is up. So I am happy to conclude there, and I am happy to address any specifics of the proposed rule in question and any other questions regarding our enforcement of the law over the last 15 years.

Chairwoman WOOLSEY. All right. Thank you very, very much, Secretary Lipnic.

As I said, I was a human resources professional for over 20 years, and it was very clear to me that the support you gave your employees, you got back double in loyalty and in their ability to focus on their job versus worrying about their families.

Let me ask you in—it seems to me that something that is missing in this review the question of how we can make changes that make it better for the worker that we have learned from these 15 years. I mean, for example, we have learned that family medical leave works wonderfully if a person can afford to be away from work because it is not paid.

Have you put any of your study into paid medical leave and other topics, such as paid leave benefits for part-time workers? What have you looked at besides just changing it so that the employer gets protected?

I am all for understanding that you cannot have people running in and out of the workforce minute by minute. We cannot do that in our offices. But, actually, when somebody has an emergency need, you cannot schedule that. So tell me if there are other things you have looked at.

Ms. LIPNIC. Madam Chairwoman, when we did the Request for Information, we asked questions on a broad array of issues that we had heard about from the regulated community, from employees, from all people who are subject to the law and not over the last 15 years, and we did get many, many comments that requested that leave be paid. We did not address those in the report that we published on our regulatory review because our focus was specifically on how the Labor Department has administered the law and how we have done so through the regulations, but it is certainly the case that we got many comments—and we indicated this in our report—suggesting that people were very interested in paid leave.

Chairwoman WOOLSEY. How did this outreach come along? I mean, it was very easy to reach the employer because we know who the employers are. How did you reach the employees?

Ms. LIPNIC. Well, we have done a number of things over the past few years. First of all, the Request for Information was published in the Federal Register and available for public comment by absolutely anyone who wanted to comment, and—

Chairwoman WOOLSEY. And we know that every employee reads the Register daily, right?

Ms. LIPNIC. Well, we do get—

Chairwoman WOOLSEY. “Oh, it is time to read the Register.”

Ms. LIPNIC. We did get 15,000 comments to the record, many from individual employees. So, certainly, there was an awareness that a review of the regulations and the law was going on.

We also over the years have had stakeholders meetings where we have talked to groups representing both employers and employees.

After we published the Request for Information, the report on it, last June recognizing how much concern and how many issues there were related to the medical certification process under the current law and how it works, we had another stakeholder meeting where we invited in employee groups, again employers, and for the first time health care providers who are incredibly important and play an incredibly important role in the administration of the law.

Chairwoman WOOLSEY. Okay. I am going to change the subject just quickly. When we talk about the FMLA for military families, we would like very much to have an interim rulemaking, in that this occupation in Iraq is into its sixth year. There are families—they are not waiting for this rule to leave their jobs to help their loved ones, and it does not just have to be a family member. It can also be, you know, a close relative.

But I am telling you if we do not—if we wait 2 more years for final rules, hopefully, this occupation will be over, but the results of it are not going to be over, and we need to step up to this right now. So tell me: Are you looking at interim regulations and interim rules that could be depended on while we are putting the final rules together?

Ms. LIPNIC. We did have an extensive discussion when the new military family leave provisions were passed about what we thought was the best way to proceed and to move and how we could get as quickly as possible to rules. I do want to point out, of course, that the one provision for caregiving that allows the 26 work weeks of leave is already in effect and went into effect on the day that the President signed that bill into law.

Following the enactment and the President signing it into law, we posted some guidance on our Web site to make sure that employers would know that they have to provide that leave if it is requested. We have had some inquiries already, certainly at the Labor Department, to our enforcement personnel about providing that leave. So that provision is actually already in effect, and the families who are in need of caregiving leave are able to take that.

As to interim rules, as I mentioned, we had an extensive discussion about what we thought was the quickest and best way to implement this. Given that we had a rulemaking underway, which was fairly well known, we were able to include the many, many questions that we have to wrestle with in coming up with the regulations to implement the military family provisions.

We believed then and certainly believe now, given how far we are into this process and the groups that we have talked to, that interim rules at this point would be a step backward, and they would delay us. We think we can get to final rules in a much quicker fashion, certainly once the record closes tomorrow.

I will also tell you it is certainly not the Labor Department's intention to take 2 years to finalize rules.

Chairwoman WOOLSEY. Well, all right. Well, we look forward to working with you on this and ensuring that those rules get finalized ASAP. They are simple.

Now I would like to yield to Mr. Wilson.

Mr. WILSON. Thank you, Madam Chairwoman.

And, Madam Secretary, thank you for your service. You, indeed, have an excellent reputation as a former staff person here as to your capabilities and competence, and we greatly appreciate your service as an Assistant Secretary and wish you well on your career.

In the department's proposed regulations, you addressed the issue of employers granting incentive bonuses, such as perfect attendance awards. Are these bonuses currently lawful? Has FMLA, in your view, acted to deter employers from offering these sorts of awards? What is the proposed change necessary?

Ms. LIPNIC. Congressman, under the current regulations for employers who provide perfect attendance awards, employers are required by the current regulations to provide perfect attendance awards to individuals who have been out on family medical leave, and we have had many, many comments to the record that we have created through the Request for Information and certainly have heard about over the years that many employers find that that requirement—that it devalues the incentive that perfect attendance awards are designed to provide in the workplace.

What we have proposed is to make a change so that employers do not have to provide perfect attendance awards to someone who is on family medical leave, they are free to do so, and they also must make sure that they treat everyone who is on any other form of leave, other than family medical leave—it would be other types of absences or other types of sick leave—that they treat all people, all their workers equally. So they cannot discriminate against someone who is on family medical leave, but they cannot place them in a preferred status either. And the idea was to restore—what we had heard—the incentive for perfect attendance awards is.

Mr. WILSON. Well, over the weekend, I was with a dear family friend of ours, former administrative federal law judge Thomasine Mason, and with Congresswoman Schroeder being here, Judge Mason is famous as the first female elected to a full term to the state senate of South Carolina. She served as federal judge. She has earned like 3 years of additional leave based on perfect attendance, a remarkable lady, and so I have seen it firsthand.

How has the passage of the Health Insurance Portability and Accountability Act, or HIPAA, affected employees' protections under FMLA? How does the department's proposed regulation address this issue?

Ms. LIPNIC. Congressman, we have proposed a number of things to essentially make the Family and Medical Leave Act regulations align better with HIPAA. The FMLA was passed in 1993, and then HIPAA, of course, came along in 1996, and HIPAA covers the field for medical privacy.

So, because the FMLA regulations preceded HIPAA, we have made a couple of changes—or proposed a couple of changes—where we are essentially saying the Labor Department in its regulations does not have to be involved in the medical privacy issue. That is now governed by HIPAA.

The FMLA statute requires that if employers request a medical certification form from their employees, the employees must provide a complete and sufficient form to their employer, and that obligation is on employees, and that has been in the statute from the beginning.

Employees have to ensure now because of HIPAA that they have filled out and arranged with their health care provider that they have a current HIPAA authorization form in effect with their health care provider so that when they need to have their medical information provided to the employer, either through the medical certification form or if they want the employer to somehow get it otherwise, that that HIPAA authorization form has been appropriately filled out by the employee, and that is the employee's responsibility.

Health care providers are not going to provide information to any employer unless they have a HIPAA authorization form on file from the employee and that that information has been filled out, which was one of the intents of HIPAA.

So our proposal is merely to make sure that the FMLA regulations align with HIPAA and to make it clear to employees and employers that HIPAA is in play and that the employees need to make sure that they have the HIPAA authorization form filled out and that that will cover the privacy issues for the employee.

Mr. WILSON. Thank you very much.

Chairwoman WOOLSEY. Congressman Bishop?

Mr. BISHOP. Thank you very much, Madam Chair, and thank you very much for holding this hearing. I think it is very important.

Madam Secretary, a couple of questions. The Chair was asking you about the rulemaking that is currently going on. Essentially, there are two rulemakings going on that, as I understand it, are joined, one having to do with the proposed changes to the current regulations and the other having to do with the expansion of FMLA with respect to military families.

The proposed changes to the current regulations are considerably more controversial than are the changes to military families. Would the department be willing to delink the two rulemakings so that we could have the military family regulations in place much sooner than would be the case if we were to carry forward as you currently are?

Ms. LIPNIC. Congressman, as I was saying earlier, we gave a lot of consideration to that, what was the quickest and best way to proceed to implement the military family leave provisions. I would point out we do not consider them two separate rulemakings because the military leave provisions amended the underlying Family and Medical Leave Act.

Mr. BISHOP. Okay. I think that is basically the thrust of my question. Would you be willing to consider them to be two separate rulemakings?

Ms. LIPNIC. We looked at that initially, but because the military family leave provisions amend the underlying FMLA and because there are any number of issues regarding notice and certification that impacts the underlying FMLA, we think the better approach, as we laid out in this rulemaking, is to move forward with the full rulemaking so that the military family leave provisions, presumably as Congress intended, are completely integrated with the underlying FML Act.

Mr. BISHOP. I think the Congress's primary intent was to get this done as quickly as possible, and my own view is that I think we would see the delinking as the best path to that.

Let me move to a somewhat different area. The proposed changes to the current regulations have been characterized by some as being tilted more in the favor of the employer or management than of the employee. How would you respond to that characterization?

Ms. LIPNIC. I have certainly seen those characterizations. I do not believe that that is true. I will—it is certainly the case that when we looked at all of the regulations and, you know, I would point out that regulations under the FMLA in particular, unlike many other regulatory themes, really operate as a whole. Every part of them is linked together. And we certainly looked at where, based on the enormous record that we had developed from the Request for Information, we thought it was appropriate to realign some responsibilities. That includes some realignment of responsibilities for employers, where we imposed additional obligations on employers, and realigning some responsibilities on employees.

I do not think on balance, though, that it is sort of pro-employer or pro-employee, and I guess the other thing that I would add is I think, in the discussion of the FMLA, I think it is a false dichotomy to set this up as sort of an employer versus employee thing, particularly given what we are trying to encourage through the changes to these regulations is greater communication in the workplace between the employers and the employees.

Mr. BISHOP. What you are describing is, in fact, an ideal world. I think we all sort of need to recognize that not all of us live in that ideal world.

Let me be more specific. One of the proposed changes to the regulations would require those employees with chronic ailments to periodically receive, in effect, a doctor's certification that that ailment remains a current condition for the employee, and it has been estimated that that, along with other provisions, would cost about \$26 million a year for both employers and employees. Would you not see that as a burden to employees that might discourage them from availing themselves of FMLA leave?

Ms. LIPNIC. Congressman, as to the individuals who have chronic serious health conditions, under the current regulations, the requirement is that they have periodic visits to a health care provider. That period is undefined in the current regulations and sometimes undefined to the detriment to employees.

Employers are entitled to a medical certification under current law—that is in the statute—whether it is a chronic serious health condition or any other type of health condition, and the proposed rules which allows for an annual certification of the chronic health condition essentially codifies what has been the department's enforcement policy over a number of years. It is not really a change from how the law has been implemented over a number of years.

Mr. BISHOP. Okay. Thank you very much. My time has expired. Thank you.

Chairwoman WOOLSEY. Congressman Kline?

Mr. KLINE. Thank you, Madam Chair.

Thank you, Madam Secretary, for joining us today.

I have a couple of questions just because I do not understand in a couple cases what the current rules are and certainly what the proposed changes are.

For one thing, in your written testimony, you made some points about call-in procedures. I do not know what the regulations currently provide, frankly. And then what would be the changes that are coming forward? Can you just kind of explain how that works?

Ms. LIPNIC. Congressman, the issue about notice, notice both that employers have to provide to employees about their FMLA rights and their obligations and notice by employees to employers is something that we put a lot of attention on in this rulemaking and something that we heard a great deal about in the Request for Information.

Under the current regulations, part of the reason it is confusing is that the regulations make distinctions between when an employee requests leave that is foreseeable—in other words, if they are going to have surgery and they know long enough in advance and they can tell their employer and, under the statute, are supposed to tell the employer 30 days ahead of time so that for every-one they can schedule around that absence—

So there is leave that is termed foreseeable, there is leave that is termed unforeseeable, which is essentially unscheduled leave, and that is where the issues of notice and how much notice the employees have to provide to the employer get confusing, and the current regulations are somewhat confusing on that.

The standard in the statute is that anything that is less than 30 days, unforeseeable, that the employee should provide notice to the employer as soon as is practicable. That is then translated into the regulations as soon as practicable based on the facts and circumstances, but within 2 days, and that 2 days became hard and fast potentially 2 days after the fact, after you have been absent from the workplace, providing notice to employers.

There is also in the current regulations at least one sentence that employees are supposed to follow employers' call-in procedures, followed by the next sentence that says, "except when they do not." So it is fairly muddled.

What we are trying to do is bring some clarity to that in the proposal and, essentially, particularly when it is unscheduled leave, to ensure that the requirement is that employees follow the employers' call-in procedures, that that has to be the default standard, and that the default standard also has to be that employees notify their employers when they are going to be absent as soon as possible, as soon as practicable, but that should not be 2 days after the fact.

We do allow for emergency circumstances because we certainly recognize that particularly if it is unscheduled leave or there is some unforeseeable circumstance that employees may not be able to notify their employers before—follow the call-in procedures or before their shift starts, but we think that has to be the default rule and that the regulations probably went a little bit further. They certainly went further than what the standard was in the underlying statute.

So we are trying to make the default rule that everybody has as much notice ahead of time and that employees have to follow the call-in procedures.

Mr. KLINE. Okay. Thank you.

I want to move to intermittent leave now that the chairwoman mentioned that briefly in her remarks. Because it does seem a matter of some concern, it seems a little bit surprising that the department chose not to address intermittent leave, as I understand it. Can you explain in whatever time we have left what the issues are that surround that and why you chose not to address it?

Ms. LIPNIC. Sure. And I will say that the issue about use of intermittent leave is something that we have heard about in enormous fashion on both sides of this issue and how it is used in the workplace.

Under the FMLA, employees have the right to 12 weeks of leave. That leave can be taken in a block. It can be taken in weeks. It can be taken in days. It can be taken in minutes. That is what the regulations provide for, and that essentially becomes the intermittent leave.

The purpose of it was to allow people, who may have a medical condition that flares up, to be late for work for an hour or go to a doctor's visit. Because the regulations allow for the taking of the intermittent leave in minutes, what we heard from many, many employers is that that is incredibly difficult to administer, that it often, particularly for people who may have a chronic health condition, becomes a license for being tardy and that the employers have no way to verify this absence and the amount of time that is being taken.

And, certainly, the use of intermittent leave in certain workplaces is a real issue and I, frankly, think something that Congress is going to need to look at further. It had been suggested to us many times—and, in fact, this was suggested back when the rules were first implemented in 1993—that the time increments that employees are allowed to take intermittent leave should not be in minutes, that it should be in some greater block of time, an hour, 2 hours, a half a day, that that is how much time they should be charged.

The department chose not to do that back in 1993, and we did not think, despite the suggestions and the desires of many employers that we do so, that we could change that time increment given the statutory language, and I know that is something that—and I certainly heard during this rulemaking process that—employers are not particularly happy with.

And, again, I would suggest that I think the issue of intermittent leave is something Congress probably needs to grapple with in a fashion greater than was our ability at the Department of Labor.

Mr. KLINE. Thank you very much.

I yield back.

Chairwoman WOOLSEY. Thank you.

Congressman HARE?

Mr. HARE. Thank you, Madam Chair. Thank you for having the hearing.

Welcome, Madam Secretary.

Just a couple of questions for you. One is, you know, I realize businesses with five employees would struggle if even one employee were to get sick or took extended leave, but this is really an issue of fairness, it would seem to me, and doing what is right.

I am wondering if you have any suggestions on what we could do to help smaller businesses comply with FMLA, because if a person needs the leave to be with somebody, simply because they work for a business that is small—granted I understand the ramifications of losing that person, but, by the same token, the employee's basically penalized for working for a small company.

So I wonder if you might comment on that.

Then I just maybe had one other follow up for you.

Ms. LIPNIC. Congressman, I think, you know, as many employment statutes have exceptions for small business, and everyone recognizes those difficulties that you have pointed out that small businesses operate on such different margins than larger companies. I think it is a difficult issue, and, certainly, Congress had a lot of debate when it set the employee threshold at 50 employees for the underlying FMLA.

I am not sure I know exactly what to tell you in response to that. The one thing that I would suggest is I think if you were looking to make some changes to have a guarantee of whether it is sick leave or family medical leave for small businesses, you would have to look at a number of the issues, including the issue about using intermittent leave, and how that has operated in larger businesses.

Just as you pointed out, you know, the smaller the business, once someone is absent, the impact is certainly greater there. It is a difficult issue, and I would certainly defer to folks with a lot more specialty in running small businesses and seek their counsel on it.

Mr. HARE. I appreciate that.

The department is proposing regulatory changes to FMLA, and, you know, this is a 15-year-old law, but, as I understand it, it has not really done any data collection on how well the law is working. In fact, the department, as I understand it, has not done a comprehensive study on FMLA since 2000. I wonder if you could explain the process that the department went through to come up with their proposals and how the department can justify them when you do not have any empirical data to support what you found out.

Ms. LIPNIC. Congressman, the Labor Department did some survey work back in 1999 and 2000 that was published in January 2001 which we refer to as the Westat surveys that had a tremendous amount of information about the use of family medical leave. It also missed some important aspects, including how this use of intermittent leave works.

Given the enormous body of case law and some very significant cases regarding the FMLA that had developed over the last 15 years, when we published our proposed rulemaking, that was based on both—the record that we had developed when we did the request for information where we had 15,000 comments. We had asked for data.

When we did the Request for Information, we had a number of national organizations that provided us with survey data of their own that they had done, and I think that overall the majority of what we have proposed in this rulemaking is either based on case law, the department's own enforcement experience over the last 15 years, which is fairly significant, and various stakeholder meetings.

On issues where data certainly is and would be more useful, like, for example, to Congressman Kline's question about intermittent leave, we did not propose a change there. We had lots of recommendations to make changes to the definition of serious health condition, and we did not propose a change there. But the changes that we have proposed, we think, are fully supported either by the case law, our own enforcement experience, or the data that we had available to us.

Mr. HARE. Let me suggest that perhaps the department might want to consider doing a comprehensive survey because I think, once you do that, you really get the data that I think you need in order to make, you know, some firm decisions here.

And, lastly, in light of the evidence that the FMLA has had very few negative impacts on businesses, what is the department's concern about expanding the law to smaller businesses or industries that do not currently qualify.

And I know my time is out. I just—very briefly—I am sorry, Madam Chair.

Ms. LIPNIC. Just to respond quickly, Congressman, I would, again, point out I do think there are a number of issues, including the use of intermittent leave that probably need to be examined further by Congress, and that is something that would certainly have to be taken into account, particularly if you were going to lower the employee threshold and cover smaller businesses.

Mr. HARE. Thank you, Madam Secretary.

