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WRITING THE NEXT CHAPTER OF THE FAMILY AND MEDICAL LEAVE ACT: BUILDING ON A 15-YEAR HISTORY OF SUPPORT FOR WORKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON CHILDREN AND FAMILIES

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

EXAMINING THE FAMILY AND MEDICAL LEAVE ACT (FMLA) (P.L. 103–3), FOCUSING ON A 15-YEAR HISTORY OF SUPPORT FOR WORKERS

FEBRUARY 13, 2008

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C O N T E N T S

STATEMENTS

WEDNESDAY, FEBRUARY 13, 2008

	Page
Dodd, Hon. Christopher J., a U.S. Senator from the State of Connecticut, opening statement	1
Kennedy, Hon. Edward M., Chairman, Committee on Health, Education, Labor, and Pensions, opening statement	5
Prepared statement	6
Murray, Hon. Patty, a U.S. Senator from the State of Washington, statement	7
Prepared statement	8
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, statement	10
Prepared statement	11
Lipnic, Victoria, Assistant Secretary, U.S. Department of Labor, Washington, DC	14
Prepared statement	17
Ness, Debra, President, National Partnership for Women and Families	32
Prepared statement	34
Reid, Marcel, President, DC ACORN, Washington, DC	39
Prepared statement	40
Grimm, Kristen, President, Spitfire Strategies, Washington, DC	41
Prepared statement	43
Elliott, Katheryn, SPHR, Assistant Director, Employee Relations, Central Michigan University, Mount Pleasant, MI	45
Prepared statement	47

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
Senator Clinton	61
Senator Alexander	61
Retail Industry Leaders Association (RILA)	62
Matthew Melmed, Executive Director, Zero to Three	63
Joe Solmonese, President, Human Rights Campaign	65
MomsRising	67
American Civil Liberties Union (ACLU)	68
Jason A. Straczewski, Director, Employment and Labor Policy, National Association of Manufacturers (NAM)	69
College and University Professional Association for Human Resources (CUPA–HR)	76
Letter to Victoria Lipnic	82
Questions of Senator Kennedy for Victoria Lipnic	82
Questions of Senator Dodd for Victoria Lipnic	85

VerDate Nov 24 2008 10:10 Jul 30, 2009 Jkt 035165 PO 00000 Frm 00003 Fmt 0486 Sfmt 0486 S:\DOCS\40836.TXT DENISE

WRITING THE NEXT CHAPTER OF THE FAMILY AND MEDICAL LEAVE ACT: BUILDING ON A 15-YEAR HISTORY OF SUPPORT FOR WORKERS

WEDNESDAY, FEBRUARY 13, 2008

U.S. SENATE,
SUBCOMMITTEE ON CHILDREN AND FAMILIES COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 3:01 p.m. in Room SD–430, Dirksen Senate Office Building, Hon. Christopher Dodd, chairman of the subcommittee, presiding.

Present: Senators Dodd, Kennedy, Murray, and Hatch.

OPENING STATEMENT OF SENATOR DODD

Senator DODD. The subcommittee will come to order.

I'm going to make a brief opening statement and turn to my Chairman of this full committee, Senator Kennedy has done so much on this issue, and so many others.

Senator Alexander, I believe, is going to make—there's a chance of him coming over? It was unclear, do you know? Senator Hatch is coming, so, OK, good.

We'll get underway, however, because I know people have other schedules to meet. Normally, I'd be waiting for a member of the minority to be here before I'd start, and I apologize to any of these members for starting with the opening statement and moving along so we don't end up delaying the hearing too long.

Let me thank all of you for coming here this afternoon to hear these important words on the Family Medical Leave Act. This hearing is entitled, "Writing the Next Chapter of Family Medical Leave: Building on 15 Years of History in Support of Working Families."

As you might know, this month, the Family Medical Leave Act will celebrate its 15th birthday. In fact, the 5th of February 1993 was the day which President Clinton, Vice President Gore, in the Rose Garden of the White House signed the Family Medical Leave Act into law. I was looking at the photographs the other night of that historic occasion, it was the first piece of legislation signed into law by the Clinton administration.

I just mentioned upstairs—we were having a bit of a press conference, and I don't know if she's come back down here or not, yet, but that day, I'll never forget—one of the early, if not the earliest authors of this idea was a Congresswoman from Colorado named

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Pat Schroeder. I'll never forget that day, because I was asked to be on the steps of the Rose Garden with the President and the Vice President and there was an audience fathered to witness the signing. Sitting in the audience was Pat Schroeder—she should have been up on the stairs as the person who really created this idea, in so many ways.

I've always regretted deeply that she wasn't there that day. I don't fault the Clinton administration—it was the first bill-signing ceremony they had, they were learning their way along. But Pat Schroeder—anyone ever talks about this issue and—while I'm proud to have been the author of it in the Senate of the United States, Pat Schroeder really was the initial person who came up with this idea in the Congress of the United States and as the history books are written about it, she deserves incredible credit for her efforts. So, I wanted to make that point.

This legislation has withstood 8 years of obstruction and two Presidential vetoes before it became law. Along the way, it was a very difficult path to follow, and I'd like to especially welcome and thank all of the witnesses who will provide testimony here today. Much of the testimony we'll hear today will illustrate the great need for sensible family leave policies that benefit both employee and employer alike.

Let me briefly share with you just one of the many personal stories that first led me to get involved in the cause of Family Medical Leave. When I first met Eva Binnel at my church, my parish in East Haddem, CT in 1989, her daughter, Jacintha, who shares the same birthday with me, May 27—multiple, multiple-handicapped child, in fact, never should have lived beyond the age of 3. She's broken every record, globally. She's now 23 years, 24 years of age—a remarkable little girl, child.

Daughter Jacintha was in her wheelchair at Mass. She had been born with a rare brain disease, was fighting for her life in an ICU unit, in those days. Her husband asked his employer for time off to be at the side of his wife and Jacintha, and he was told to never come back to work, leaving his family without an income, without health insurance, and almost without hope.

I met them in my parish, was deeply impressed, and decided that too many people probably were going through what they were going through and decided we could do better in this country.

Sadly, before the passage of Family Medical Leave, stories like Eva Binnel's and her husband's were a fact of working life for so many millions of Americans throughout this country of ours.

Fortunately, doctors were able to save Eva's daughter, she's still alive today, remarkably, after all she's been through. But the sad truth is, that her family had no legal protection against her husband's firing.

The Family Medical Leave Act has been essential to protecting families like hers since its passage. More than 60 million Americans have used their right to time off so they can watch over a newborn or adopted child, help a parent through an illness, or get better themselves, knowing their job will be there when they return.

We've heard hundreds of thousands of stories about how Family Medical Leave has helped workers and their families. Children

have benefited significantly. When parents can be there for their sick children, they recover faster, avoid more serious illnesses and stay healthier.

I'll never forget, this very hearing room, listening to C. Everett Coop, the Surgeon General under Ronald Reagan, a pediatric surgeon by training, testifying about the importance of the Family Medical Leave Act and what a difference it made in children who could have a parent or a family member present during periods of recovery. They just exponentially recovered as a result of having a family member around. I always have appreciated immensely, Dr. Coop's testimony for this committee, which helped us tremendously in convincing people who were reluctant to support the legislation.

Family Leave encourages mothers to breastfeed longer, and provides more time for parent-child interaction, fostering positive emotional development of children.

At the same time, it has been a safeguard for families, FMLA has been good for businesses, as well, with lower turnover and a boost of morale, retention rates, productivity rates—90 percent of employers told the Department of Labor in 2000 that they had a neutral or positive effect on the profits of their company. Those gains for health, for families, and for employers are well-worth noting, as we mark this important anniversary of 15 years.

But the true reason for celebrating anniversaries is not to look back, of course, but to look forward. When it comes to family leave in America, there's still so much to do.