Chairwoman WOOLSEY. Thank you.

Congressman McKeon? And thank you for joining us today.

Mr. MCKEON. Well, thank you.

And thanks for being here, Madam Secretary.

And welcome back, Madam Chair. We missed you.

Chairwoman WOOLSEY. Joe missed me.

Mr. MCKEON. I missed you—very quiet around here.

Question, Madam Secretary. You know, as I listen to this and think about not just this law but other laws, you were questioned a little bit about why we could not move ahead with the military part of this, and you indicated how long things take around here. I was reading Congresswoman Schroeder's statement about how long it takes to have a baby and how long it takes to get a law passed, and it seems like it takes forever, and this law was finally passed in 1993. If you could just kind of walk us through the process—a law is passed. Then the department rights regulations—how long does that take?

Ms. LIPNIC. Well, I will give you the very lawyerly "it depends."

Mr. MCKEON. There is no law that states how long it takes to do the regulations?

Ms. LIPNIC. It completely depends on, first of all, what the underlying statute says. For example, when the FMLA was passed, I think Congress gave the Labor Department 120 days to come up with regulations, and I will tell you that when I sat up here, I thought that was nothing, but sitting here, I can tell you 120 days is no amount of time at all. So either—Congress prescribes a time period in which regulations need to be promulgated.

Very often, depending on the complexity of the particular law, agencies may publish something where they ask a series of ques-

tions which is essentially what we have done here in the military family leave provision, get input from the public, either proceed to direct final regulations then or publish interim regulations, it can take—and, obviously, depending on what Congress requires—the agency that has to administer the law certainly a good, you know, 3 to 6 months to come up with some guidance, again depending on the complexity, for the regulated community, but it then has to go through—

Mr. MCKEON. Do you know how—

Ms. LIPNIC [continuing]. Follow the Administrative Procedures Act, go through a public comment period, which is required to be at least 60 days, and then depending on the size of the record, have to review that entire record.

Mr. MCKEON. Let me get back. Do you know how long it took to do the regulations for this bill?

Ms. LIPNIC. For the underlying family medical leave, the regulations—the law was passed in 1993. The department first asked a series of questions, published a set of interim regulations in 1993. It took until August of 1995 for the final regulations, which everyone operates under today, to go into effect. There were interim regulations, but—

Mr. MCKEON. So the law said, “We want you to pass regulations in 120 days,” and that took 2 years?

Ms. LIPNIC. Well, there were interim regulations within 120 days to meet the congressional requirement, and then another 2 years on top of that.

Mr. MCKEON. The real regulations—if you are out in the real world running a business, a law gets passed, and it takes 120 days to do some interim regulations that probably nobody paid too much attention to because they were waiting for the real regulations, but that came 2 years later.

And now here we are 15 years later, and we are doing rule-making. When did you start the rulemaking process?

Ms. LIPNIC. Well, we started with stakeholder meetings in late 2002 into early 2003.

Mr. MCKEON. 2002?

Ms. LIPNIC. We sort of took a break from it for a while. Then we—

Mr. MCKEON. Yes. I am not picking on you, I am picking on government, and we could do the same thing probably if we had industry in here because they probably take longer than people would like to get things done too. But, you know, I wonder sometimes if we have not hampered ourselves so much in trying to get things done that we cannot get things done.

I look at the Pentagon, you know, out there that took a year to build during World War II. Now it probably could not be built. I am sure we have enough environmental regulations that—it was a swamp, so it probably could not be built there. I am sure there are endangered species.

But assuming we could get through all that process, go through all the court cases and everything, we would probably be into the Vietnam War before we could get the Pentagon built, and I think what has done has hampered us so much in dealing—we are in a very competitive world now. We are competing with China. We are

competing with India. We are competing around the world on many different issues.

I know I am really off of the subject, but I do not get this opportunity too often, so I want to get it on the record that we have hampered ourselves so much by laws, regulations, rulemaking that people could go through their whole career—and I am sure this is an exaggeration—before they could get their family leave, you know, in just one instance.

But I think, at some point—and we could probably start in this committee and maybe in others simplifying some of these things to where common sense—we are in the sixth year of a war now, and we have not gotten around to how we deal with medical leave for the affected troops and their families, and it is not you. It is not the department. It is the whole system that I think really needs some—there is a good word going around now—change.

Like every time a president comes in, we do not get change. We do, but what we really need to focus on is what kind of change and how we could do some change to benefit people. I think that is why they get so frustrated with our government that you hear these kind of answers that we cannot do something because we are hampered.

Okay. I had my time to vent.

Thank you very much. Thank you for being here. It has been a good day.

Chairwoman WOOLSEY. Well, thank you, Congressman McKeon.

Actually, maybe we could use the military family leave act as an example of how we could—because everybody is for it, you know, bipartisan of—maybe we could say, “This is something we all agree on. Can’t we make it happen?” Let’s talk about it.

Mr. MCKEON. How long should we talk about it?

Chairwoman WOOLSEY. Well, not too long.

Mr. MCKEON. Yes, I am with you—

Chairwoman WOOLSEY. Have it done yesterday.

Mr. MCKEON [continuing]. If you can find some way to speed it up.

Chairwoman WOOLSEY. Thank you, Madam Secretary.

I want to tell you are a pro up there. You did a really good job. Thank you very much for coming to see us.

Ms. LIPNIC. Thank you for having me.

Chairwoman WOOLSEY. And now we are going to have our second panel.

Mr. WILSON. I will be right back.

Chairwoman WOOLSEY. All right. You do not have to tell me where you are going.

I would also just like to welcome you all and to remind those of you who have not testified before this subcommittee in the past that the lighting system is a 5-minute rule. Everyone, including members, is limited to 5 minutes, and you saw that we do not, you know, cut people off at the minute the red light goes on.

But when the green light is illuminated, you begin to speak. When you see the yellow light, that means you have 1 minute left, and when the red light goes on, that means that your chair drops out, and you are going to disappear. No, it means that it is time to, you know, bring it all together.

So let me introduce the entire panel in order of—that I have here anyway.

I have first the honorable Pat Schroeder who was the first woman elected to Congress from Colorado and served in the House of Representatives from 1993 to 1997—1973 to 1997! I am sorry, Congresswoman.

While in Congress, she served as Chair of the Select Committee on Children, Youth and Families, a position from which she was instrumental in the creation of the Family and Medical Leave Act. In fact, Representative Schroeder was the first member of Congress to introduce the family leave act on April 4, 1985. She introduced the Parental Leave and Disability Act providing leave for parents in the case of birth, adoption, or serious illness of a child. Her bill also mandated temporary disability leave for medical reasons.

Congresswoman Schroeder was also co-chair of the Congressional Caucus on Women's Issues for 10 years, the first woman to serve on the House Armed Services Committee, and ranking member of the House Judiciary Subcommittee on the Courts and Intellectual Property.

From 1964 to 1966, Representative Schroeder worked for the National Labor Relations Board. Prior to her service in Congress, she also worked for Planned Parenthood and taught in the Denver public schools. Currently, Representative Schroeder serves as CEO of the Association of American Publishers.

In 1961, she earned a bachelor's degree at the University of Minnesota. She earned her law degree from Harvard University in 1964.

Welcome, Congresswoman.

Chante Lasco is an assistant state's attorney for Dorchester County, Maryland. I have to tell you we are going to have a series of votes, but let's get through these introductions and maybe have one or two—we will see how we do—have a couple of your reports, and then we will—then we will come back, we promise.

Okay. Chante Lasco is an assistant state's attorney for Dorchester County in Maryland, a position she has held since February 2006.

You know, if you would all be happy with this, I will just enter this into the record, and we will get started because it is going to take me 20 minutes to read all this.

Okay. So, without objection, I am going to enter the introductions of our witnesses, our wonderful panel of witnesses, into the record, and we will begin with Congresswoman Schroeder.

STATEMENT OF HON. PAT SCHROEDER, FORMER REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO, ORIGINAL SPONSOR, FAMILY AND MEDICAL LEAVE ACT

Ms. SCHROEDER. Thank you very much, Congresswoman Woolsey, and this wonderful panel.

I really, really appreciate the time and the effort because, as we all know, employment practices in the U.S. have really not kept pace with most of the rest of the developed world, and as the congresswoman said, I am kind of the mother of the Family and Medical Leave Act, and it did take 9 years to get this thing into law. So it was a very frustrating and long period.

In 1988, after it had been introduced for 3 years, I looked insanely at running for president, and when I came to my senses and got out, my good friends said to me, "But we have lost our forum for talking about family issues," and so Gary David Goldberg, who was then writing "Family Ties," and Dr. T. Berry Brazelton, who is the famous pediatrician from Harvard, and Dr. Diana Meehan and I decided to do this family tour, and we basically went to the South to talk about family leave.

We went to the primary states in the South because that is where we were having the most trouble trying to get co-sponsors, and I must say, Congressman Wilson, we were so impressed with your state because, in your state, yours was the only state in the South where the Chamber of Commerce backed us. They were very, very pro, and they were very welcoming.

In all of these states, we outdrew all the politicians. People came out in droves, and the stories we heard you all know. It was very tragic. This choosing between your job or your family was a very tough thing.

The other thing we know was there was so much research done on bonding, how important those early bonding years were, and there was research even showing that many criminals had not had proper bonding. So this was important.

Now I had started out wanting 18 months. We got 12. I wanted companies with 25 or more being covered, but we got 50 and so forth and so on. But we made tremendous progress, and we came back, and we even had—at that point, the first George Bush was running for president, and even he said that he would back family leave because we had made so much noise in so many states. We were very disappointed when he vetoed it after we passed it the first time, and then he vetoed it again, and it took until 1993 when we finally were able to pass it and get it signed into law.

It has been very depressing to see for these 15 years we really have not made much progress until all of you, thank goodness, did something for our military families, which was long, long overdue, and now we see a few states, like—Congressman Payne, the State of New Jersey has done a wonderful job of passing paid family leave, and I think that is now been signed into law or is about to be. So that is very, very exciting.

But it really seems to me that the time has come where we need to look at paid leave because so many families cannot deal with this, and, Congressman, you were talking about so many companies are—people who work in smaller places cannot use this. So we really need to investigate how can we move forward on this.

This is a very, very important thing, and people in other countries have done it long ago. We still are doing less than any other country, any other developed country in this area. So I really thank you so much, Congresswoman, for starting these hearings because I think after 15 years, it really is time to look at this and say, "Can't we go forward? Can't we build on this?"

After we passed this, for 2 years, we went around the country to have hearings to see if anybody had been severely impacted because the horror stories we heard before we passed this were like all industry was going to stop in America, and, happily, we did not find that kind of impact. Instead, we found people were very happy.

So thank you very much. I will be quiet and move along.
[The statement of Ms. Schroeder follows:]

Prepared Statement of Hon. Patricia S. Schroeder, President & Chief Executive Officer, Association of American Publishers, Former Member of Congress

American families will tell you employment policies have not kept pace with the changing needs of the workforce in this country.

I was proud to be the “mother” of the Family Medical Leave Act (FMLA). It took nine months to deliver each of my children and nine years to deliver FMLA! I had worked on the bill for several years and was amazed by what a hard sell it was. Pediatricians everywhere felt it was so important for mothers and fathers to have time to bond with new borns. Bonding wasn’t just something NICE to do; there were volumes of research proving it essential to healthy development. Meanwhile, the business community continued to be able to say to workers, “Choose, it’s your family or your job,” or “It’s your baby or your job.” This seemed very barbaric.

In 1988, after coming to my senses and getting out of the Presidential race, I looked for another way to have some impact in the campaign for work and family issues. My friends, who had helped me with FMLA, Dr. T. Berry Brazelton, America’s favorite pediatrician; Gary David Goldberg, creator of the television show Family Ties; and Diana Meehan, a distinguished writer and thinker, said they would join me in a “Great American Family Tour.” The tour would go to early primary states, hold meetings and ask people to get the candidates to commit to support the FMLA and other badly needed family legislation. We got larger crowds than the candidates wherever we went.

We were so excited when candidate George H.W. Bush said he supported FMLA during the campaign and were shocked when he vetoed it after its passage saying, he was for it in concept but not in the law! So much for campaign promises. FMLA was the first major bill signed by President Clinton in 1993. He had been the Governor of Arkansas during our tour, joined us, and was fully ready to go! Every developed country had a stronger bill than we passed, but at least the United States was no longer a zero.

When we passed it, there was huge opposition. * * * many said they didn’t want the Federal Government mandating benefits, employees should have the “freedom” to negotiate their own benefits! Others did not want men included; they wanted maternity leave. However, there were legal cases saying such benefits should be extended to both men and women.

Here is what the amended bill said:

Any company with less than 50 employees is not covered. An employee must work a year before being eligible. Family leave was reduced from 18 weeks to 12 weeks. Medical leave was reduced from 26 weeks to 12 weeks.

Still the business community howled. There was a Commission that studied the impact of FMLA on American businesses for two years after its enactment. The impact was very slight. Unlike a heart attack or major illness, employers could plan for when an employee with a new baby would be on leave. There are many companies that provide qualified employees on a short-term basis to fill in. Obviously, families that used it loved it. However, many families could not use it because they either worked in smaller companies that weren’t covered or they could not afford to miss the paychecks.

Here we are in 2008, fifteen years later, and we haven’t made much progress. I do want to compliment you for including in the Defense Authorization bill an extension of leave to six months for families of workers who have a seriously injured service member and 12 weeks leave if it is needed because of the deployment or impending deployment of a family member. Thanks so much for that much needed coverage, but we still need to consider paid leave and of course many of us are very worried that the Department of Labor will propose new regulations, making it more difficult for workers to access the FMLA leave.

It seems to me we should be continuing to catch up with the rest of the world. Juggling work and family is going to be essential for almost every American family in the global economy we live in. The Norman Rockwell image of full-time caregiver at home is history. FMLA should be expanded to provide coverage to all Americans and Congress should try and figure out how to move to paid leave.

Thank you.

Chairwoman WOOLSEY. Thank you.

Ms. Lasco?

STATEMENT OF CHANTE LASCO, NEW MOTHER

Ms. LASCO. Thank you for having me. I am humbled to be here and also to follow Representative Schroeder. But, basically, I have more of a personal story.

On July 22 of 2007, I gave birth to my first child, Cooper, who all of you unfortunately heard this morning, but, as with millions of new parents before me, my life and my perspective were forever altered by having my first child. And one of the first challenges I had to face was how to find this balance, how to spend as much time as I could with him, before going back to work.

Fortunately, I do work for our county, so I qualified to take leave under the Family and Medical Leave Act. So, when I first found out I was pregnant and inquired about taking that leave, I was frankly surprised to find out that it did not require any payment whatsoever, and all of my friends who had not had children yet did not realize that either. So we were all surprised by that, actually.

And then a lot of my friends said, "Well, you know, you work for a government agency." You would think maybe a government agency would be proactive and be able to serve as a role model for the private sector, but that did not happen either.

I was permitted to use my annual leave and my sick leave after getting a note from my doctor that I needed time to recuperate from birth, which I thought was somewhat obvious.

But, in any case, I was able to get some of my 12 weeks of leave paid, but, of course, 9 weeks were not paid, and, during that time, I still had to pay all of my bills, including my huge student loans from law school, on top of all of the new baby-related costs.

In the end, I was able to take the full 12 weeks, largely due to a very tragic event in my life, which was the death of my mother from cancer. My mother died 2 days after Christmas in 2006. This was about a month after I told her I was pregnant. She was very excited about my grandson—her grandson coming on the way, and I thought that she might actually hang in there long enough to meet him, but that was not to be.

However, after she passed away, I was very surprised to discover she had a small life insurance policy, and I was one of the beneficiaries, along with my brother, and it was this insurance policy that made it possible for me to stay home and use my leave. So I realized that was the last gift, and the best gift I ever got from her.

Yet the 12 weeks did go by really fast, when you are trying to get to know your own child, nursing him, holding him, rocking him to sleep, and trying to figure out what soothes him, what kind of person he is going to be. All of that went by extremely fast, and the first day I had to go back to work, I cried three times on my way to work.

I also discovered how difficult it was and incredibly expensive it was to find child care for a 12-week-old baby. That is almost impossible to find and to afford. Therefore, my husband, who is a nurse, who is with me here today, quit his job. He stays home with our child during the week while I am at work, and he works weekends in a new position, and then I stay home alone with the child during

the weekends, which is very difficult on us as a family, but it is the way that we have been able to make it work.

Adding to all of these difficulties is the fact that I was very aware of all the health benefits of nursing my child. Research suggests that it not only leads to fewer colds and ear infections, which, frankly, lowers parent absenteeism at work, but it could prevent everything from obesity to leukemia. These are some of the things that you hear.

So I wanted my son to get all these benefits, but having to go back to work at just 12 weeks made that difficult, so I have been balancing that and I am still balancing that. I am a prosecutor, and I find myself running back during a recess from court to pump or nurse my son in the office, and running back to the courtroom. But I am very lucky because I am in a position where I am able to do that, and I know many women who are waitresses and in positions where that is just physically impossible.

So, in conclusion, I just want to say, despite all the financial, emotional, logistical challenges I have faced, I have really benefited from the FMLA and am very grateful to the honorable Pat Schroeder and all other Congress members who passed this very important protection.

I was actually a little reluctant to come forward today because I felt that I was very fortunate to be able to work this out the way that I did and that there are many other workers who are in a much tougher position, people who are working part-time, who, therefore, do not qualify or who work for smaller companies, or who just simply cannot afford to take any kind of unpaid leave.

I would also just like to say that, of course, if I had the choice, I would much rather have my mom here, I would much rather have had her be able to meet my son, but I also recognize what a gift it was that I was able to afford to take my leave and that she really made that possible for me.

She was a single mom. She worked two jobs, and she put herself through school to become a psychologist in order to better all of our futures. So she really—that was her legacy, and I still do not know what kind of legacy I will leave for my own son, but I just want to say that all of you involved in creating the FMLA and all of those who may seek to change it, you all have the possibility of leaving a legacy as well, and I challenge you to create an even better legacy for the FMLA.

Thank you for your time and attention.

[The statement of Ms. Lasco follows:]

Prepared Statement of Chante Lasco, New Mother

On July 22, 2007, I gave birth to my first child and, as with millions of new parents before me, my life and my perspective were forever altered. One of the first challenges I had to face as a new mother was how to make it possible to spend as much time as I could with my newborn son. Fortunately for me, I met the requirements to take time off from my job as a prosecutor under the Family Medical Leave Act.

When I first found out I was pregnant and inquired about taking leave, I was surprised to learn that such leave is totally unpaid. All of my friends who hadn't had children were equally stunned as they, too, assumed at least some of this leave would be paid. Additionally, because I work for the government, I had thought that perhaps government agencies would offer enhanced benefits to serve as a role model for the private sector, but I was wrong.