First, we have to protect the gains we've made, and that's why I'm concerned about the proposed Department of Labor regulations, that may put unnecessary roadblocks in the way of workers seeking the leave they've earned and deserve. Among other changes to FMLA, the proposed rules would prevent employees from calling in to up to 2 days—before an absence, a critical protection for workers facing medical emergencies. After all, medical emergencies aren't planned in advance.

The potential regulations could also throw up another bureaucratic roadblock, by requiring workers to show proof of their medical conditions at least twice a year, even if those conditions are lifetime and permanent. That is especially difficult for workers who may not have health insurance.

Finally, it's essential that the new regulations not weaken guarantees to the relatives of wounded members of our Armed Forces, because the care of loved ones has been shown to be vital to service members' recoveries.

In sum, the Federal Government ought to be doing everything it can to make it easier for workers to take necessary time off to support their families, help their children, and provide critical care for a loved one, and not harder to do so. In examining these DOL proposals, I would rather make sure that we continue to do just that.

But even as we secure the FML protections that so many families have come to count on, we need to ensure that they extend to all families, no matter what their income. No one of any income should be forced, in a time of crisis, to make the impossible choice between work and family. But the truth is that millions who have earned family medical leave can't afford it. In fact, over 80 percent of the people who have not taken family and medical leave will tell

you they have not done so because of the financial burdens that they face, their inability to take that time because of the loss of revenue coming into their families. For every worker who can weather a day without pay, three more can't afford the loss. I believe that they deserve paid leave.

Why do we offer no paid leave as a nation? When the European standard is 10 paid months? Why are we one of only four countries in the world to deny paid maternity leave? Leaving us in the company of Swaziland, Liberia and Papua New Guinea?

We also lag behind in paternity leave, 66 countries ensure that fathers either receive paid paternity leave, or have the right to paid parental leave. Thirty-one of these countries offer 14 or more weeks of paid leave. The United States guarantees fathers neither paid paternity, nor paid parental leave.

It's high time we bring paid family leave to America, at least 8 weeks is what we're suggesting. I've introduced legislation to secure just that, and will be working my hardest to ensure that it gets passed. If the past is any guide, we'll likely have another long struggle on our hands, but we can remember what history has shown us—a good idea is worth it.

Let me also mention Ted Stevens, who is my co-sponsor of this effort. I've always sought bipartisan support for these efforts, and I want to thank the Senator from Alaska for joining in this effort of a paid leave program.

Without further comment from me, I'd like to briefly introduce all of our witnesses, and then quickly turn to my colleagues here, Senator Kennedy and Senator Murray. Senator Murray was working on these issues long before she got to the Senate and had a wonderful history in the Washington legislature of fighting for these very issues herself. In fact, I recall when she arrived here, saying she wanted to get involved—these were the issues that she cared most about in the State legislature and wanted to continue her work here in the Senate on it.

Senator MURRAY. I will tell you, it was the first debate and vote I took part in as a U.S. Senator, so I was very proud of that.

Senator DODD. Yes, I remember that, as well.

I want to thank Assistant Secretary Victoria Lipnic for being with us—thank you very much, Victoria, for being here today—who oversees the administration of FMLA at the Department of Labor.

Debra Ness, a wonderful friend and person I've worked with over the years, and on so many issues, who's President of the National Partnership for Women and Families, the organization that led to the creation and passage of the very act we're talking about today.

Marcel Reid from the DC ACORN will share her personal story about FMLA, and Kristen Grimm, President of the Spitfire Strategies, whose small firm provides paid leave and unpaid leave, although not required to do so, under FMLA, and has got a great story to remind everyone about the values of this, and I appreciate immensely her being with us.

Kathie Elliott, for sharing her perspective from experience at the nexus of human resources and government. I look forward to hearing from all of you in this informative hearing this afternoon.

Before I do that, let me turn to the Chairman of the full committee. Again, as I said upstairs, none of this would have ever hap-

pened without Senator Kennedy. That could be said about literally hundreds of pieces of legislation over the last number of decades. Without his efforts and support and backing and ideas, so many of these great ideas never, ever, ever would have become the law of the land. It just seems almost superficial, and it's hard to come up with the words, as rich as our language is, to adequately describe the impact this one human being has made in the lives of millions and millions of people, both at home and abroad.

Senator, we thank you immensely. I thank you, personally. It never would have happened without you, and I thank you immensely for that.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Thank you so much, Senator Dodd, for having this hearing, and for your years of leadership. I find that you have new emphasis, new spirit, new life in your statements, now that Grace and Christina—two young Dodds—have been brought into this wonderful world.

We thank you for giving this whole issue an additional kind of focus and attention. I join you in paying great tribute to Pat Schroeder and Debra Ness, others who are here. ACORN, who has been working in this area for so many years, Patty Murray who has been such a valued ally.

Just a couple of points, I'll put my statement in the record.

The phenomenon of a two-parent family has really disappeared in American life. We don't even have, sort of, a one-parent, effectively, family—one person at home family. That's a phenomenon that's taken place. There is naturally enormous pressure on children, and also on parents. It is, by and large, the single mom—sometimes the single dad—but more often, the single mom that is trying to take care of both the child and being the parent. The challenge, I believe, of government is how we make it easier, not how we make it more difficult.

Senator Dodd and the others have given us a pathway to make it easier, make it more humane, make it more compassionate, make it more decent, make it fairer, make it more affordable, make it more consistent with the values of our country that says that we value children, and we value families. The real issue in question is whether we as a country, and society, are going to catch up with that ideal that has been stated so eloquently by Senator Dodd, and others—bipartisan—who have supported the Family and Medical Leave.

Our concern about the Labor Department is they make it more complicated, more difficult, more costly, more expensive, more troublesome, bothersome. I have a son who's a chronic asthmatic, Patrick, who's a Congressman, and has been a chronic asthmatic since the day he was born, and continues to be. Why he should have to go down, several times a year, to get a doctor's report to say that he's a chronic asthmatic? Time, expense, the purpose of it is to discourage people. We can't have that discouragement, we have to find ways to encourage, bring people to a more decent and fair awareness and understanding of this legislation.

Congratulations, Senator Dodd. This is enormously important, and we want to give you the assurances, the Chairman of the com-

mittee, that we will do everything with you, Senator Murray, others, to move this legislation, to mark it up. We'll work with our leadership to get it out on the floor of the Senate. We're not here just to have a hearing, we're here for action. I know that's your commitment, that's certainly ours, and we'll work very closely with you to get it.

Thank you.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

I commend Senator Dodd for holding this important hearing. Striking the right balance between work and family is never easy. But it's especially difficult when serious illness or a medical emergency strikes.

In these turbulent economic times, workers face great challenges. More and more families are already strapped for cash and time, and taking time off from work to deal with a serious illness of family members can threaten their jobs. Countless American families depend on a second income to keep a roof over their heads, food on the table, and heat in their homes. Fewer and fewer families can afford to have a parent stay home with their children, and caregiving is even more difficult for single parents who constantly have to juggle the demands of work and family.

It's not just families with children who are struggling. Many working parents are part of the "sandwich generation"—they're working full-time, and struggling to care for both their children and their own elderly parents. They're stressed to the breaking point trying to balance the jobs they need and the families they love.

I learned first-hand just how difficult these crises can be when my son was diagnosed with cancer. Months of difficult treatment followed, and he had the good fortune to become cancer-free and return to a full life. I was fortunate enough to be able to take the time I needed to be there for him. Many people are not so lucky.

Fifteen years ago, we won a major victory by enacting the Family and Medical Leave Act. That landmark law passed with bi-partisan support, and it has enabled more than 60 million Americans to take time off when they need it most without the fear of losing their jobs.