I was permitted to use annual leave and after getting a note from my doctor stating that I needed time to recuperate from giving birth (which seems like it should be obvious) I was able to use my accrued sick time. So I managed to get a few of the twelve weeks off paid but while I was not being paid, of course, the mortgage still had to be paid, the utilities still had to be paid, and my huge student loans from law school still had to be paid, on top of all the new baby-related costs. Still, I was able to take the full twelve weeks largely due to a tragic event that occurred during my pregnancy—the death of my mother from cancer.

My mother died two days after Christmas 2006, about a month after I told her I was pregnant. She was very excited about her grandchild on the way. I thought she might hang in there long enough to meet her grandson but it was not to be. Much to my surprise, I learned after her death that she had a small life insurance policy for which I was one of the beneficiaries. I soon realized that this insurance money was the last and best gift I ever received from my mother because it was what made it possible for me to stay home with my baby.

Still, twelve weeks goes by fast when you are getting to know to your own child. Twelve weeks of nursing him, holding him, rocking him to sleep. Twelve weeks of changing him, bathing him, and learning what soothes him. All too soon, twelve weeks had passed and it was time to leave my tiny baby and return to work. I cried three times during my first day back. To make matters worse, I soon discovered that finding child care for a twelve-week-old baby was exceedingly difficult and incredibly expensive. Thus, my husband—a nurse—left his job and took a weekend job so we can take turns caring for our child. My husband cares for our baby while I am at work during the week and I care for him alone on the weekends while he works twelve-hour shifts. This means we do not have to pay for child care but it also means we rarely see each other and seldom are together as a whole family.

Adding to the difficulties of returning to work is the fact that my baby depends on me for sustenance. The health benefits of breast milk are astounding, with research suggesting it not only means fewer colds and ear infections (and thus less parent absenteeism at work) but may help prevent everything from obesity and diabetes to leukemia. Trying to ensure my son gets these benefits while at the same time having to return to work after twelve weeks has been an immense challenge. I have found myself struggling to be both a full-time prosecutor and a nursing mom, running to my office during recesses to pump breast milk and having my husband drive my son to my office each day to nurse at lunch. Still, I know that I am one of the lucky ones. After all, I not only had twelve weeks to nurse my son at home, I also have an office to nurse and pump in, unlike some other women I know.

In conclusion, despite these financial, emotional, and logistical challenges, I have benefited from the Family Medical Leave Act and I am grateful to the Honorable Pat Schroeder and other Congress members who created this incredibly important protection. To be honest, I was a bit reluctant to come speak to you today because I know that I am one of the lucky ones. I can't help but think about all the other workers who can not benefit from this law. Those who work two or three part time jobs and aren't lucky enough to be full time. Or those who simply cannot afford to take unpaid leave. Despite how crucial the FMLA is, it still does not go far enough to help enough people.

In the end, I want to say that if I'd had a choice, I would rather my Mom had had a chance to meet my son and to hold him in her arms rather than living off of her life insurance policy during my family leave. But sometimes life is about doing the best you can with the limited choices you are given and seeing a gift for what it is. So I am grateful for every day of those twelve weeks with my son and I thank those of you who created the FMLA. But I also thank my Mom for making it possible to actually use it. I know she'd be proud of me speaking here today. She was a single Mom who worked two jobs and put herself through school to become a psychologist. Her legacy was one of hard work and struggle and I now know how hard it must have been for her to leave us with babysitters and go to grueling jobs. And yet she fought to improve her life and to help me get where I am today. That was her legacy. I don't yet know what kind of legacy I will leave for my own child: our story is just beginning. Those of you involved in creating, protecting, or even seeking to weaken the FMLA will leave a legacy, too, and I challenge you to use the Family Medical Leave Act to instead create an even better legacy for the future. Thank you for your time and attention.

Chairwoman WOOLSEY. Thank you.

We have three votes. If the three of you can wait for us—I mean all of you—we will be back as soon as the third vote is over, which means it could be 20, 25 minutes.

[Recess.]

Chairwoman WOOLSEY. We will call this hearing back to order, and what you have to know is—we are sorry it took so long—we swore in a new Member of Congress from the State of California, Jackie Speier, this morning, but that all takes a long time. Just so you know how it works, they put that in between a vote, the swearing-in, then two more votes, so, indeed, we stay there instead of running back and forth.

So, Jennifer Hunt, we are glad to hear from you.

STATEMENT OF JENNIFER HUNT, AIRLINE ATTENDANT

Ms. HUNT. Thank you, Chairwoman, for holding this hearing and inviting me to testify today.

My name is Jennifer—

Chairwoman WOOLSEY. I do not think you have your microphone on.

Ms. HUNT. I will scoot a little closer.

My name is Jennifer Hunt, and I am a 19-year full-time flight attendant with US Airways currently based at Ronald Reagan Washington National Airport and a member of the Association of Flight Attendants. I am the wife of John Calley, a Blackhawk helicopter pilot with the Virginia Army National Guard and an Iraq war veteran who completed a 17 month deployment to Iraq in February of 2007. John is a commercial pilot, and we have two wonderful young children.

As a family where both my husband and I work full-time, I am here to tell you that the Family and Medical Leave Act has been a great benefit and has provided peace for many.

When Congress passed the Family and Medical Leave Act in 1993, the intent was to provide an employee 12 weeks of unpaid leave if they worked a minimum of 60 percent of a full-time schedule. When developing this threshold, Congress looked at the traditional 40-hour work week which comes to 1,250 hours.

However, I and thousands of other full-time working flight attendants in this country have unfortunately been unable to take full advantage of this benefit. This problem arises out of the fact that flight crew pay hours are calculated in a very unique way. Flight attendants are only paid for their flight hours, which is basically the time from when the door of the aircraft closes until arrival at the destination airport.

On the average, when I fly a trip, I am gone 60 to 65 hours, away from base, but I yield about 18 paid flight hours. Your average flight attendant in the industry today works approximately 80 flight hours a month, which translates to approximately 20 days of flying. Again, let me remind you those 80 hours I referenced are only flight hours. They do not include all the time and service to the company performing work.

As you can see, the calculation of hours for flight crews in the airline industry is very unique. Basing a threshold of 1,250 hours to our uncommon situation is not relevant. My own situation will help shed some light on this problem.

After the birth of our second child and the completion of my husband's deployment to Iraq, I returned to full-time employment as a flight attendant with US Airways, arranging it so that I could be home on the days that my husband worked his schedule in order to care for our two small children.

On December 27, 2007, my husband was diagnosed with cancer. While exploring the various treatment options available to him and preparing for imminent surgery, I immediately applied for the Family and Medical Leave. Because of the way our hours are calculated, I did not meet the 1,250-hour requirement for FMLA.

I should point out that I was working at US Airways flying 75 flight hours a month. This is above the 73 flight hours a month that US Airways defines as a full-time schedule.

While I was unable to qualify for FMLA, I did however qualify for Personal Care Leave, which is something my union, the Association of Flight Attendants, had negotiated with our company management. Negotiating a more meaningful FMLA policy is something that we at US Airways and many other flight attendants at other airlines have had to do.

The unfortunate thing with our company-based personal care leave is that it must be used in a 5-day block. The provision within FMLA that would have allowed me to take intermittent leave at various times was not an option for me and my family. Instead of missing 1 day, for instance, to take my husband to medical appointments, I would be forced to take 5 days off, a waste of productivity for the company and 5 days of no pay for my family at the worst possible moment.

I did not want, nor was I willing to take, 5 days of unpaid leave every time I needed to utilize my leave. In the end, I was able, due to the flexibility that my seniority provides, to adjust my schedule so as not to use the personal care leave and avoid such a prolonged absence from work.

As my husband's surgery approached in February of 2008, I was forced to juggle my flying schedule to attend his surgery and post-operative care. Very soon after my husband's release from the hospital, I had to return to work. I was incredibly fortunate that I could rely on friends and family to assist in the care of my husband following his surgery and the care of our two children. If I did use the personal care leave, I would have unfortunately missed 5 full days of paid flying, and I could not afford that option while my husband was recovering.

Madam Chair, this denial of FMLA benefits to flight crew is frustrating because the original authors of FMLA were clear in their intentions that the new law must cover flight crew members who work full-time schedules. This issue was addressed on the House floor, and the bill authors made clear that flight crews were not meant to be held to a hard number for qualification.

So we are frustrated that we have been forced to bargain for a right that every American is afforded under the law. What is most frustrating is the fact that we were intended to be covered by the law from the very beginning. Congress must correct this oversight and get back to the original intent of the law.

H.R. 2744, a bipartisan bill introduced by Representative Tim Bishop and supported by a majority of the House of Representa-

tives, will provide the necessary clarification to the Family and Medical Leave Act that is so needed. This bill states that airline flight crews will be considered qualified for FMLA if they fulfill or have been paid for 60 percent of their airline's full-time schedule.

The good news for me and my family is that my husband is expected to make a full recovery. However, tens of thousands of other flight attendants are not so lucky. Many are denied FMLA benefits despite the fact that the law was intended to cover flight crew members.

The Family and Medical Leave Act has helped millions of employees to remain with their employer, but still meet the needs of their family. I urge you to pass H.R. 2744 in order to correct this oversight and get back to what Congress originally intended—that I and the over 90,000 flight attendants in this country will be able to have the peace of mind that the Family and Medical Leave Act is intended to provide.

[The statement of Ms. Hunt follows:]

Prepared Statement of Jennifer Hunt, Flight Attendant

Thank you, Chairwoman Woolsey and the distinguished members of this panel. I very much appreciate you holding this hearing and inviting me to testify today. My name is Jennifer Hunt and I am a 19 year full time flight attendant with US Airways currently based at Ronald Reagan Washington National Airport and a member of the Association of Flight Attendants. I am the wife of John Calley, a Blackhawk helicopter pilot with the Virginia Army National Guard and an Iraq war veteran who completed a 15 month deployment to Iraq in February of 2007. John is a commercial pilot with Comair and we have two wonderful young children.

As a family where both my husband and I work full-time, I'm here to tell you that the Family and Medical Leave Act has been a great benefit for millions of American families since its enactment in 1993. Allowing an individual to take up to 12 weeks of unpaid leave in order to care for themselves or a family member during an illness or injury, knowing that they will have a job to return to, has provided peace of mind for many.

However, I and thousands of other full time, working flight attendants in this country have unfortunately been unable to take full advantage of this benefit. This problem arises out of the fact that our pay hours are calculated in a very unique way for airline flight crews—flight attendants and pilots—than are those in other industries. Our unique situation demonstrates that one size does not fit all.

When Congress passed the Family and Medical Leave Act in 1993, the intent was to provide an employee 12 weeks of unpaid leave if they worked a minimum of 60% of a full time schedule. When developing this threshold, Congress looked at the traditional 40 hour work week as defined by the Fair Labor Standards Act: 60% of a full time schedule, based on the "traditional" 40 hour work week over a year is approximately 1,250 hours. So, as the law was written, someone has to have worked 1,250 hours in a 12 month period.

The problem for flight attendants and pilots is that, as I stated previously, the timekeeping methods and calculation of paid hours are very unique in the airline industry. For example, we use three different types of hours to classify our time spent in the employ of the airline.

The first type of hours are "flight hours." This is basically the time from when the door of the aircraft closes and it starts to move until the moment the aircraft comes to a stop at the arrival airport and the deplaning door opens. These flight hours are time for which we receive our hourly rate of pay. Our pre-flight safety checks, boarding and deplaning time on each and every flight is unpaid time, yet we are still on duty with the company.

The second type of hours, time spent performing duties such as those I just mentioned, as well as time on the ground in between flights, is referred to as "duty hours". Duty time usually begins approximately 1 hour before the first scheduled flight of the day up until approximately fifteen to thirty minutes after the last flight of the day. Again, flight attendants do not receive an hourly rate of pay for these working hours.

The third category of hours is called "time away from base". These hours combine all the hours that we spend away from the airport in which we are based. Part of

this calculation is the time spent in hotels away from home and family. For example, I am based at Washington Reagan Airport. I consistently work trips that mean I am away from Reagan National for up to 4 days, working flights to various cities across our country. The hours I spend away from home, at the request of the company, are defined as “time away from base” hours and the significant majority of those hours are unpaid, despite the fact that I am on duty and available for duty in service to my company. During the majority of these hours, I am governed by—and must adhere to—FAA regulations.

Your average flight attendant in the industry today works approximately 80 flight hours a month, which translates to approximately 20 days of flying. Again, let me remind you those 80 flight hours I reference are only flight hours. They do not include all the time spent in service to the company performing work.

As you can see, the calculation of hours for flight crews in the airline industry is very unique. Basing a threshold of 1,250 hours to our unique situation is not relevant. It is simply like comparing apples to oranges and does not adequately reflect the reality of work for airline flight crews.

My own situation will help shed some light on the problem. After the birth of our second child and the completion of my husband’s 15 month deployment to Iraq, I returned to full time employment as a flight attendant with US Airways. I continued to work a full time schedule upon my return, arranging it so that I could be home on the days that my husband worked his schedule in order to care for our two small children.

On December 27th, 2007 my husband was diagnosed with prostate cancer. While exploring the various treatment options available to him and preparing for a potential surgery, I immediately applied for Family and Medical Leave. Because of this unique way in which our hours are calculated, I did not meet the 1250 hour requirement for FMLA. I should point out that I was working a full time schedule at US Airways flying 75 flight hours a month. This is above the 73 hours a month that US Airways defines as a full time schedule.

While I was unable to qualify for FMLA, I did however qualify for Personal Care Leave which is something my union, the Association of Flight Attendants, had negotiated with our company management. Negotiating a more meaningful FMLA policy is something that we at US Airways and many other flight attendants at other airlines have had to do. Even the companies over the years have recognized the fact that the majority of flight attendants would not qualify for FMLA using the 1,250 hour threshold. They themselves have recognized that the 1,250 hours is not translatable for the unique time keeping methods of our industry.

The unfortunate thing with our company-provided Personal Care Leave is that it must be used in a 5 day block. The provision within FMLA that would have allowed me to take intermittent leave at various times was not an option for me and my family. Instead of missing one day, for instance, to take my husband to medical appointments, I would be forced to take 5 days off, a waste of productivity for the company and 5 days of unpaid days for my family at the worst possible moment.

I did not want, nor was I willing to take, 5 days of unpaid leave every time I needed to utilize my leave. In the end I was able, due to the flexibility that my seniority provides, to adjust my schedule so as not to use the Personal Care Leave and avoid such a prolonged absence from work.

As my husband’s surgery approached in February of 2008 I was forced to again juggle my flying schedule to attend his surgery and post-operative care. Immediately upon my husband’s release from the hospital, I had to return to work. I was incredibly fortunate that I could rely on friends and family to assist in the care of my husband following his surgery and the care of our two children. If I did use the Personal Care Leave, I would have unfortunately missed five full days of paid flying time and could not afford that option while my husband was out of work during his recovery process.

While I was able to adjust my schedule to attend to my family’s needs during this time, approximately 25% of the flight attendant population is on what is called “reserve” status. For reserve flight attendants, FMLA benefits are out-of-reach and virtually impossible to obtain. Reserve flight attendants are crewmembers that are on a “on call” status to staff flights during irregular aircraft operations or in case of crewmembers who become ill during their flight assignments. Reserve flight attendants can be “on call” up to 24 hours a day for approximately 20—21 days a month. Reserve flight attendants can receive a phone call from the company at any time during their on-call timeframe. Upon receiving the phone call to report to work, flight attendants have between 1—2 hours to be at the airport ready to work the required flight. Reserve flight attendants are truly tied to their phones and waiting for calls. They do not have the flexibility while “on call” to get a second job to supplement their income. They must be ready and able to head to the airport at a mo-

ments notice. If they have children, they must have childcare ready to go at a moments notice.

Reserve flight attendants are classified and treated by the airlines as full time employees, as airline management itself recognizes that reserve flight attendants are technically on duty to the airline during their reserve time and must abide by all Federal Aviation Regulations governing flight attendants during that reserve time. As part of the recognition that they are full time employees, the airlines guarantee that those flight attendants will at least receive a payment for a minimum number of flight hours a month.

For example, a reserve flight attendant with US Airways is guaranteed to receive payment for 73 flight hours a month for their time commitment to the company during their approximately 20 days of being “on call.” The flight attendant could very well be called in to fly more than those 73 flight hours in a given month, and they will receive payment for their actual hours, but because of their time commitment to the company, they are guaranteed at a minimum to be paid 73 flight hours.

The unfortunate thing for these reserve flight attendants is that for FMLA qualification, only the time that they are called in to work a flight counts towards reaching their 1,250 hour threshold. It is virtually impossible for reserve flight attendants to qualify for FMLA. As they are the most junior flight attendants at any base, they need the flexibility that Family and Medical Leave provides.

Madame Chair, this denial of FMLA benefits to flight crew is frustrating because the original authors of FMLA were clear in their intentions that the new law must cover flight crewmembers who work full time schedules. This issue came up on the House floor on May 10, 1990. Congressman Norman Minetta asked Congressman Clay, one of the bill’s authors, about this situation faced by flight attendants and pilots and the unique way their hours are calculated. Mr. Clay’s response was clear. He said:

“We certainly do not intend that dedicated workers in unique circumstances should be excluded from the bill’s protection simply because of their industry’s unusual time-keeping methods. Flight attendants and pilots who work the number of hours constituting half-time (eventually increased to 60%) employment during the previous 12 months as defined either by a collective bargaining agreement or by industry standard are fully entitled to family and medical leave under this bill.”

Furthermore, the Senate report language accompanying the final bill, states clearly that the “minimum hours of service requirement is meant to be construed broadly * * *”

So, we are frustrated that we have been forced to bargain for a right that every American is afforded under the law. What is most frustrating, is the fact that that we were intended to be covered by the law from the very beginning. Congress must correct this oversight and get back to the original intent of the law.

HR 2744, a bipartisan bill introduced by Representative Tim Bishop will provide the necessary technical correction to the Family and Medical Leave Act that is so needed. This bill states that airline flight crews will be considered qualified for FMLA if they fulfilled or have been paid for 60 percent of their airline’s full time schedule. Although a full time schedule varies by carrier, each carrier has established its own definition of what constitutes a full time schedule. That full time schedule is established through a monthly “guarantee” or monthly “minimum”.

The term is a standard in the airline industry and is used by both unionized and non-unionized airlines. The employer is guaranteeing that a full-time flight attendant or pilot will get—at a minimum—a set number of flight hours scheduled in a month.

For example, the monthly guaranteed minimum flight hours at US Airways is 73 flight hours. US Airways is basically saying that each flight attendant with the airline will get scheduled for 73 flight hours that month. This constitutes a full-time schedule. A flight attendant may subsequently schedule themselves to work for less than the 73 flight hour threshold and get paid fewer hours, or a flight attendant may choose to work 95 flight hours in a month and gets paid for 95 hours. But all flight attendants at US Airways are promised by the company that as a flight attendant—as a full time employee—they will get scheduled for 73 flight hours.

The concept of a guarantee is an industry standard term. However, there is no one guarantee that is applied uniformly throughout the industry as monthly guarantees vary from airline to airline. The employing airline is allowed to develop the monthly guarantee due to the unique nature of each individual airline’s scheduling needs. This allows flexibility for the employer to determine what that specific airline’s full time schedule is. The “full time” schedule at an airline may be changed from year to year due to the changing nature and uniqueness of each airline’s operation and needs. Again, this provides the employer flexibility to increase their “full time” schedule as needs and demands may dictate.

The good news is that my husband is expected to make a full recovery. However, tens of thousands of other flight attendants are not so lucky. Many are denied FMLA benefits despite the fact that the law was intended to cover flight crew members. The Family and Medical Leave Act has helped millions of employees to remain with their employer but still meet the needs of their family. I urge you to pass HR 2744 in order to correct this oversight and get back to what Congress originally intended—that I and the over 90,000 flight attendants in this country will be able to have the peace of mind that the Family and Medical Leave Act is intended to provide.

Chairwoman WOOLSEY. Thank you very much.
Ms. Cossette?

**STATEMENT OF BRENDA COSSETTE, ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

Ms. COSSETTE. Madame Chair Woolsey and distinguished members of the subcommittee, my name is Brenda Cossette, and I am the director of human resources for the City of Fergus Falls in Minnesota. I commend the subcommittee for holding this hearing on the Family and Medical Leave Act, and I appreciate the opportunity to provide testimony.

By way of background, I am a certified H.R. professional with over 25 years experience in human resource management. In my current role, I manage the human resource function for the City of Fergus Falls in Minnesota, ensuring compliance with all state and federal laws and administering policies and procedures, including the Family and Medical Leave Act.

I appear today on behalf of the Society for Human Resource Management, or SHRM, of which I am a member, and SHRM is the world's largest professional association devoted to human resource management, and it is uniquely positioned to provide insight on workplace leave policies.

Please note that I do not sit here before you today as merely an H.R. professional, but as an employee who is personally benefiting from the act's provisions. I was diagnosed with breast cancer in September and have had two separate surgeries and have just finished undergoing chemotherapy.

With cancer as a chronic condition, my need to use FMLA leave continues on an intermittent basis. The benefits afforded under the FMLA allow me to take time off as necessary for my treatments and for the often unpredictable complications of chemotherapy. The FMLA also allows me to take time off without any accompanying stress or anxiety about my absence from the workplace.

Therefore, my perspective upon this issue today is based on real experience tempered with an appreciation for the needs and concerns of employers.

Both employers and employees benefit from workplaces that foster and support an appropriate balance between work and family demands, and the Family and Medical Leave Act was premised on this principle. While I believe that H.R. professionals work diligently to assist employees in striking this balance, after 15 years of experience administering FMLA leave, I am confident this important statute is in need of modest, yet important fixes to ensure that it serves the best interests of both employees and employers.

Undoubtedly, the Family and Medical Leave Act has helped millions of employees and their families. For the most part, the family leave portion of the FMLA, which provides up to 12 weeks of unpaid leave for the birth or adoption of a child, has worked as Congress intended, resulting in few challenges for either employees or employers.

Key aspects of the regulation governing the medical leave provisions, however, which provide 12 weeks of unpaid leave for an employee to care for a close family member with a serious health condition or to recover from their own serious illness, have drifted far from the original intent of the act, creating challenges both for the employers and employees.

H.R. professionals have struggled to interpret various provisions of the FMLA, including the definition of a serious health condition, intermittent leave, and medical certification.

Madam Chair, challenges with FMLA implementation have been well documented over the last several years and, as such, SHRM believes policymakers should address the underlying problems both employers and employees encounter with the FMLA. To this end, SHRM was pleased with the recent FMLA proposal by the Department of Labor.

While a number of the changes proposed by the DOL will certainly improve FMLA implementation, particularly the medical certification process, the society believes the proposal fell short in two key areas: The proposed regulation fails to significantly improve the definition of a serious health condition, and there still are no meaningful tools available for employers to effectively manage misuse of unscheduled intermittent leave. These are important issues that are fundamental to effective FMLA administration and, as such, Congress should strongly consider policy options to remedy these challenges.

SHRM shares Congress's interest in providing families additional work flexibility, but we are concerned about proposals to expand the FMLA Act given the problems administering current FMLA leave. While well intentioned, proposals that build on a flawed FMLA framework will only exacerbate the significant challenges both employers and employees currently encounter.

SHRM also has serious concerns about proposals that mandate paid leave. While many employers offer generous voluntary paid leave benefits to better assist employees in balancing work and personal needs, it is important to remember that paid leave benefits are only one element of the employee's total compensation package, and employers have a finite pool of compensation dollars.

Employers, not the federal government, are best situated to know the benefit and compensation needs of their employees and, as such, a one-size-fits-all paid leave mandate really restricts an employer's flexibility in designing and implementing employee benefit plans, which oftentimes will work against employees.

Therefore, SHRM respectfully requests that Congress fix the documented shortfalls of the FMLA before considering additional leave mandates that curtail an employer's flexibility.

In conclusion, SHRM does applaud the subcommittee's examination of the FMLA to gauge whether this leave law is meeting the needs of both employees and employers and appreciates the oppor-

tunity to provide this testimony on this important leave statute. The society looks forward to working with the subcommittee to craft practical workplace flexibility policies that meet the needs of employees, families, and employers.

And thank you again for inviting me here today, and I look forward to answering your questions.

[The statement of Ms. Cossette follows:]

**Prepared Statement of Brenda Cossette, Human Resources Director, on
Behalf of the Society for Human Resource Management**

Chairwoman Woolsey, Ranking Member Wilson and distinguished members of the Subcommittee, my name is Brenda Cossette and I am the Human Resources Director for the City of Fergus Falls, Minnesota. I commend the subcommittee for holding this hearing on the Family and Medical Leave Act (FMLA) and I appreciate the opportunity to provide testimony to you today.

By way of background, I am a certified senior professional in human resources with over 25 years experience in human resource management. My experience includes work in government, manufacturing, banking, wholesale/retail grocery as well as health care. In my current role, I manage the Human Resource function for the City of Fergus Falls, Minnesota, ensuring compliance with state and federal laws, negotiating and administering four labor contracts as well as establishing and administering internal policies and procedures, including the Family and Medical Leave Act.

I appear today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest professional association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

It is important for you to know that do I not sit before you today as merely an HR professional who has administered the FMLA since it was enacted in 1993, but as an employee who is personally benefited from the Act's provisions. I have been diagnosed with breast cancer, have had two separate surgeries, and am currently undergoing chemotherapy. With cancer as a chronic condition, my need to use FMLA leave continues on an intermittent basis. The benefits afforded under the FMLA allow me to take time off as necessary for my treatments and for the often unpredictable complications of chemotherapy. The FMLA allows me to take time off without any accompanying stress or anxiety about my absence from the workplace.

Given my personal familiarity with the FMLA, my perspective on the issues before us today is based on real experience, tempered with an appreciation for the needs and concerns of employers in my home state of Minnesota. Thank you for giving me an opportunity to share my personal and professional experiences with you.

In addition, SHRM is uniquely positioned to provide insight on workplace leave policies. The Society's membership is comprised of HR professionals who are responsible for administering their employers' benefit policies, including paid time-off programs as well as FMLA leave. On a daily basis, HR professionals must determine whether an employee is entitled to FMLA leave, track an employee's FMLA leave, and determine how to maintain a satisfied and productive workforce during the employee's FMLA leave-related absences.

FMLA Overview

Both employers and employees benefit from workplaces that foster and support an appropriate balance between work and family demands, and the Family and Medical Leave Act was premised on this principle. And while I believe that HR professionals work diligently to assist employees in striking this balance, after 15 years of experience administering FMLA leaves, I am confident this important statute is in need of modest, yet important fixes to ensure that it serves the best interests of both employees and employers.

Family Leave Working as Congress Intended

Undoubtedly, the Family and Medical Leave Act has helped millions of employees and their families since its enactment in 1993, and as an HR professional, I have personally witnessed employees reap the important benefits afforded under this law. For the most part, the family leave portion of the FMLA—which provides up to 12

weeks of unpaid leave for the birth or adoption of a child—has worked as Congress intended, resulting in few challenges for either employers or employees. As evidenced in the 2007 SHRM Survey FMLA and Its Impact on Organizations, only 13 percent of respondents reported challenges in administering FMLA leave for the birth or adoption of a child.

When my son was born over 23 years ago, I did not have FMLA leave protection, which caused me some anxiety as I had a complicated delivery and premature infant, requiring me to take three months of leave as well as more time to deal with the respiratory complications that came with a premature infant. I personally believe that FMLA is a wonderful benefit for working men and women who have families, as they can take leave for the birth or adoption of a child without angst over losing their job or benefits. FMLA leave allows a new parent to take time to adapt to their parenting role and bond with their child, and this would not be easily done if they had to worry about their job or benefits.

Medical Leave Challenges

Key aspects of the regulations governing the medical leave provisions, however, have drifted far from the original intent of the Act, creating challenges for both employers and employees. In fact, 47 percent of SHRM members responding to the 2007 SHRM FMLA Survey reported that they have experienced challenges in granting leave for an employee's serious health condition as a result of a chronic condition (ongoing injuries, ongoing illnesses, and/or non-life threatening conditions). HR professionals have struggled to interpret various provisions of the FMLA, including the definition of a serious health condition, intermittent leave, and medical certifications.

HR professionals have two primary concerns with the Act's regulations: the definitions of "serious health condition" and "intermittent leave." For example, with regard to the definition of serious health condition, the Department of Labor (DOL) issued a statement in April 1995 advising that conditions such as the common cold, the flu, and non-migraine headaches are not serious health conditions. The following year, however, the DOL issued a statement saying that each of these conditions could be considered a "serious health condition." Practically any ailment lasting three calendar days and including a doctor's visit, now qualifies as a serious medical condition (due to DOL regulations and opinion letters). Although Congress intended medical leave under the FMLA to be taken only for serious health conditions, SHRM members regularly report that individuals use this leave to avoid coming to work even when they are not experiencing a serious health condition.

Furthermore, HR professionals encounter numerous challenges in administering unscheduled, intermittent leave. It is often difficult to track this type of leave usage, particularly when the employee takes FMLA leave in small increments. Unscheduled, intermittent leave also poses significant staffing problems for employers. When an employee takes leave of this nature, organizations must cover the absent employee's workload by reallocating the work to other employees or leaving the work unfinished. For example, 88 percent of HR professionals responding to the 2007 SHRM FMLA Survey Report indicated that during an employee's FMLA leave, their location attends to the employee's workload by assigning work temporarily to other employees. In most cases, it is not cost-effective to use temporary staff because the period to train a temporary employee is sometimes longer than the leave itself. Furthermore, employers typically do not receive sufficient advance notice regarding an employee's need for FMLA leave, thereby making it difficult to obtain temporary help on short notice.

In addition to staffing problems, "intermittent leave" (as defined in the FMLA regulations) has resulted in numerous issues related to the management of absenteeism in the workplace. The most common challenge HR professionals encounter in administering medical leave, for example, is instances in which an employee is certified for a chronic condition and the health care professional has indicated on the FMLA certification form that intermittent leave is needed for the employee to seek treatments for the condition. This certification in effect grants an employee open-ended leave, allowing leave to be taken in unpredictable, unscheduled, small increments of time. The ability of employees to take unscheduled intermittent leave in the smallest time units that the employer uses, often one-tenth of an hour or six minutes, means that employees can rely on this provision to cover habitual tardiness. While serious health conditions may well require leave to be taken on an intermittent basis, limited tools are available to employers in order to determine when the leave is in fact legitimate. As a result, 39 percent of HR professionals responding to the 2007 SHRM FMLA Survey Report indicated that they granted FMLA leave for requests that they perceived to be illegitimate.

15 Years Later—FMLA Clarifications Necessary

The challenges outlined above have been well-documented over the last several years most notably in numerous congressional hearings, agency stakeholder meetings and through submissions to the DOL Request for Information on the FMLA regulations. SHRM supports the goals of the FMLA and wants to ensure that employees continue to receive the benefits and job security afforded by the Act. However, given the significant challenges HR professionals continue to experience with FMLA administration, SHRM respectfully suggests that policymakers take steps to address the underlying problems both employers and employees encounter with the FMLA.

Last year the DOL completed a thorough review of the effectiveness of the FMLA regulations in which the Department received over 15,000 comments from employers, employees and other interested organizations. The June 2007 DOL Report on the FMLA noted that in many instances, when it comes to the “family” portion of FMLA, the regulations are basically working as Congress intended with few concerns for employers or employees. However, the report also highlighted that in other areas, particularly in the “medical” leave portions of the regulations, differing opinion letters, federal court rules and regulator guidance have clouded and sometimes undermined key provisions of the FMLA. As outlined above, these findings accurately reflect the cumulative experiences of HR professionals who have been administering FMLA leave for the last 15 years.

As you know, the Department’s review of the FMLA regulations culminated in the publication of a Notice of Proposed Rulemaking (NPRM) to update the Family and Medical Leave Act regulations on February 11, 2008. The comment period for this NPRM closes on April 11, 2008, and SHRM will provide a copy of our comment submission for the hearing record.

In short, while SHRM appreciates a number of the changes proposed by the DOL, particularly the medical certification process, the Society believes the proposal fell short in two key areas—the proposed regulation fails to significantly improve the definition of a serious health condition and there still are no meaningful tools available for employers to effectively manage misuse of unscheduled intermittent leave or to address many of the unintended consequences of the existing regulations. These are important issues that are fundamental to effective FMLA administration and as such Congress should strongly consider policy options to remedy these challenges.

Despite these shortcomings, SHRM believes this regulatory action is an important step toward restoring the balance intended by Congress between employers’ business needs and employees’ need for time to attend to important family and medical issues. After all, the original purpose of the FMLA, as envisioned by Congress, will never be fully realized until both the employee and employer communities feel comfortable in their determination that an employee is rightly entitled to FMLA leave.

FMLA Expansions

While SHRM shares Congress’ interest in providing families additional work flexibility, we are concerned about proposals to expand the Family and Medical Leave Act, including paid leave mandates, given current problems implementing FMLA leave. As outlined above, there is already a lengthy record of problems with administering leave under the Act due to confusing and inconsistent regulations. While well intentioned, proposals that build on a flawed FMLA framework will only exacerbate the significant challenges both employers and employees currently encounter.

SHRM also has serious concerns about proposals that mandate paid leave. As members of the Subcommittee know, in addition to the benefits afforded workers under the FMLA, many employees are also eligible for paid-time-off benefits provided by their employer. In fact, many employers offer generous voluntary paid leave benefits to better assist employees in balancing work and personal needs as paid leave programs are a key recruitment and retention tool. However, paid leave benefits are only one element of an employee’s total compensation package that includes not only wages but often retirement benefits, health care coverage, and other benefits. To meet business objectives, employers have a finite pool of compensation dollars. At the same time, costs associated with complying with various federal and state mandates continue to rise along with the cost of offering employee benefit plans, consuming a larger portion of the compensation pool, thereby limiting resources for wage increases and other important benefits such as paid-time-off programs. SHRM believes that employers, not the federal government, are best situated to know the benefit and compensation needs of their employees. As such, “one-size-fits-all” paid leave mandates restrict an employer’s flexibility in designing and implementing employee benefit plans, which often times works against employees. Therefore, SHRM respectfully requests that Congress fix the documented shortfalls

of the FMLA before considering additional leave mandates that curtail an employer's flexibility, including paid leave proposals.

Conclusion

SHRM applauds the Subcommittee's examination of the Family and Medical Leave Act to gauge whether this leave law is meeting the needs of both employees and employers and appreciates the opportunity to provide testimony on this important leave statute. As noted earlier, HR professionals and their organizations are committed to both the proper application of the FMLA in the workplace as well as assisting their employees in balancing their work and family demands. The Society looks forward to working with the Subcommittee to craft practical workplace flexibility policies that meet the needs of employees, their families, and employers.

Chairwoman WOOLSEY. Thank you.
Ms. Ness?

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

Ms. NESS. Good afternoon, Congresswoman, Congressmen. Thank you for holding this hearing.

I am Debra Ness, president of the National Partnership for Women & Families, and for more than 3½ decades, we have been working on issues important to women and families, and we are proud of our history as the organization that led that 9-year campaign for the Family and Medical Leave Act, and, today, we lead a coalition of more than 200 groups who are working to defend and expand the Family and Medical Leave Act.

As everyone has noted, this is the 15th anniversary of the FMLA, and in our mind, its enactment was truly a watershed moment for working families because it was more than just the law. It profoundly changed our culture and our expectations of the workplace, and it has demonstrated that family-friendly policies are good for businesses as well as for workers and their families.

Many of us here today, but most particularly Congresswoman Schroeder, were instrumental in winning the passage of the FMLA. We overcame a lot of scare tactics—businesses claimed that the law would be the end of them—but 15 years later, the FMLA is well established and businesses have flourished.

And it is important for us to remember those scare tactics when we talk about expanding the law because opponents will use them again and again, and we have to keep in mind that they are today what they were then, unfounded claims, and if we summon the courage to move forward, we will prove once again that family-friendly policies work well for everyone.

This anniversary is especially sweet for us because it is also the year that marks the first time the FMLA has been expanded, and, Congresswoman, thank you for holding the important hearing last fall that helped lead to the fact that today military families can use the FMLA for up to 26 weeks to take care of soldiers injured in combat. We are thrilled that this law has been expanded to help families that have sacrificed so much for our country.

But, at the same time we celebrate that victory, we are also deeply concerned about efforts to chip away at the progress we have made. As we all know, comments are due tomorrow on the regulatory changes proposed by the Department of Labor, and we,

of course, will submit comments, and, once again, we will put forth comprehensive evidence that the FMLA is working well.

In fact, it is estimated that FMLA has been used approximately 100 million times by workers since its passage, and, for the most part, the FMLA is accepted by employers, and in the department's own words, "They are pleased to observe that in the vast majority of cases, the FMLA is working as intended."

Yet the changes that are proposed in our mind really begin to upset the careful balance that the FMLA strikes between the needs of employers and the needs of workers. If the regulations are enacted, workers will find that they have to give more notice, they have to provide more information, they have to have more medical examinations, and they have to respond to employer requirements in a shorter timeframe.

Employers, on the other hand, will have more time to respond to requests for FMLA leave and more ways to delay or deny it. We are especially concerned that the regulations will make it more difficult for workers to use their own earned paid leave while they are on FMLA and that it will increase the direct contact that employers have with their employees' medical providers.

So we believe these proposals actually go in the wrong direction. Instead of limiting employees' access to Family and Medical Leave, we should be exploring ways to build on it and to expend its protections to more families. Right now, as we all know, about 40 percent of workers in this country are not even covered by the law, and millions more workers who desperately need to use it do not take it because they cannot afford to take unpaid leave.

So there are many things we can do. We need to expand the FMLA so that it covers all workers. We need to make it possible for workers to take time off for critically important things like meeting with a child's teacher or obtaining needed services to deal with domestic violence. We should be able to allow workers to take time off for other family members, like grandparents and siblings, adult children, domestic partners, and as Ms. Hunt just pointed out, we need to fix the FMLA so it covers flight attendants.