The act has been a huge success for both workers and employers. It lets workers get treatment for their own or a family member's serious medical condition, while keeping the job they need to pay for that treatment. As one employee told the Department of Labor, "because of the act, I was able to keep my parents out of nursing homes and still keep my job to support them later. This is the best thing you can do for working families around the country."

The act has also provided important benefits to employers by allowing them to keep good workers. Employees feel increased loyalty to their company, and businesses say that workers with such leave are more productive and motivated, with less turnover and better workplace morale.

In the face of all this progress, however, the Bush administration last week took a step backward, announcing new regulations that will limit workers' ability to use such medical leave when they need

it. The regulations place stricter requirements on when employees can request leave in advance, and shorten the window in which they can claim their rights after an emergency. As a result, many workers entitled to this leave are likely to have their requests unfairly denied.

The changes also make it more difficult for people to return to work when their health crisis has passed. They increase the amount of private medical information that employers can demand before employees can come back to work, and they require frequent certifications from workers taking periodic leave.

They also impose onerous new paperwork on both workers and health providers. Requiring workers with chronic conditions to have a doctor recertify twice a year that they suffer from a serious health condition is an extra burden for workers, doctors and employers. In addition, workers will have to shoulder the additional cost of unneeded doctor's appointments.

The new regulations also risk diminishing the enforcement of the act's protections. By allowing private settlements without any oversight by the Department of Labor or the courts, vulnerable workers can be unfairly persuaded to give up their rights.

There is no basis for such changes. The act has worked well in helping employees meet their health care needs.

The only real problem with the act is that its protections don't go far enough. One out of 3 workers is not eligible, and the current law only guarantees unpaid leave. Since many working men and women can't afford to miss a paycheck, they don't take family and medical leave when they need it.

The leave for workers for serious health conditions should be paid leave, as proposed by Senator Dodd in his Family Leave Insurance Act. We must also enact paid sick days, so that employees can recover from brief illnesses or obtain needed preventive care. It's a sensible policy to stop the spread of disease, reduce costs and protect our families.

With more and more people facing heavy demands at work and at home, families deserve more security, not less. Today's hearing will explore how we can preserve the protections of the Family and Medical Leave Act and build on them to benefit all working families. I welcome today's witnesses, and I look forward to their insights on this pressing issue for the Nation's families.

Senator DODD. Thanks very much, Senator.

Senator Murray has a statement, as well, and we welcome your words and your support. More importantly, your support over the years, and your interest in the subject.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Mr. Chairman—it really is an honor for me to join you and Senator Kennedy on an issue that is so important to so many people.

The principles that led you all to the floor of the U.S. Senate 15 years ago to win this to begin with are as important today as they were then. That is, that no one should have to choose between their job and their family at a critical time and issues that they're facing at home. That balance, and that moral ability to be able to take care of your family is something that our country should honor and

cherish and support. That's really what the Family and Medical Leave is all about.

I am concerned about what I'm hearing are rules and regulations that are really being put out there as a way to inhibit people from doing this, because I think the role of government ought to be to make sure that families are supported, for all the right reasons, that both of you talked about. I think we ought to be looking at how we expand this successful law so that more families can get that same kind of support and hope that they need to be able to work in today's world, and raise their families, too.

We certainly need people in the workforce. We certainly need people raising healthy families. The more we can do to support that in better ways, I think, is critically important.

So, thank you very much for your leadership, and I look forward to working with you to move to do what we can to expand and make better the law that you worked so hard to pass 15 years ago.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Mr. Chairman, thank you for calling this hearing. The Family and Medical Leave Act is an issue that is vital to our working families.

You're a great advocate for working families in the Senate, and I appreciate your efforts to get the discussion going about how we can build on the progress we've made so far.

As we celebrate the 15th anniversary of FMLA—and especially as we discuss some administrative changes proposed by the Department of Labor—it's important to understand the real value of this legislation. FMLA provides more than job security during a time of personal or family illness. It gives people the peace of mind they need to be successful workers and caregivers. And when the working families of our country are more stable, so are our communities, our businesses, and our economy.