But perhaps most urgently, we need to provide some kind of income support for workers when they take leave. You know, so many lawmakers speak passionately about building a nation that values families, but millions of workers cannot take care of their families because they just cannot miss a paycheck and still manage to make ends meet. We can change that.

California was the first state to pass a paid family leave law, Washington State last year became the second, and I think it is really exciting that this week New Jersey becomes the third state. But we cannot wait for 47 other states to do the same. We need a national paid leave law, and, Representative Woolsey, I know this is something that you are working on. I know you are aware that Senators Dodd and Stevens have introduced a bipartisan bill in the Senate and that Representatives Stark and Miller are planning to introduce a companion bill here in the House. This family leave insurance bill really needs to be passed.

There is just one more thing that I want to add here, and that is it is important for us to remember that FMLA coverage is limited to serious, long-term illnesses. It does not help when you are

dealing with a common illness like the flu or you need to go for routine medical care like your mammogram or your colonoscopy.

Millions of workers are out of luck when they need that kind of care, and that is because almost half of our workforce does not have a single paid sick day. They either go to work sick or they send a sick child to school because they do not have a choice. The Healthy Families Act, which has been proposed in both the House and the Senate, would guarantee workers 7 paid sick days a year in businesses with 15 or more employees. It is already working in San Francisco. It is about to become law here in the District, and we really need to adopt this as a minimum labor standard nationwide.

So, in closing, I would just echo something that Congresswoman Schroeder said. Our workplaces are terribly out of sync with the realities that working families face today. We do not, for the most part, in our families, have full-time caregivers at home. We lag shamefully behind other countries when it comes to taking care of our families, and we can do better.

So there are two things: Let's expand the Family and Medical Leave Act, and let's set a minimum standard for paid sick days for all workers so that workers do not have to choose between their families, their health, or their jobs.

Thank you very much.

[The statement of Ms. Ness follows:]



**Written Testimony of Debra Ness
Subcommittee on Workforce Protections
Hearing on the Family and Medical Leave Act
April 10, 2008**

Good Morning. I am President of the National Partnership for Women & Families, a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care, and policies that help workers in the United States meet the dual responsibilities of work and family.

The National Partnership for Women & Families leads a broad, diverse coalition of more than 200 groups dedicated to defending and expanding the Family and Medical Leave Act (FMLA) on behalf of workers across the country. The coalition reaches across a wide spectrum of concerned citizens and includes 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 broad-based coalition advocating for its passage.

I am especially pleased to be here today because this year marks the 15th anniversary of the FMLA. Its passage was a watershed moment for government support of working families in the United States. The law guarantees eligible workers up to twelve weeks of unpaid leave each year to care for immediate family members or to address serious personal health concerns. By making job-protected leave available to all eligible workers, and requiring that health insurance continue through the leave, the law has enabled both women and men to meet their responsibilities for their families without sacrificing their jobs and long-term economic stability. The law also helps combat gender discrimination and pernicious stereotypes about gender roles because both male and female workers can take FMLA leave. The law helps to ensure that women are not penalized or unfairly denied job opportunities simply because of assumptions about their family care giving responsibilities.

To celebrate this anniversary, the National Partnership for Women & Families launched a new website, www.thanksfmla.org, for workers to learn about the FMLA and to share their stories about how the law has helped in their lives.

Many of us in the room today were instrumental in the long fight to pass the FMLA. We braved an unrelenting stream of attacks from businesses that claimed the law would be the end of them. Fifteen years later, the law is well established and businesses have flourished. It is important to remember that lesson when we talk about expanding the FMLA and creating a way to include wage replacement while workers are on leave. We will undoubtedly hear that the same scare

tactics and predictions that the sky will fall again. It did not fall when we passed the FMLA, and it will not fall if we make this basic family support available and accessible to more workers. In fact, as we explain in more detail below, the strongest economies in the world are in countries that provide paid family leave to all workers. The FMLA is good for families, and it is good for business. Expanding it will make it even more so.

It is an exceptionally sweet anniversary for supporters of the FMLA because this year also marks the first time the law has been expanded since its inception. Now under the FMLA, military families will be able to take up to 26 weeks of leave to help care for their soldiers injured in combat. These families have sacrificed so much for our country, and we are very pleased that the expansion of the FMLA will help them access a necessary support – leave to care for a wounded soldier. Additionally, military family members will be able to use FMLA leave to help them cope with the deployment of a close relative.

While the anniversary and expansion of the FMLA are cause for celebration, we are also very concerned for the vitality of the law given the proposed changes put forward by the Department of Labor in February. Comments to these changes are due tomorrow, April 11th. The National Partnership for Women & Families has drafted a comprehensive response to the proposed changes and to the questions raised by DOL regarding the implementation of the expansion of the FMLA for military families. As my testimony will make clear, the FMLA is working and working well. The law does not need any significant regulatory changes. Rather, we should be looking at how we can expand it so more workers can realize its promise of job-protected leave in times of need.

I. The FMLA is Working Well

Since 1993, workers have used the FMLA approximately 100 million times to take the unpaid time off that they need to care for themselves or their families.¹ This includes employees from all walks of life. Twenty seven percent of leave takers earn less than 30,000/year; 51 % of leave takers earn between \$30,000 and \$74,999/year; and 22% of leave-takers earn \$75,000/year or more.² A significant number of leave takers are men (42 %),³ who use the FMLA for both their own serious illness (58 %) and to care for seriously ill family members (42 %).⁴ When taken, leave is usually quite short: the median length is just 10 days.⁵

¹ The Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information 2007 Update (U.S. Department of Labor June 2007) ("DOL 2007 Report") at 129. We based this estimate on multiplying the Employer Survey Based Estimate by 15.

Unfortunately, the data we have on FMLA leave use is quickly becoming out of date. The Department of Labor last surveyed employers and employees on the FMLA in 2000. Since then, the Department has not conducted any national survey on the FMLA. In its most recent Request for Information and Report, the Department appeared to question the data from its 2000 Report, although it did not offer substitute data, nor has it attempted any more recent national survey. The Department needs to conduct scientifically sound survey research on the FMLA so that policy decisions can be made based on that information, rather than on selected employers' complaints.

² David Cantor et al. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update*, (U.S. Department of Labor, Washington, DC, 2000) ("DOL 2000 Report") at 3-7.

³ *Id.*

⁴ *Id.* at 4-17.

⁵ *Id.* at 2-4.

Workers overwhelmingly support the FMLA. In 2006, DOL issued a Request for Information about the FMLA and received thousands of comments from individual workers concerning how incredibly important the FMLA is in their lives. Indeed, DOL observed that it could have “written an entire report” based solely on the individual stories supplied by workers.⁶ Some of the stories included by DOL in its report illustrate why the FMLA is so important:

As a cancer survivor myself, I cannot imagine how much more difficult those days of treatments and frequent doctor appointments would’ve been without FMLA. I did my best to be at work as much as possible, but chemotherapy and radiation not only sap the body of energy, but also take hours every day and every week in treatment rooms.⁷

FMLA has tremendously helped my family. I have a child born w/[asthma], allergies & other medical issues. And, there are times I’m out of work for days[. If I didn’t have FMLA I would have been fired [a long] time ago. I’ve been able to maintain my employment and keep my household from having to need assistance from the commonwealth.⁸

The FMLA has also been accepted and welcomed by employers. Data from the most recent national research on it, conducted by the U.S. Department of Labor, show that the vast majority of employers in this country report that complying with the FMLA has a positive or neutral effect on productivity (83 percent), profitability (90 percent), growth (90 percent), and employee morale (90 percent).⁹ The Act benefits employers in numerous ways, most notably the savings derived from retaining trained employees, from productive workers on the job, and from a positive work environment.

The Department of Labor agrees that the FMLA is working well. According to its 2007 Report:

[The] Department is pleased to observe that, in the vast majority of cases, the FMLA is working as intended. For example, the FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to care for family members with serious health conditions. The FMLA also appears to work well when employees require block or foreseeable intermittent leave because of their own truly serious health condition. Absent the protections of the FMLA, many of these workers might not otherwise be permitted to be absent from their jobs when they need to be.¹⁰

Of course, we recognize that the FMLA is only working well for those employees who can access its protections. In the rest of my statement, I will discuss where we should expand the law to cover more employees. At the same time, we should also look at how we need to fix the law—a good example of that is making sure that flight attendants are covered under the FMLA, and there is a bill to make that happen currently pending in Congress.

⁶ DOL 2007 Report at iv.

⁷ *Id.* at 1.

⁸ *Id.* at 2.

¹⁰ DOL 2007 Report at v.

II. The Department of Labor's Proposed Regulations

In February, the Department issued new proposed regulations for the FMLA. Taken as a whole, the proposed changes are cause for concern for workers. The proposed changes upset the careful balance struck by the FMLA between the needs of employers and workers to favor the employers. If these regulations are enacted, workers will find that they must give more notice, more information, have more medical examinations, and respond to employer requirements in shorter time frames. Employers, on the other hand, would have more time to respond to employees' request for FMLA leave and more ways to delay or deny FMLA leave.

These proposed changes that could make it harder for workers are almost entirely based on anecdotal information from employers. DOL has not conducted any rigorous analysis or surveys of how the law is working since 2000. We believe that lacking such data, DOL should not be making wide ranging policy changes. Furthermore, in the proposed regulations, DOL has provided for limited additional education for employees to learn about these changes and the FMLA in general. We already know that many employees do not take FMLA leave because they are simply unaware that they have the right to do so. These proposed regulatory changes may make it even more difficult for employees, including those who know about the FMLA, to take their FMLA leave. Thus, DOL should be proposing a major mandatory FMLA education campaign for workers and employers to accompany any changes it makes.

At the same time that we are opposing many of DOL's proposed changes for the FMLA, we are also submitting comments supporting the expansion of the FMLA for military family members. Military families need this expanded FMLA leave now and clearly Congress intended the provisions to be effective immediately. Thus, we have asked DOL to issue interim regulations for the military provisions as rapidly as possible. DOL should not link the issuance of regulations for the military provisions to the regulations they've proposed for the rest of the FMLA. Our hope is that the military regulations will move forward immediately while DOL studies the comments it receives on the other parts of their proposed regulations.

It is also important to note that during the Request for Information process employers and their advocates asked for a broad range of changes that would have severely curtailed FMLA rights. In part because of the strong support shown by workers, FMLA advocates, and law makers for the FMLA, DOL did not chose to put forward some of the most damaging employer suggestions.

Among the proposed changes that DOL did put forward, the ones about which we are most concerned are the following:

- *Making it More Difficult to Use Paid Leave While on FMLA Leave*
Being unable to afford to take unpaid leave is the most common reason that workers who qualify for and need FMLA leave do not take it. Currently, workers are relatively free to use their earned paid leave (vacation time and personal time) while on FMLA leave so they are able to be paid while on FMLA leave. Under the proposed regulations, in order to use that earned vacation or personal time while on FMLA leave, workers will have to meet the employer's rules for using vacation or personal time. Many employers require advance notice for using vacation leave, require that it be used in day long increments, or

refuse to allow vacation leave during certain times of the year. Because of these employer policies, this change would make it more difficult for workers to use their accrued paid time off while on FMLA leave. Many workers may not be able to take the FMLA leave they need because they cannot afford to miss a paycheck.

- *Increased Requirements for Workers Seeking Leave*
If enacted, the proposed regulations will shorten the time in which employees must give notice of their need for leave, increase the amount of information they must give their employers, require them to follow certain employer practices for notification, and increase the number of medical re-certifications and fitness for duty certifications employees must produce. Employees who fail to meet these new standards may find their FMLA leave delayed or denied. Meanwhile, the proposed regulations extend the time employers have to respond to employee requests for leave.
- *Increased Direct Contact between the Employer and the Employee's Health Care Provider*
Currently, if an employer wants to clarify information on a worker's FMLA medical certificate or authenticate the information, the employer has to follow a two step process. First, the employer has to obtain the employee's permission to talk to her doctor and then the employer has to have a medical professional talk directly with the worker's doctor. Under the proposed rule, to clarify information on the medical certification, an employer could contact an employee's health care provider after obtaining a medical release from the employee; there would not longer be a requirement that the employer use a health care provider to make this contact. If the employee refuses to allow the employer access to the health care provider, FMLA leave could be delayed or denied.

If the employer wants to check that the health care provider listed on the certificate actually saw the employee and filled out the certificate, under the proposed rules the employer could contact the health care provider directly, without getting the employee's permission.

Employees, especially those with serious health conditions that carry social stigma, are very concerned that employers will now have more direct access to their health information.

III. Expanding the Number of Employees Covered by the FMLA

Rather than working to limit employees' access to family and medical leave, we should be examining how we can make FMLA a reality for more employees. Currently, close to 40% of workers in the United States work for employers with less than 50 employees and thus are not covered by the minimal protections the FMLA provides. Analysis by the National Partnership shows that reducing the employer-size threshold to 25 workers would extend FMLA protections

to approximately 13 million more workers. This would reduce the percentage of employees not covered by the FMLA from 40% of the workforce to 29%.¹¹

Some states have already expanded their FMLA laws to cover small business. For example, Maine covers employers with 25 or more employees, Vermont covers employers with 15 or more employees, and Oregon covers employers with 25 or more employees.

It is also important to cover more employees by removing the requirements that limit employees from being eligible for FMLA leave because they have not been on the job long enough. FMLA leave is a basic labor standard. With very few exceptions, we do not allow other labor standards, such as minimum wage or basic workplace safety standards, to be accessed only by employees who have been on the job for a certain length of time. According to 2006 Bureau of Labor Statistics data, approximately 25% of all employees had 12 months or less of tenure on the job. This is true for men and women, African Americans and Asians. Hispanics have an even greater percentage of lower tenure employees (30%), and younger employees also have lower tenure (50% of employees ages 20-24 have 12 months or less tenure).¹² Removing job tenure requirements would give part time workers or workers employed at more than one job access to FMLA leave and ensure they are better equipped to meet critical family responsibilities without risking their jobs.

IV. Expanding the Family Members Covered by the Family and Medical Leave Act

Families in the United States are not “one size fits all,” and the FMLA needs to be expanded to recognize this reality. For example, several states have extended the protections of their state family and medical leave laws to domestic partners; Maine did so just last year. Ideally, the federal FMLA should be extended to all domestic partners. Furthermore, as families are more spread apart geographically than ever before and caregiving requirements are increasing as the population ages,¹³ extended family members like grandparents, siblings, adult children, and parents-in-law are either needing care or stepping forward to take care of family members in need. Currently, the FMLA does not recognize these relationships for the purposes of caregiving, leaving these caregivers without access to FMLA leave when they desperately need it.

I am glad to report that the new military leave provisions of the FMLA accommodate this dynamic and extend FMLA leave to qualifying “next of kin” rather than simply the family members currently covered in the FMLA. To truly support working families, we need for this expansion to apply to more than just military families.

¹¹ National Partnership for Women & Families, *Expanding the Family and Medical Leave Act to cover businesses with 25-49 Employees: The Impact in the US and in Each State*. Washington, DC: National Partnership for Women & Families, 1997.

¹² Bureau of Labor Statistics, *Distribution of employed wage and salary workers by tenure with current employer, age, sex, race, and Hispanic or Latino ethnicity*, January 2006 (available at <http://www.bls.gov/news.release/tenure.t03.htm>).

¹³ Individuals 65 years and older represent 12.4% of the population in 2006 and are expected to be 20% of the population in 2030. Department of Health and Human Services, Administration on Aging, *Statistics on the Aging Population*, (available at <http://www.aoa.gov/prof/Statistics/statistics.asp>).

V. Paid Sick Days- The Next Minimum Labor Standard:

FMLA coverage for illnesses is limited to serious, longer-term illnesses and the effects of long term chronic conditions. The statute is predicated on the belief that workers have access to sick time off in order to deal with illnesses that do not meet the FMLA standard of "serious" and for routine medical visits for themselves and their families. However, in reality, many workers do not have sick time and even those covered by the FMLA may not have job-protected sick time or sick time that they may use to care for a family member. In order to address this issue, we urge Congress to pass the Health Families Act, a law that guarantees seven paid sick days a year for full time workers and a pro-rated amount for part time workers employed in businesses with 15 or more workers.

Nearly 50% of all private sector workers do not have paid, job-protected sick days.¹⁴ Seventy-nine percent of low income workers do not have a single paid sick day,¹⁵ and 94 million workers do not have paid sick days that can be used to care for a sick child.¹⁶ The problem is particularly acute for working women, who are still predominantly responsible for meeting family caregiving needs. Almost half (49%) of working mothers report that they must miss work when a child is sick. And of these mothers, 49% do not get paid when they miss work to care for a sick child.¹⁷

The lack of paid sick days is a public health concern. Workers who disproportionately lack paid sick days work with the public every day. Only 22 % of food and public accommodation workers have any paid sick days. Workers in child care centers, retail clerks, and nursing homes also disproportionately lack paid sick days.¹⁸

No state requires private employees to provide paid sick days. Last year, San Francisco passed the first local ordinance requiring that private employers provide paid sick days. Reports after the first year show that the policy is working well and that businesses have been able to provide paid sick time with minimum difficulty. Last month, the District of Columbia became the second municipality to require paid, job-protected sick days.

Over a dozen cities and states are working to pass paid sick days laws to ensure this basic labor standard becomes a right for all workers. But illness knows no geographic boundaries, and access to paid sick days should not be dependent on where you happen to work. Paid sick days should be a basic labor standard like the minimum wage – there should be a federal minimum standard of paid sick days that protects all employees, with states free to go above the federal standard to meet the needs of their residents.

VI. Paid Family and Medical Leave

¹⁴ Testimony of Dr. Heidi Hartmann, Institute for Women's Policy Research, before the U.S. Senate Committee on Health, Education, Labor, and Pensions, 2006 (hereinafter "Hartmann 2006").

¹⁵ Jody Heymann, *The Widening Gap: Why America's Working Families are in Jeopardy and What Can Be Done About It*, Basic Books, 2000.

¹⁶ Hartmann, 2006.

¹⁷ Kaiser Family Foundation, "Women, Work and Family Health: A Balancing Act," Issue Brief, April 2003.

¹⁸ Vicky Lovell, *Valuing Good Health: An Estimate of Costs and Savings for the Healthy Families Act*, Institute of Women's Policy Research, 2005.

Politicians and lawmakers often speak passionately about building a nation that values families, and the FMLA was a monumental step toward this goal. But it was only a first step. Millions of Americans cannot afford to take advantage of the protections it affords. We strongly support expanding the FMLA to make it more accessible to all working families and to make paid family and medical leave an option for working families who simply cannot afford to take the unpaid leave the FMLA provides.

Without some form of wage replacement, the FMLA's promise of job-protected leave is a chimera for too many women and men. In fact, 78% of employees who qualified for FMLA leave and needed to take the leave did not because they could not afford to go without a paycheck.¹⁹ More than one-third (34%) of the men and women who take FMLA receive no pay during leave, and another large share of the population have a very limited amount of paid leave available to them.²⁰

Two months ago, we received a story from a woman in Colorado that illustrates how devastating the lack of wages while on leave can be:

I needed to take FMLA when I was pregnant. My job didn't offer paid leave when I gave birth to my daughter. Because of FMLA I was guaranteed time off when I was put on bed rest. Because it was unpaid I had to work from my bed and go back to work before my daughter was ready for me to go back. Financially I needed to go back to work. My daughter was 4 weeks old and on oxygen. I had to make special arrangements for a family friend to watch her instead of the childcare facility because of her age and special needs.²¹

When a personal or family medical crisis strikes, workers frequently have no choice but to take unpaid leave or leave their jobs. As a result, for many workers, the birth of a child or an illness in the family forces them into a cycle of economic distress. Twenty-five percent of all poverty spells begin with the birth of a child, according to The David and Lucile Packard Foundation.²²

The lack of paid family and medical leave hits low-income workers hardest, almost three in four low-income employees who take family and medical leave receive no pay, compared to between one in three and one in four middle- and upper-income employees.²³ In addition, low-income workers, as well as their children and family members, are more likely to be in poor health in large part because many lack health insurance and are not eligible for coverage under Medicaid and SCHIP.²⁴

Providing paid family and medical leave helps ensure workers can perform essential caretaking responsibilities for newborns and newly-adopted children. Parents who are financially able to

¹⁹ DOL 2000 Report at 2-16.

²⁰ *Id.* at 4-5—4-6.

²¹ Email Received by the National Partnership for Women & Families, www.thanksfmla.org, on February 5, 2008.

²² The David and Lucile Packard Foundation, 2001. *The Future of Children: Caring for Infants and Toddlers*.

Richard Behrman, ed. Los Altos, California: 11(1).

²³ DOL 2000 Report at 4-5 and A-2-31 Table A2-4.1.

²⁴ Kaiser Family Foundation, 2007. *The Uninsured: A Primer. Key Facts About Americans Without Health Insurance*. <http://www.kff.org/uninsured/upload/7451-03.pdf>.

take leave are able to give new babies the critical care they need in the early weeks of life, laying a strong foundation for later development. Paid family and medical leave may even reduce health care costs. Studies have shown that when parents are able to be involved in their children's health care, children recover faster.²⁵

Paid family and medical leave will also help the exponentially growing number of workers who are caring for older family members. Thirty-five percent of workers, both women and men, report they have cared for an older relative in the past year.²⁶ Roughly half of Americans 65 years of age and older participate in the labor force. Many require time away from work to care for their own health or the health of a family member.²⁷

A national paid family and medical leave program will help businesses. Studies show that the costs of losing an employee (advertising for, interviewing and training a replacement) is often far greater than the cost of providing short-term leave to retain existing employees. The average cost of turnover is 25% of an employee's total compensation.²⁸ When businesses take care of their workers, they are better able to retain them, and when workers have the security of paid family leave, they experience increased commitment, productivity, and morale, and their employers reap the benefits of lower turnover and training costs. Finally, establishing a national paid family and medical leave program will help small business owners because it will allow them to offer a benefit that they could not afford to provide on their own. This will help level the playing field with larger businesses, making it easier for small businesses to compete for the best workers.

As described below, only a handful of states offer paid family and medical leave programs for workers in their states. At the federal level, Senators Christopher Dodd and Ted Stevens have introduced the first-ever bipartisan bill that would provide wage replacement for workers on family and medical leave. The Family Leave Insurance Act would provide up to eight weeks of partially paid leave to people who need to take time off work for those reasons allowed under the FMLA. The bill would create a "Family Leave Insurance Fund," paid for by small contributions from both employers and workers, to allow for pooled risk and lower costs. The payments would be issued through employers' regular payroll system, to make it simple to administer, with prompt reimbursement from the Family Leave Insurance Fund. In the House, Representatives Stark and Miller plan to offer a companion to the Dodd-Stevens bill.

The public strongly supports paid family and medical leave. This fall, the National Partnership released national polling data that shows consistent support for paid family and medical leave. Respondents were asked whether they would support a plan in which workers and employers pay a dollar each every week for paid family and medical leave. 76% of the total sample were supportive. Hispanics and African Americans were even more strongly supportive—86% and

²⁵ Palmer S.J., Care of sick children by parents: A meaningful role. *J Adv Nurs*. 18:185, 1993.

²⁶ Families and Work Institute, *Highlights of the 2002 National Study of the Changing Workforce*, 2002.

²⁷ AARP Public Policy Institute, *Update on the Aged 55+ Worker*, 2005.

²⁸ Employment Policy Foundation 2002. "Employee Turnover – A Critical Human Resource Benchmark." HR Benchmarks (December 3): 1-5 (www.epf.org, accessed January 3, 2005).

84% respectively. Neither gender nor age affected support for the proposal: 73% of men and 78% of women supported it as did, as noted above, a large majority of respondents of all ages.²⁹

A. States Leading the Way

Realizing the importance of paid family and medical leave, state programs are starting to provide it. Already, the six states with temporary disability programs (California, Hawaii, New Jersey, New York, Rhode Island and Puerto Rico) provide wage replacement for women during the period of disability due to pregnancy.

California

In 2004, California became the first state to provide wage replacement while a worker is on family leave.³⁰ The most comprehensive of its kind, the law has given more than 13 million California workers (nearly one-tenth our country's workforce) partial income replacement (roughly 55% of wages) while they care for a new child or seriously ill family member. Premiums for the program are paid entirely by workers and are incorporated into the state's temporary disability fund. Critically, the wage replacement program covers all California workers who pay into the system; it is not limited to those who are covered by the federal or state family medical leave act. Thus, the program reaches workers who may need it the most—those who are not covered because they work for small businesses or do not have a long tenure at their current job. Studies of workers using the wage replacement offered by the law show that 88% do so to care for a new baby and 12% do so to take of another family member.³¹

Washington State

In May of 2007, Washington State became the second state in the country to enact a paid parental leave program. Washington's program will provide \$250.00 per week for five weeks to new parents who are staying home with their child. Although not as expansive as California's, Washington's program also covers more workers than the FMLA and provides job-protected leave for employees who work in establishments with over 25 employees.

New Jersey

This week, New Jersey passed a paid family and medical leave program. New Jersey expanded its existing temporary disability insurance program to add six weeks of paid family leave, providing two-thirds of a worker's salary while they are on leave, and making it available to all workers in the state.

Wage Replacement or Income Insurance Campaigns in Other States

More states are engaging in efforts to provide the necessary income for workers to be able to take the leave they need. In the past year there have been active campaigns to make family and medical leave affordable by guaranteeing some wage replacement in New York, Illinois, and

²⁹ Lake Research Partners, *Nationwide Polling on Paid Family and Medical Leave Poll*, conducted June 20-27, 2007.

³⁰ California's temporary disability system already provided payment when a worker was unable to work because of the worker's own disability, including disability due to pregnancy.

³¹ California Employment Development Department, Press Release, July 1, 2005 (available at <http://www.edd.ca.gov/newsrel05-36.pdf>).

Oregon. Additionally, Massachusetts, Pennsylvania, Arizona and Texas all introduced bills to create paid family and medical leave.

VII. Where We Stand Internationally

The United States stands alone among industrialized nations in its complete lack of a national program to ensure that workers are financially able to take leave when they have a new baby or need to care for an ill family member or recover from an illness. A Harvard/McGill study of 173 nations found that 169 guarantee paid leave to women in connection with childbirth, and 66 ensure that fathers can take paid paternity leave. The United States is the only industrialized country without paid family leave, and guarantees no paid leave at all for mothers. It is in the company of just three other nations: Liberia, Papua New Guinea, and Swaziland.³²

VIII. Conclusion

It is time – past time – we join the rest of the world and make sure our families do not have to risk their financial health when they do what all of us agree is the right thing—take care of a family member who needs them. Now is the time to put family values to work by protecting the FMLA from burdensome regulations that could make it harder for workers to utilize it, and by expanding it to cover more workers and help those who urgently need paid leave.

³² Jody Heymann, et al., *The Work, Family, and Equity Index: Where Does the United States Measure Up?*, 2007. Harvard School of Public Health. Project on Global Working Families. Boston, MA.

Chairwoman WOOLSEY. Thank you—all of you. This was a great group of witnesses.

Congresswoman Schroeder has to leave in just a few minutes, and I get to go first because I am the Chair of the subcommittee. So I am going to ask you a couple of straightforward questions, no surprise to anybody.

Given that the department is not using empirical data for their changes, I mean, admittedly so, so I am not asking you, Congresswoman, to use empirical data, but tell us if you will, what you would do to build on what we have learned over the last 15 years regarding bridging work and family and making the Family and Medical Leave Act more meaningful and erasing the embarrass-

ment that the richest nation in the world cannot take care of their working families.

Ms. SCHROEDER. Well, I thank you very much for that question, and I could give you a book. But, obviously, I really think when you look at what is covered by the federal government, there are all sorts of different standards. But 50 employees is a very high standard. I honestly think it should go way down to cover many more. Obviously, the smallest of the small cannot be covered, but it seems to me that 25 or 20 can be covered.

I think we do need to have 18 weeks. Most pediatricians talk about 4 months for bonding at least, minimum, and we do not have that. I think we do need to look at how to pay for this somehow so people can use it and so forth. I mean, there is a whole list. I think the intermittent is terribly important because of cancer patients and so forth. We went through that and vetted that very carefully.

Now I know that some employers will say, "Well, this is very hard, and people cheat" or "They do this." Well, you know, they may be stealing paper clips, and they may be doing other things. That is a management problem in that company. I think that most employers have found this works very well and that people are so relieved that they have this benefit that they do not abuse it. I am an employer of, you know, 50 people, and people do not abuse it. They really are very happy to have it, and, you know, part of it is your H.R. provisions and making sure that everybody understands what they are and that you are going to play by the rules.

But, to me, when you look at it, as I say, every developed nation has done so much more, and I do not understand why we have not done more, and I just cannot thank you enough for having these hearings 15 years later to say, "Let's go." It is amazing to me as a politician because everybody got so excited when it passed and everybody talks about how wonderful it was, and yet nothing else got added to it until just recently. So it is a disconnect, and I think it is time to connect it.

Chairwoman WOOLSEY. Well, Ms. Ness, what do we do for the employee who works for a company with two or three employees? I mean, should that person not have—

Thank you, Congresswoman. Thank you very much.

Should those workers not have any protection?

Ms. NESS. Well, you are talking to somebody who believes that these protections should be basic labor standards available to all workers.

You know, I think we need a paradigm shift in this country. I think for too long we have thought about these kinds of work-family policies as luxury benefits. They are not. These policies make the difference between economic survival and economic disaster for families in this country, and so we need to take into account the fact that in most families both parents are working. We do not have caregivers at home.

If we really value our families, if we really believe they are the backbone of our country, if we really believe that strong families are a necessary ingredient to a strong economy, then we need to extend these kinds of benefits as basic, basic labor protections to all workers.

Chairwoman WOOLSEY. Thank you.
I yield now to Mr. Wilson.

Mr. WILSON. Thank you, Madam Chairman.

Ms. Cossette, thank you for your very enlightening testimony. You certainly have a unique perspective on the FMLA, both as an employee who has personally benefited from its coverage and as a human resources professional who has confronted the day-to-day issues related to the administration of the act.

You noted in your written testimony the need to undertake some modest yet important fixes to ensure that the FMLA serves the interests of both employees and employers alike. It is important for us as we contemplate the state of the law to take into account the need to balance the interests on both sides.

In your experience, has that balance changed over the years?

Ms. COSSETTE. I think that over the years, as we have experience with it, I do not know that the balance has changed dramatically, although there have been some difficulties in administering it and that, of course, it falls more on the employers' side, but I think, at this time, we are not looking that anybody has any leave taken away from them. We think it is important that it works as Congress intended, and we do not want leave taken away from them.

But, you know, SHRM supports the DOL's proposal to update the regulations, but there are some elements of it that we think that would improve FMLA implementation, and there are two basic areas, and the first is really to get a clarification of what constitutes a serious health condition, and that is really been something over the last 15 years that has made it more difficult because so many things become a serious health condition under the law now, anything that requires you to be out at least 3 days and see a medical professional. That can be anything.

Second, the proposal does not address the size of increments of intermittent leave that can be taken, even though even according to the testimony from the DOL today, no issue received more substantial commentary to the Request for Information than the employees' use of unscheduled intermittent leave. So those are two areas that I think Congress may need to address, both intermittent leave and the definition of serious health conditions.

Mr. WILSON. Additionally, in your testimony, you spoke about the numerous challenges that human resources professionals face in administering unscheduled, intermittent leave. It must be difficult to keep track of this type of leave usage, especially when taken in small increments.

It would seem that the administrative and scheduling issues presented by this type of leave would be the most challenging part of the FMLA, particularly for smaller businesses. Could you elaborate on issues that employers face when tracking time in very small increments?

Ms. COSSETTE. Well, I will try to do that for you. The difference really between the type of unscheduled intermittent leave that I am using in order to recover from my treatments and the unscheduled intermittent leave that really creates the challenges for employers is, you know, when you have unscheduled intermittent leave, but you are still undergoing a regiment of treatments, it is more expected by the employer rather than those that are just

intermittent because they have had a certification that allows them for an entire year to just have intermittent leave when they choose to have it, and I have no idea as an employer when that is going to happen. It makes it difficult to schedule someone to replace them.

We do understand there are emergencies. There are always medical emergencies. We understand that. But I think there are some—this is an area where inappropriate use of FMLA is happening, and that is our challenge.

Mr. WILSON. And I want to commend your profession, human resources. I frequently—I am sure Congresswoman Woolsey does, too—will go and visit different plants and office buildings and facilities, and, invariably, the brightest-looking person, full of enthusiasm, is H.R., and then I appreciate the opportunities they give to persons and then the recommendations they make to other businesses in the event that they are not applicable where they apply. So your profession is extraordinary.

And one final note as I conclude, Ms. Lasco. One of my sons is an assistant prosecutor, and so I know the time that is required, and I really admire it. And your baby was cute as a button. So you are obviously doing very well professionally and with your family. God bless you.

Thank all of you for being here.

Ms. LASCO. Thank you.

Chairwoman WOOLSEY. Congressman Hare?

Mr. HARE. Thank you, Madam Chair.

Ms. Lasco, let me just give you a comment from a perspective. My father died shortly before my son was born, and, you know, he did not get a chance to see him, but I just want to say, you know, you talked about your mother leaving a gift, and I just want you to know that from my perspective, she left a wonderful gift for your grandson, that was you, and I appreciate everything that, you know, you do and how hard it is to have that balance.

Ms. HUNT, I just wondered—Tim Bishop asked me if I would try to fill in for him on it because he is the author of H.R. 2744, and I just have a couple of questions for you. I am proud to be a co-sponsor of it. Does your company have any paid leave policies?

Ms. HUNT. No.

Mr. HARE. You have none. So maybe could you describe for us what it is like to be on call?

Ms. HUNT. On call is a reserve flight attendant, and they are on call about 20 days a month, and they have to be at the airport in as short amount of time as an hour, so they cannot get another job. They are on duty for US Airways, or whatever airline, for 20 days a month. So they are considered full-time and they are paid as full-time because they are unable to look for other compensation during those 20 days.

Mr. HARE. So, just to clarify, there is no partial pay or supplemental wages for all the extra hours for the flight attendants that are on call?

Ms. HUNT. No.

Mr. HARE. None?

Ms. HUNT. None at all.

Mr. HARE. And then just my last question for you would be: How would H.R. 2744 make your situation different for all those employees that we are talking about here?

Ms. HUNT. I think it is a huge stress reliever to know that your job is going to be there and also that you do not have to constantly be negotiating, juggling your schedule, trying to make this work out, and being able to be there for your family member or for yourself and not have to be concerned about the job being there.

Mr. HARE. And, Ms. Ness, if I could, just two quick questions. We have had some—I believe Ms. Cossette testified that mandated paid family medical leave might be detrimental, and I wondered if you would, you know, care to comment on it. Do you think the claim is legitimate, and if not, why not?

And then my second question to you is: How would you respond to the claim that paid leave legislation is not needed because the employers are best situated to know what to do and what benefits to compensate their employees by?

Ms. NESS. Okay. Could you just repeat the last part of the first question? I did not hear the actual question.

Mr. HARE. Sure. I believe Ms. Cossette testified that mandating paid family medical leave would be detrimental, and I wanted to know from your perspective do you think that claim, you know, is legitimate, and if not, why not?

Ms. NESS. Okay. Well, I will start by saying that the claims of detriment to business are familiar. They are very similar to the claims we heard back in the early 1980s when we first started working on the Family and Medical Leave Act. They are the same claims that we hear any time we propose a move forward in terms of work family policies. They are the same claims we hear when we talk about paid sick days.

To my knowledge—and I think if you look at the track record of the Family and Medical Leave Act—you will not see that those claims have materialized. It did not hurt businesses. Workers did not lose their jobs. Employers did not cut back on benefits. In fact, after the Family and Medical Leave Act, we entered a thriving period in our economy.

So I think they are legitimate fears, but I think that those fears do not come to pass, and we cannot allow ourselves to be held back from moving forward because of those fears.

I think it would be nice if every employer provided these benefits voluntarily. I think many employers are doing the right thing. I think many are model employers. I think many are doing what they think is good for workers, but also what they think is good for the bottom line because there is lots of evidence that these policies are not just good for workers and their families. They are also good business sense.

But, unfortunately, not all employers do the right thing, and some employers are shortsighted, and so while it do not necessarily make good economic sense to refuse to provide these kinds of benefits, unfortunately, too many employers do, and that is why I think we need these laws.

Mr. HARE. And then just one quick question just for statistical purposes: You said what percent of workers have absolutely no paid leave at all?

Ms. NESS. About half of all workers in this country do not have a single paid sick day, and when you look at low-wage workers, it is almost 80 percent.

Mr. HARE. That is incredible. Well, we can do much better than that. We are going to.

Ms. NESS. We definitely could.

Mr. HARE. I appreciate your all coming. Thank you.

I yield back.

Chairwoman WOOLSEY. Congresswoman Shea-Porter?

Ms. SHEA-PORTER. Thank you.

Ms. Ness, I am a big advocate for privacy, and when I read through your testimony, I was very concerned. One of the proposed changes deals with the manner in which an employer can contact an employee's health care provider, and the changes that you mentioned in your testimony with respect to this issue are of particular concern to me, and I would imagine that these concerns are shared by most Americans.

This is fundamentally, I think, an issue of privacy. Can you go into more detail on the specific change and the chilling effect that allowing for direct employer-doctor contact will have both from the perspective of the single proposal and then also within the context of the other changes that are proposed?

Ms. NESS. Well, I am sure I do not need to tell you how concerned people are about privacy these days. It seems like we are constantly hearing about breaches in privacy and people's confidential information. When it comes to confidential medical information, those concerns are really off the charts.