Fifteen years after the law's enactment—and despite dire predictions from businesses—our experience tells us that FMLA has worked for families and employers.

We saw an economic boom in the 1990s. And workers still tell us how important it is not to have to choose between their jobs, and their health, or their families during hard times. It's hard to put a price tag on that kind of value. But unfortunately, it appears the Administration is trying to do just that.

I am disappointed that once again, the Labor Department has taken a position that seems to be tipping the scales in favor of employers over workers and their families. And I'm concerned that some of its proposed administrative rule changes would impose unnecessary burdens on workers.

At a time when more and more working families depend on dual incomes—and as more people find themselves caring for aging parents in addition to children—family and medical leave should be expanded, not narrowed.

I am looking forward to hearing from Assistant Secretary Lipnic about the Department's proposal. I'm especially interested to hear the Administration's explanation of how the proposal protects workers' rights rather than restricting them.

I believe FMLA was a great start in 1993. And I think we're ready to move to the next step. More needs to be done to help working families better balance their work and family obligations. Even though the ability to use family and medical leave is critical, not all workers are covered under the current law. And of course, no one is receiving paid leave.

Our government should be moving toward covering workers at smaller companies or those who work part-time and aren't eligible under the current law. As a society, I believe we need to move toward paid family and medical leave as a norm and not the exception.

I am always disheartened to hear that our country stands alone among its industrial partners in not guaranteeing some form of paid leave to workers. It is my hope that in the near future that statistic will soon become a part of our Nation's past.

Some of our States have already made strides in securing paid leave for workers. I am proud to say that my home State of Washington recently passed a bill that will provide $250 a week for 5 weeks to eligible workers who use their family leave when they become new parents.

That's real progress I hope we can mirror at the Federal level.

I was proud to co-sponsor your bill, Mr. Chairman, which would go even further, providing up to 8 weeks of leave for workers who use family and medical leave. It is definitely another step in the right direction.

Working families need us to be their voice and make them our first priority. And that's why we're here today.

I look forward to hearing from our witnesses about the value of family and medical leave to working families, businesses, and our communities.

Thank you.

Senator DODD. Thank you, Senator, very, very much. I appreciate that immensely.

We've been joined by my good friend and colleague from Utah, Senator Hatch.

I was making a point—I want to make reference to that, on the paid leave proposal idea, I'm very grateful to Senator Ted Stevens, who's a lead co-sponsor of that idea.

I should have mentioned—I talked about Teddy, obviously, and his work, and Patty Murray—Senator Murray—and Pat Schroeder. But the legislation also wouldn't have happened had it not been for Dan Coates, then a Senator from Indiana, Kit Bond, a Senator from Missouri and Arlen Specter who were very important.

This wasn't a partisan battle, it was a battle with the White House at the time. But I had terrific support from the Republican side of the aisle on this issue, as well, and so I've always been grateful. Dan Coates has left the Senate years ago, but Kit Bond is still here, Arlen Specter is still here—there were others, as well, but those were the ones that played an instrumental role in drafting the legislation. It's important that we go back 15 years now, in talking about those who were involved initially, here. Those names need to be mentioned, as well, they made a huge difference in this legislation becoming the law of the land.

Senator Hatch, we're pleased to have you with us. Do you have an opening comment or statement you want to make before we hear from our witnesses?

STATEMENT OF SENATOR HATCH

Senator HATCH. Well, I'd be happy to say a few words, if I can.

Senator DODD. Yes, certainly, please.

Senator HATCH. Thank you, so much. It's great to be with you, and the other Senators here on the dais who have worked long and hard on this. I want to thank you for convening this hearing. I want to welcome each of our witnesses here today, and I look forward to hearing your testimony.

Mr. Chairman, I think we can all agree with last week's *Wall Street Journal* editorial that said,

> "Few laws are so universally acclaimed as the 1993 Family and Medical Leave Act. It's an excellent example of how we, as a Nation, have adapted to the demands of our changing workforce."