People are very worried about their personal private medical information getting into the wrong hands or being used inappropriately, and most people will tell you they do not want their employers to have any more access to their medical history or any more contact with their medical providers than absolutely necessary.

I think the troubling thing about the proposed changes in the regs is that while it is true that the employee has to sign a HIPAA release, if you do not do that, you do not get your Family and Medical Leave. So, yes, you have to give consent for the employer to get the information from your medical provider, but if you do not, you do not get the benefit. So I think many employees feel like that is not much of a choice.

I think the other problem is that we have now made it possible for employers to talk directly with medical providers as opposed to there being a medical professional as an intermediary. Again, you are putting the employer one step closer to being able to get medical information, and people are very nervous about how that information could be used in the workplace.

Ms. SHEA-PORTER. Thank you, and that is exactly my concern. Can you think of any good reason they proposed this instead of allowing doctor-to-doctor relationships and correspondence there to make it so that somebody's employer can now speak directly? What do you think the reason for that was?

Ms. NESS. I am assuming that from an employer point of view, it is an opportunity to streamline the process and potentially the elimination of the expense of having a health care professional be in an intermediary role, but I balance that against the enormous

risks and the enormous harm that can be caused people if their medical information is used inappropriately or gets into the wrong hands.

Ms. SHEA-PORTER. I agree with you.

And thank you.

Chairwoman WOOLSEY. Mr. Wilson?

Mr. WILSON. Madam Chairwoman, I have a unanimous consent request that the Request for Information and a copy of the Notice of Proposed Rulemaking be put in the hearing record.

Chairwoman WOOLSEY. Without objection.

[The information follows:]

[Federal Register, 29 CFR Part 825, Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule, appears at the following Internet address:]

<http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>

[The Department of Labor's proposed rules change in the FMLA, dated February 11, 2008, appears at the following Internet address:]

<http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>

Chairwoman WOOLSEY. Well, thank you all for being here.

I particularly want to thank Assistant Secretary Lipnic. You were here the whole time. This does not happen. Thank you very much. And I respect you for staying, and I thank you for staying.

Now I also want to thank the mother of FMLA, Congresswoman Pat Schroeder, for being here and taking her time.

But I would like to remind everybody that in 1993 when we passed FMLA, that was following the election that was the year of the woman. That was actually my first year here in Congress, and I would like you to look at each other, who has been up here testifying before us, including our Assistant Secretary, all wonderful women, and that is because without a doubt whatever we do with FMLA affects women more than anybody else.

But this is not just a women's issue. It is a family issue. So thank you for what you have provided us. We have to learn from the last 15 years and build upon it, not take away from it, and all of you have helped us very much going in the right direction.

Thank you very much.

Oh, wait. I have other things to say. [Laughter.]

I have my script.

As previously ordered, members will have 15 days to submit additional materials for the hearing record.

Any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 15 days.

Without objection, this hearing is adjourned.

[Letter from the American Association of University Women, dated April 8, 2008, submitted by Ms. Woolsey follows:]

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
April 8, 2008.

Chairwoman LYNN WOOLSEY, Ranking Member JOE WILSON,
Subcommittee on Workforce Protections, Committee on Education and Labor, Rayburn House Office Building, Washington, DC.

DEAR CHAIRWOMAN WOOLSEY AND RANKING MEMBER WILSON: On behalf of the more than 100,000 bipartisan members of the American Association of University Women, I write to share AAUW's comments for the April 10, 2008 Subcommittee on Workforce Protections hearing, "The 15th Anniversary of the Family and Medical Leave Act: Achievements and Next Steps."

AAUW strongly supports the Family and Medical Leave Act, and is concerned that the Notice of Proposed Rulemaking and Request for Comments (NPRM) issued on February 11, 2008 is a sign that the U.S. Department of Labor is considering regulatory changes that would roll back the FMLA's protections or narrow the scope of its coverage. AAUW supports regulations that ensure workers can take full advantage of their FMLA protections, and strongly opposes any changes that would limit the scope of the FMLA.

AAUW's Support for the Family and Medical Leave Act

AAUW believes that creating work environments that help employees balance the responsibilities of work and family is good public policy—good for workers, good for families, and good for business. AAUW's member-adopted 2007-2009 Public Policy Program supports family and medical leave policies, which for women are critical to "equitable access and advancement in employment."¹ AAUW efforts in this area include long term advocacy from 1983 to 1992 to pass the Family and Medical Leave Act, which was finally signed into law in 1993.

The FMLA is a groundbreaking law that helps employees balance the increasing demands of work and family at little or no cost to employers. More than 50 million covered and eligible employees have used the FMLA to take care of themselves and their families during times of critical need without jeopardizing their health insurance benefits or job security.²

In January 2001, the bipartisan Commission on Family and Medical Leave released a study reporting that almost 90 percent of covered employers said that complying with the FMLA brought no or minimal increase in their administrative costs.³

Further, while the vast majority of employers reported the FMLA had no impact on business practices, productivity, and outcomes, some employers reported cost savings associated with lowered employee turnover, as well as improved employee morale.⁴

By making leave available to all eligible workers, the law has enabled both women and men to balance their work and family obligations without sacrificing long-term economic stability. The law also helps combat gender discrimination and insidious stereotypes about gender roles—because both male and female workers can take FMLA leave, the law helps to ensure that women are not penalized or unfairly denied job opportunities simply because of assumptions about their family caregiving responsibilities.

The FMLA is a real success story: it ensures that America has productive and successful workers and healthy and secure families. However, in the fifteen years since the law's passage, some clear areas for improvement have emerged. One of the biggest challenges in FMLA coverage clearly arises from its unpaid status. For example, 78 percent of eligible employees who have needed FMLA-covered leave have not been able to take it because they could not afford it.⁵

AAUW believes we should be putting our energy into expanding the FMLA to cover more workers, and into making paid family and medical leave and paid sick days available to all.

Context of Notice of Proposed Rulemaking and Request for Comments (NPRM)

AAUW has included comments in response to the NPRM below. However, these comments must be placed in context by outlining several overarching concerns AAUW has about the NPRM itself.

Any examination of the FMLA should focus squarely on how to ensure vigorous FMLA enforcement and compliance with the law, and to identify ways to expand the law to more workers in need of the FMLA's protections. AAUW is concerned that the NPRM is more focused on imposing limits or constraints on the FMLA, rather than full enforcement and compliance. This approach, if pursued, will impede the ability of workers to use the FMLA effectively to balance their work and family responsibilities, and will result in the erosion of the FMLA's core protections. It is

crucial for the U.S. Department of Labor to demonstrate a clear and consistent commitment to comprehensive implementation and enforcement of the FMLA.

In addition, the lack of available data is an unfortunate reminder of U.S. Department of Labor's own failure to conduct objective studies on the FMLA and its implementation in recent years. The Request for Information from 2007 took great pains to criticize the 2000 study of the FMLA undertaken by Westat and commissioned by the department ("2000 Westat Study"). But the 2000 Westat Study, even with its limitations, has been invaluable and represents the best available source for information on FMLA usage and coverage. The department has neglected to undertake significant efforts to update this research, thus leaving an information void. While the 2007 Request for Information solicited data from the public on a long list of questions, in many cases it is the U.S. Department of Labor that is best positioned to gather the relevant data to provide answers. To pursue changes to the FMLA regulations without such scientifically valid data, however, is unwarranted and inappropriate.

AAUW has identified these core concerns at the outset to make clear the inherent problems we believe are reflected in the NPRM that raise questions about its utility and could be used to undermine vital FMLA protections.

Responding to the NPRM: AAUW's Key Issues

Employee Eligibility

AAUW opposes any changes to the current eligibility standards that would impose additional obstacles for workers seeking to take FMLA leave. Existing eligibility rules were drafted to find the appropriate balance between the needs of employers and employees. At a minimum, we should preserve this balance and ensure that workers who meet the requirements for leave are able to take it. To the extent that changes to employee eligibility are under consideration, AAUW believes the focus should be on ways to expand FMLA eligibility to cover more workers who currently are unable to take leave when faced with a family or medical emergency.

Serious Health Condition

AAUW opposes any regulatory changes that would scale back the definition of "serious health condition." The FMLA enables eligible workers to take family or medical leave for serious health conditions,⁶ and its regulations establish objective criteria to be used to determine whether conditions qualify for leave.⁷ While the regulations set parameters to help define these conditions, they do not include an exhaustive list of conditions deemed "serious" or "not serious." As explained in the preamble of the FMLA regulations, the U.S. Department of Labor "did not consider it appropriate to include * * * the 'laundry list' of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally 'serious,' rather than apply the regulatory standard."⁸ The regulations are intended to create a reasonable standard that can be applied with sufficient flexibility to adjust for differences in how individuals are affected by illness—what can be a serious life threatening illness for one individual can be a minor illness for someone else.

The current regulations defining "serious health condition" reflect the practical reality that serious health conditions that require family or medical leave can sometimes be of a fairly short duration. Current FMLA regulations also appropriately acknowledge that the relevant consideration for leave eligibility is the impact of the medical condition on a worker's need for leave, and not the particular diagnosis. The existing regulations properly define a serious health condition by applying objective criteria to a worker's individual case, including duration of the illness and number of treatments, rather than categorically excluding any set of health conditions from FMLA coverage. AAUW believes the current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid criteria that could hinder the ability of workers to take leave when necessary.

Leave Flexibility

Regarding leave flexibility, AAUW believes the current regulations addressing intermittent leave appropriately balance workers' need for flexibility and employers' interest in having adequate staff to cover their workplace needs. The NPRM unnecessarily clarifies what leave qualifies for FMLA exchange. By making the transformability less flexible, workers are penalized. Leave flexibility not only benefits workers; it also benefits employers by maximizing workers' ability to meet workplace demands in the face of family and health challenges. AAUW supports the current regulations on intermittent leave.

The current regulations allowing for the substitution of paid leave for FMLA leave are essential to workers' ability to exercise their rights under the law. Permitting workers to use their accrued paid leave during FMLA leave makes it possible for them to afford to take time off to address critical family and medical issues. While the FMLA has been an enormous gain for millions of workers, many employees have been unable to make use of its benefits because the leave authorized under the FMLA is unpaid. Thus, AAUW believes the provisions in the law allowing employees and employers to substitute paid leave benefits for FMLA leave in some circumstances are particularly important and should remain in the regulations.

Medical Certification

AAUW opposes any changes to the medical certification regulations that would impose unnecessary obstacles for workers seeking FMLA leave and is disappointed with the proposed changes. The existing medical certification regulations appropriately balance a worker's interest in a manageable process that does not impose unreasonable burdens with the employer's interest in accurate certification of the worker's medical condition. Additionally, the regulations recognize that employer's judgment regarding an employee's health condition should not be substituted for the professional medical opinion of the employee's health care provider. AAUW opposes any changes to the certification requirements that would create unnecessary barriers and impose unnecessary costs to workers who need to take FMLA leave.

Conclusion

The FMLA represents a critical step towards this country becoming a nation that values working families, and more specifically, does not discriminate against working women who provide the lion's share of family caregiving. The law has been instrumental in enabling workers across the country, in every occupation and industry, to take leave to care for family members or themselves without putting their jobs, their healthcare benefits, or their family stability at risk.

AAUW urges the U.S. Department of Labor to make strong FMLA enforcement, support for existing FMLA regulations, and comprehensive FMLA research key priorities. The department should require employers to provide workers with adequate information regarding their rights and responsibilities under the FMLA. Employers also should be required to promptly inform workers when they are using their FMLA leave, and to maintain records of FMLA leave balances. AAUW also strongly recommends that the U.S. Department of Labor significantly increase efforts to educate the public about the FMLA. The department should use this NPRM process to publicly affirm its commitment to consistently and vigorously uphold and enforce the FMLA, and begin this public education process. AAUW strongly opposes any efforts to rollback the FMLA's hard-won protections, and urges the department to reject any recommendations in that direction.

AAUW will continue to oppose all efforts to weaken FMLA protections, which would limit women's equal opportunity in the workplace. AAUW will also work to advance policies that will improve workplaces for employees with family responsibilities of all kinds. Such protections and improvements are critical to women's employment opportunities and economic security.

If you have any questions, please feel free to contact me at 202-785-7720, or Tracy Sherman, government relations manager at 202-785-7730. Thank you for the opportunity to submit comments for the hearing on the important role of the FMLA.

Sincerely,

LISA M. MAATZ,
Director, Public Policy and Government Relations.

ENDNOTES

¹ 2007—09 AAUW Public Policy Program (approved July 2007).

² National Partnership for Women and Families. All statistics were compiled from the U.S. Department of Labor report, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update*. <http://www.nationalpartnership.org/portals/p3/library/FamilyMedicalLeave/THEFMLAWhatWhoHow.pdf>. Accessed January 5, 2007.

³ National Partnership for Women and Families. All statistics were compiled from the U.S. Department of Labor report, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update*. <http://www.nationalpartnership.org/portals/p3/library/FamilyMedicalLeave/THEFMLAWhatWhoHow.pdf>. Accessed January 5, 2007.

⁴ U.S. Department of Labor, Bureau of Labor Statistics. The 2000 THE FMLA Survey Report. Table A2-6.12 and A2-6.19. <http://www.dol.gov/esa/whd/theFMLA/theFMLA/APPX-A-2-TABLES.htm>. Accessed January 12, 2007.

⁵ U.S. Department of Labor, Bureau of Labor Statistics. The 2000 THE FMLA Survey Report. Table A1-2.17. <http://www.dol.gov/esa/whd/theFMLA/theFMLA/APPX-A-1-TABLES.htm>. Accessed January 12, 2007.

⁶ 29 U.S.C. §§ 2611(11), 2612(a)(1)(C), (D).

⁷ 29 C.F.R. § 825.114.

⁸ Regulatory Preamble, 60 Fed. Reg. at 2195 (emphasis added).

[Additional submissions of Mr. Wilson follow:]

[Statement of the National Business Group on Health follows:]

Prepared Statement of the National Business Group on Health

The National Business Group on Health (The Business Group) commends the Congress and the U.S. Department of Labor (DoL) for their efforts to improve an important law that has helped millions of workers and their families in times of serious medical illness and the birth or adoption of a child. The updated rules, recently proposed by the DoL, will make needed corrections and clarifications to help ensure that the benefits of the 15 year old law remain secure. The Business Group, representing over 300 large employers that provide health care coverage to more than 55 million U.S. workers, retirees and their families, is the nation's only non-profit organization devoted exclusively to finding innovative and forward-thinking solutions to large employers' most important health care and related benefits issues. Business Group members are primarily Fortune 500 and large public sector employers, with 63 members in the Fortune 100.

The Business Group appreciates the opportunity to submit this statement for the record. Today's hearing addresses necessary updates to the current law to assure appropriate use of the Family and Medical Leave Act (FMLA) in order to protect leave for those who need it, to improve productivity and employee morale, and to minimize the administrative burden that invites litigation and threatens the integrity of this important law.

Employers recognize the importance of family leave and these new rules will help to make clear what employees need to do to take FMLA leave for their own serious illnesses. The updated rules will also make it easier for human resources professionals and employers to administer FMLA for serious medical illnesses.

As stated recently by Helen Darling, President of the Business Group, "Employers consistently rank FMLA at the top of the list when asked what the most difficult federal regulation to administer is. While the family leave part of the law works well, unclear and sometimes conflicting regulations and court decisions pertaining to employees' medical leave continue to increase the administrative costs for employers and causes workplace disruption for employees."

The Business Group's members generally offer generous benefit and leave programs. Employees often have multiple options for leave—paid and unpaid. In many cases, employees may use accrued paid leave and FMLA simultaneously. The Business Group does not support mandated paid FMLA leave. The Business Group does support appropriate use of FMLA. However, many employers are experiencing dramatic increases in employees' requests for FMLA leave, often for brief time periods and non-serious medical conditions, and experience substantial burdens administering FMLA.

Clarifications Needed

While a number of items are addressed in DoL's proposed regulations, the following clarifications and technical corrections to FMLA are needed to help assure appropriate use of FMLA and to minimize the administrative burden and adverse productivity impacts of many of the current FMLA regulations:

- Clarifying the qualifying conditions for FMLA eligibility pertaining to employees' requests for leave due to their own health condition by adding an inability to work test to qualify for FMLA;
- Clarifying the definition of qualifying conditions and exclusions eligible for FMLA by specifying additional conditions that would generally qualify and conditions that would not generally qualify for FMLA;
- As a fallback to the two clarifications above, requiring mandatory inclusion of the diagnosis code or codes on the medical certification provided by the employee and attending physician to the employer;
- Establishing a minimum leave time in larger time increments;
- Permitting employers to require employees who request unscheduled intermittent leave to choose between extending FMLA leave or a leave of absence if the employer cannot reasonably accommodate the request;
- Permitting employers to contact providers to confirm information provided by employees;
- Maintaining the employer option of permitting employees to use accrued paid leave and FMLA simultaneously; and

- Permitting employers to exclude employees taking FMLA qualifying absences from employee bonus and recognition programs for attendance.

Employers Are Experiencing a Dramatic Increase in Requests for FMLA Leave, Often for Short Periods or Minor Conditions. Some Examples are Listed Below:

- Some employers report that up to 25% of their employees take FMLA leave each year.

- One employer states that FMLA leave is often used for headaches, sinusitis, colds, flu, tooth extractions and other minor illnesses for which recovery is brief.

- Another employer cites cases in which employees whose vacation requests for specific time periods have been turned down subsequently file for FMLA leave for stress because their vacation requests were denied.

- In other cases, FMLA leave is requested in the absence of any medical condition, serious or minor. For example, an employee requests FMLA leave because their acupuncturist wants to observe their response to treatment for a long period of time.

The Administrative Requirements for FMLA Are Burdensome

- One employee requests a ten minute FMLA leave every week to attend to a contact lens problem. The employer generates a significant amount of paperwork to comply with this request. A minimum leave period would alleviate this burden.

- Although employers may request a second medical opinion prior to granting FMLA leave, it is often scheduled too late by the individual to be of any use. Amending the FMLA to permit employers to contact providers, as proposed by DoL, to confirm the presence of a serious condition for which recovery is not expected to be brief would enable employers to confirm information.

- Coordination with disability leave is complicated because guidelines for implementing FMLA leave are not as strict as those for disability leave. For example, while some conditions may qualify for FMLA, they do not qualify for disability leave. Clarifying the definition of qualifying serious medical conditions would facilitate coordination with disability leave.

Comments to the Department of Labor Provide Specific Examples of FMLA Abuse

- Because employees can essentially establish their own schedules under FMLA regulations, there is evidence of employees who take their FMLA leave during regular working hours and then work the overtime shifts (evenings, weekends, and holidays) to work their required number of hours to maintain employment and at the same time collect higher wages. An airline reports that employees use FMLA to work shifts paying overtime but are often no shows for regular shifts. FMLA usage plummets on December 25 (Christmas Day) each year when triple overtime is paid. FMLA usage is near its peak the day before Christmas and jumps the day after, but nearly all those employees who have been out on FMLA are able to come to work on Christmas day.

- A state agency reports that FMLA misuse affects morale negatively. Some employees have “bragged to others how easy it is to get the extra time off and how they use this time for vacation.”

- Multiple industries have mandated staffing ratios. Hospitals are required to staff a certain number of nurses per patient, schools are mandated to have a certain number of teachers per student, and planes cannot fly without the appropriate number of flight crew. When FMLA leave is taken intermittently and without prior notice, the ability to conduct “business as usual” can be threatened. Employers incur higher costs when they have to bring on an unscheduled worker and pay that person a higher wage to cover the absent employee. For example:

- A 911 call center reports “an enormous amount of short notice overtime is required to handle unscheduled absences. This leads to overtired people making critical life and death decisions during emergencies.”

- A school district notes that that bus drivers claiming FMLA leave with no notice “mean[s] children are often left waiting on street corners in all weather” while the County tries to find replacement drivers.

- The way that FMLA is structured-up to 60 days off each year-could potentially allow an employee to have four-day work weeks for an entire year. This means that employees who are classified as full-time workers, but only work part-time, receive full-time benefits while employees who are truly part-time workers only receive part-time benefits (if any). One state reports that some intermittent FMLA leaves almost default into light duty assignments because supervisors must reassign work that the frequently-absent employee is responsible for to ensure that deadlines are met and services are provided to customers.

DoL's Proposed Updates to the FMLA

The new rules should make clearer both employees' obligations to notify employers when taking FMLA leave and employers' obligations to employees regarding FMLA notice requirements, reducing future lawsuits over different interpretations of the rules. The vagueness of the old rules, some of which were nullified by the Supreme Court in *Ragsdale v. Wolverine Worldwide Inc.* and other court rulings had provoked numerous lawsuits against employers. The new rules strengthen requirements to document serious illnesses and improve the ability to verify the presence of serious illnesses for FMLA leave.

Definition of "Serious Health Condition"

The Business Group supports a clarification of "serious health condition" by listing examples of conditions that would generally qualify and conditions that would generally be excluded, to reduce the use of FMLA leave for minor conditions in which treatment and recovery are brief. This would reduce this burden on employers by excluding from the list of conditions minor conditions such as colds, minor headaches, and the flu.

Reduced /Unscheduled Intermittent Leave

The Business Group supports a clarification that employers may track unscheduled intermittent leave in larger time increments. This clarification would ease the cost and paperwork burden, while ensuring that those employees who need intermittent leave are granted such leave. Employers should also be able to require employees who request unscheduled intermittent leave to choose between extended FMLA leave or a leave of absence.

Relationship to Paid Leave

The Business Group supports the current policy regarding concurrent leave, which gives employers the option of permitting employees to use accrued paid leave and FMLA simultaneously. This policy protects employees' incomes during periods of serious illness and maximizes the flexibility in the design of employer leave policies.

Perfect Attendance Awards

The Business Group supports the proposed changes to perfect attendance awards. The unintended consequence of current law is that many employers have dropped these programs due to the negative impact on employees who have not missed any work being recognized alongside employees who may have taken up to 12 weeks of FMLA leave. This change would allow employers to use attendance, bonus and recognition programs once again as a means of rewarding employee attendance and improving employee morale.

Waiver of Rights

The Business Group supports the ability to voluntarily waive rights and allow employees to settle FMLA claims out of court.

Employer Notice Requirements

While 15-business days is justified for notification, as it is equal to the amount of time employees are allowed to return their FMLA paperwork, a 10-day time frame is more reasonable than the increase to 5-business days contained in the proposed rule to allow employers more time to make a well-informed decision as to whether FMLA leave is warranted.

Employees' Notice Obligations

The Business Group supports advance notification of employees taking FMLA leave. Lack of advance notice (e.g., before employees' shifts start) for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations.

Medical Certification Process

The Business Group recommends requiring physicians to include diagnosis codes on the certification form. By requiring physicians to include the diagnosis code or codes on the medical certification form, the DoL could dramatically improve the proper use of FMLA. In addition, the DoL should make the form more concise by adding the non-serious health condition list to the form.

Recertifications

Many employers find that doctors recertify using the same information from the initial certification and simply change the date. The Business Group recommends the DoL create a sample form for recertification (in addition to the revised WH-380 or create a new section for recertification) that provides a standard set of questions

for health care providers. The form could include language to deter health care providers from “rubber stamping” the initial certification.

Our understanding of the current regulation is that employers must not only delay the request for 30 days but also then wait an additional period until the employee’s next absence. This could be any number of days after the 30-day period ends. We have seen that many employers simply send out the recertification request every 30 days without waiting until the next absence. The Business Group believes employers need clearer direction to administer these recertifications. In addition, the former interpretation (waiting until the next absence after the 30-day period) is extremely challenging to administer.

Fitness for Duty (FFD)

The Business Group is pleased the proposed rule will enable employers to require “fitness-for-duty” certifications to assess employees’ abilities to perform the essential functions of their jobs before they return to work following regular or intermittent FMLA leave.

The Business Group also supports the proposed language that will enable employers to provide physicians with a list of essential job functions and require employees’ health care providers to certify whether employees can perform the work. This is a vast improvement to the current practice where physicians submit only statements to employers that employees can return to work, but may not know their job functions and duties, which creates unnecessary risks (for both employers and employees), and jeopardizes workplace and public safety, if individuals returning to work can not perform their jobs.

Military-Related FMLA Leave

Employers recognize the importance of added flexibility and the need to support military families. The Business Group also believes that the new military-related FMLA leave provisions are best administered and understood by both employees and employers if they are administered in a way consistent with other FMLA leave where possible. The Business Group believes military-related FMLA leave should be limited to the “exigencies,” listed in the proposed regulation, including: making arrangements for child care, financial and legal arrangements to address service members’ absences; attending counseling related to the active duty of the service member; attending official ceremonies or programs where the participation of the family member is requested by the military; attending to farewell or arrival arrangements for a service member; and attending to affairs caused by the missing status or death of a service member.

The Business Group believes the DoL should also follow the existing precedent under all other FMLA leave and clarify the fact that requests for more than one FMLA absence in a year is based on a maximum total of FMLA leave per employee. The Business Group believes that employees with multiple leave requests should also follow the proposed regulation to require employees requesting FMLA leave to follow their employers usual and customary call-in procedures for reporting an absence.

Again, the Business Group appreciates the opportunity to submit this statement for the record. We look forward to working with the Congress and the members of this Committee to ensure that both employers and employees continue to benefit from an updated FMLA policy for the 21st Century.

[Statement of the National Coalition to Protect Family Leave follows:]

Prepared Statement of the National Coalition to Protect Family Leave

The National Coalition to Protect Family Leave (“Coalition” or “NCPFL”) is a broad-based, non-partisan group of organizations, companies and associations dedicated to protecting the integrity of the Family and Medical Leave Act (“FMLA” or “the Act”). The Coalition supports both the spirit and intent of the FMLA and commends the Subcommittee for holding this hearing commemorating the 15th anniversary of this important statute. The Coalition appreciates the opportunity to submit this statement for the record.

Since its enactment in 1993, the FMLA has guaranteed invaluable work and family flexibility for millions of Americans. Members of the Coalition recognize the challenges employees face in balancing work and family demands and their desire to feel secure in their jobs, particularly in the event they need to be absent for family or medical issues. We also understand the concerns of employers when administering

certain portions of the FMLA on a daily basis. The Coalition believes that Congress intended the Act to strike a balance between the needs of employees for leave for family and serious medical reasons, and the interests of employers to know when employees will be at their job. This hearing provides an ideal opportunity to examine the FMLA 15 years later to determine whether the law continues to meet the needs of both employees and employers.

I. FMLA Challenges

The Coalition recognizes the significant contributions the FMLA has made to the American workplace and the millions of Americans who have benefited from this historic piece of legislation. The family leave provisions of the FMLA have been particularly successful, and employers have encountered very few challenges implementing the leave provisions as they apply to the birth or adoption of a child or the extended care of a sick parent or child. Further, the medical provisions of the FMLA generally work well in cases of planned surgery and long-term scheduled medical events as well as scheduled intermittent leave for recurring conditions. The common factor in each of the above mentioned examples is that in each instance, the need for leave was either foreseeable or scheduled in advance. While the Coalition realizes that not every need for leave is foreseeable or predictable, the ability of an employer to know ahead of time that an employee will be absent from work and to be able to plan for the employee's absence is crucial to the successful administration of the FMLA.

Notwithstanding the FMLA's successes, employers have experienced challenges with the Act, in particular, the use of intermittent leave for chronic conditions. While Congress wisely foresaw the need for intermittent leave by employees to receive physical therapy, dialysis, or chemotherapy treatments when it passed the FMLA, the workplace impact of unscheduled, sporadic leave in small increments of time was not fully appreciated. As a result, the day-to-day administration of the Act has confused both employers and employees alike resulting in employers not being sure what leave they should grant, employees taking leave that is not consistent with the intent of Congress, and ultimately extensive litigation to resolve these disagreements.

Employers have also struggled with the definition of what constitutes a serious health condition as well as with the implications of unscheduled intermittent leave. The intermittent leave regulations, coupled with the vague, and seemingly open-ended, serious health conditions regulations, allow employees to characterize chronic, non-serious health conditions as FMLA leave.

In 2007, the Coalition released a survey conducted by the Society for Human Resource Management (SHRM) that found more than half (51%) of human resource (HR) professionals have faced "significant challenges" in implementing the medical leave provisions of the FMLA. In addition, nearly two-thirds of HR professionals have experienced problems in determining when to grant "chronic leave" under the Act, leading to employee morale issues for those employees who have to cover for an employee on leave.¹ The challenges of chronic leave threaten the integrity of this important law for those employees who truly have serious health conditions. For these reasons, the Coalition has actively supported public policies and regulatory changes that will strengthen the FMLA to ensure its availability to those employees Congress intended to cover.

Much of the confusion surrounding the medical portion of the FMLA has been the inconsistent U.S. Department of Labor ("DOL" or "the Department") opinion letters and Federal court decisions that have undermined the original intent of the Act. Consequently, the Coalition has repeatedly urged DOL and Congress to strengthen the FMLA regulations by clarifying the medical leave interpretations and other FMLA administrative complexities which are causing problems in the workplace.

II. DOL's Proposed FMLA Regulation

On February 11, 2008, the DOL published its long-awaited proposed rules to address many of the sections of the FMLA that are confusing for both employees and employers. The Coalition appreciates a number of the proposed changes put forth by the Department. It is clear that the DOL's suggested modifications are modest in scope, well supported by an extensive record, and will protect the benefits afforded to employees under the Act while improving FMLA administration in the workplace. In no way will the proposed changes jeopardize, or undermine the ability of an employee to take the leave intended by Congress when it passed the FMLA in 1993.

¹Society for Human Resource Management, SHRM Survey Brief: FMLA (2007)

The Department's proposal is the result of a lengthy and comprehensive review of the FMLA regulations that included numerous stakeholder meetings, more than 15,000 public comments from employers, employees, and health care providers, numerous congressional hearings, and much litigation. Unfortunately, the proposed rule does not appear to adequately address the challenges employers have experienced in determining the definition of a serious health condition under the current regulations—which will mean that this issue will require attention at a future date. Despite this omission, the Coalition believes the DOL's proposal represents a good first step—and we support this reasonable approach for the following reasons:

First, the Coalition supports the DOL's proposed changes to the medical certification process so that "vague, ambiguous and non-responsive" answers may be clarified. As this process is the foundation of the medical leave determination, it is imperative that as much information as possible, consistent with requirements for maintaining privacy, be collected. The more an employer understands about an employee's condition, the better they can accommodate that employee's needs. Providing a medical provider with a list of necessary job functions and asking him or her to certify the employee is fit for duty will ensure the health and safety of the employee as well as his or her colleagues. In addition, granting an employer the ability to ask clarifying questions of the health care provider consistent with the Health Insurance Portability and Accountability Act, the Americans with Disabilities Act and other Federal statutes, will ensure prompter FMLA leave request reviews and decrease costs for both employers and employees. We also join with many health care providers and associations of health care providers who have expressed concerns about the current WH-380 medical certification form and commend the Department for proposing a new form that will be easier for health care providers to use and will likewise assist employers in making proper determinations about the granting of FMLA leave.

Second, the proposed rule provides a practical approach to requirements for the employee to provide notice of when they will be using FMLA leave and ends the ability of an employee to report his or her failure to show up for work for up to two days with no notice as FMLA leave (absent a severe emergency situation). By requiring a qualified employee to make a "reasonable effort" to contact his or her employer before an assigned shift, employers can more adequately staff and operate their businesses. Additionally, the Coalition believes that this proposed change will alleviate much of the workplace friction by providing employees and employers alike with clearer guidance as to how and when unscheduled intermittent leave may be requested. This provision will also benefit those employees who are at the job and would otherwise have had to cover for an employee who was taking leave that would not have been scheduled, or may not be appropriate.

The Coalition also supports the DOL's proposal regarding substitution of paid leave. The Coalition believes that DOL's proposal to allow employers to enforce the terms and conditions for when substitution of paid leave occurs when an employee uses FMLA leave is consistent with the main statutory goal of the FMLA, namely that nothing in the FMLA be construed so that it would discourage employers from adopting or retaining more generous leave policies. The Coalition believes that inherent in the provision of paid leave voluntarily provided by employers are the terms and conditions associated with utilizing such paid leave. Thus, leave is not available for employee use unless the terms and conditions for its use are satisfied. Such an interpretation is consistent with DOL's opinion letters on this topic, as well as the statute, which specifically provides for an unpaid leave entitlement unless accrued leave is available to substitute.

Finally, the NCPFL believes the proposed rule could have done more to address the issue of defining serious health conditions by clarifying the "objective test" of more than three days incapacity plus treatment and by increasing the minimum increment of intermittent leave allowed to half or full days. Either or both of these changes would likely have reduced the use of medical leave that is inconsistent with the act, and would have helped employers determine whether an FMLA leave request is legitimate. Increasing the increments of intermittent leave would have reduced the time spent calculating FMLA time used and accrued, and also served as a disincentive to employees using intermittent leave to cover for tardiness.

These concerns do not override our strong support for these proposed changes. The NCPFL hopes that Congress will allow DOL to proceed with the regulatory changes to the FMLA which will restore the balance Congress intended between employers' needs for a productive workforce and workers' needs for time to attend to important family and medical issues.

III. Support for FMLA Regulatory Changes

A recent poll conducted on behalf of the Coalition indicated that American voters strongly support efforts to modify the FMLA. The national survey was conducted by the polling company(tm), inc. and represents the results of a nationwide telephone survey of 1,000 registered voters from February 7-12, 2008. The survey has a margin of error (plus/minus) 3.1%.

Among the survey's key findings:

Many Americans Recognize Potential for FMLA Misuse * * * A majority (59%) of voters said there was a "serious" potential for FMLA misuse. And nearly half (46%) of those surveyed could cite at least one occasion where they suspected "a fellow employee who claimed to be taking time off for family or medical reasons was really using it for something else."

One in Three Workers Say Unscheduled Leave Makes Their Jobs Harder * * * Just over one-third (34%) of survey respondents said sporadic, unannounced leave by co-workers—a major issue under current FMLA rules—makes them less productive on the job.

The survey results also indicated strong levels of support for many of the concepts embodied in the proposed rule changes, including:

88% of Americans support "requiring employees who wish to take FMLA leave to get their 'serious medical conditions' recertified by a health care provider once a year or every six months. Currently employees never have to return to their doctors for check-ups or to get recertified."

73% of voters approved of "allowing employers to speak directly to a worker's health care provider when he or she is ready to return to work after taking FMLA leave to ensure that the worker is able to resume working and will not pose a danger either to himself or herself or to other employees."

69% of voters approved of "strengthening the notification requirements so that employees are required to give reasonable notice before taking unscheduled leave under the FMLA."

IV. FMLA Expansion

As mentioned earlier, the NCPFL supports both the spirit and intent of the Family and Medical Leave Act and recognizes the many Americans who have benefited from this important law. In order to preserve the integrity of the law's leave protections for family and medical reasons, the medical leave provisions of the Act and the corresponding regulations must be clarified to ensure that the Act benefits those employees who need it most. While we understand that some members of Congress are interested in providing additional work flexibility to employees and their families, or providing these benefits to more employees and their families, the Coalition believes that the FMLA regulations need to be improved before expansion of the Act or other leave mandates are considered. Expanding a law that is not working properly will only exacerbate the problems currently experienced by both employers and employees. Similarly, we are opposed to amending the FMLA to make leave paid. We believe this will create a strong incentive for employees to look for opportunities to take leave that is not consistent with the balance of interests established in the Act.

V. Conclusion

Regulatory changes to the Family and Medical Leave Act proposed by the Department of Labor will strengthen a law that is critically important to employees and their families. At the same time, more work needs to be done to clarify other areas of the FMLA's implementing regulations. The Coalition appreciates the spotlight Congress has placed on this important policy that has benefitted so many. We look forward to working with you, and members of this Committee, to ensure the needs of our ever-changing workforce and their employers are met by the FMLA.

[Statement of the Retail Industry Leaders Association follows:]

Prepared Statement of the Retail Industry Leaders Association

RILA supports the spirit and intent of the Family and Medical Leave Act (FMLA) and recognizes the challenges employees face in balancing their work and families with their desire to feel secure in their jobs should they need to be absent for family or medical issues. We also understand employer concerns with administering the FMLA on a daily basis. RILA believes the Act's current administrative complexity should be addressed and opposes efforts to expand its scope to include additional employer mandates beyond the Act's original intent.

The Retail Industry Leaders Association promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry—retailers, product manufacturers and service suppliers—which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

As Congress examines this important issue, employees who need it must continue to be able to enjoy the intended benefits of the FMLA. Workers must be able to take time off for the birth or adoption of a child, to take care of a family member with a serious illness or seek treatment themselves when seriously ill. The FMLA was never intended to turn full-time jobs into part-time jobs. It was never intended to allow employees to take sporadic leave without any notification. It was never intended to unfairly burden colleagues forced to cover the unpredictable absences of their co-workers.

The proposed changes to the FMLA regulations will improve a law that has helped millions of American workers and their families. Despite an ever-changing workforce, the DOL has not updated the FMLA since the implementing rules went into effect 15 years ago. While the family leave sections of the law are generally working well, some of the medical leave sections are causing confusion in the workplace. The most difficult parts of the law for retail managers to work with are 1) the definition of a serious health condition, and 2) unscheduled, intermittent leave. Clear guidance on both of these issues would greatly enhance employer-employee relations and it is important for RILA that benefits afforded employees under the FMLA remain secure.

[Letter, dated April 11, 2008, from the Society for Human Resource Management to the Department of Labor, may be obtained from the following Internet address:]

<http://www.shrm.org/>

[Whereupon, at 12:41 p.m., the subcommittee was adjourned.]