Another timely example in the Senate's recent action to expand the FMLA to cover the needs of families who need leave to care for our sick and wounded service men and women. This was the first-ever expansion of FMLA, the product of a bipartisan Commission, and bipartisan action here in Congress. Together, we recognize that the needs of military families have changed over the past few years, and we took action to help them.

I'm pleased to see that the executive branch is moving forward with implementing regulations on the so-called "wounded warriors" additions to FMLA. In its proposed rule package published on Monday, the Department of Labor asked for public comments on a variety of issues related to the implementation of the new statutory provisions that President Bush signed into law on January 28. I think the Department should be commended for recognizing that the military families and their employers are anxiously awaiting these rules, while also taking the necessary steps to ensure that its forthcoming final rules will be the correct ones.

Nothing causes so much confusion within a regulated community than an agency's constant tweaking and changing of its rules. If we want these new provisions to work, and we want them to work well for our military families and for the people who issue their paychecks, then we need to let the Department gather and consider comments from the public before they go ahead with their final regulations. This is going to take time, so I urge the Department to make publishing a final rule its top priority.

As for other items in the proposed rules package, what we have before us is the result of a deliberative process, one that included a thorough examination of the current regulations, and extensive effort for input from a wide range of stakeholders and intensive consultations with Members of Congress.

Mr. Chairman, I ask unanimous consent that a copy of the proposed rule be included in the hearing record.

Senator DODD. Without objection.

Senator HATCH. Now, a critical component of this deliberative process was the Department's report last year about how the

FMLA and its related regulations were functioning in the workplace. It includes a chapter of anecdotes from people whose lives were made better because the FMLA exists.

With the FMLA, they were able to cope with their own, or a family member's medical crisis while enjoying the security that comes from knowing that their health insurance is continuing, and their job awaits them when they return.

For employers, it appears FMLA is generally working well, especially where employees who are taking leave to care for a newborn child or other planned absences. However, some employers and others expressed frustration that the challenges of running time-sensitive workplaces while trying to comply with FMLA rules.

Now, I have other remarks, but I think I'll just put them all in the record at this point.

[Editor's Note: Due to the high cost of printing, previously published materials are not reprinted. The information previously referred to can be found at *http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf* **(Family and Medical Leave Act Regulations—A report on the Department of Labor's Request for Information 2007 Update) and** *http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf* **(Monday, February 11, 2008—29 CFR Part 825: The Family and Medical Leave Act of 1993; Proposed Rule)]**

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR HATCH

Thank you, Mr. Chairman for convening this hearing on the Family Medical Leave Act. I want to add my welcome to each of our witnesses today, and look forward to hearing your testimony.

Mr. Chairman, I think we can all agree with last weeks Wall Street Journal editorial that said, "Few laws are so universally acclaimed as the 1993 Family and Medical Leave Act." It's an excellent example of how we as a nation have adapted to the demands of our changing workforce.

Another timely example is the Senate's recent action to expand the FMLA to cover the needs of families who need leave to care for our sick and wounded servicemen and women. This was the first-ever expansion of the FMLA—the product of a bipartisan commission, and bipartisan action in the Congress. Together, we recognized that the needs of military families have changed in the past few years, and we took action to help them.

I am pleased to see that the Executive Branch is moving forward with implementing regulations on the so-called wounded warriors additions to FMLA. In its proposed rule package published on Monday, the Department of Labor asked for public comments on a variety of issues related to the implementation of the new statutory provisions that President Bush signed into law on January 28th. The Department is to be commended for recognizing that military families and their employers are anxiously awaiting these rules—while also taking the necessary steps to ensure that its forthcoming final rules will be the correct ones. Nothing causes so much confusion within a regulated community than an agency's constant tweaking and changing of its rules. If we want these new provisions to work well for our military families and for the people who issue their paychecks, then we need to let the Department gather and consider comments from the public before they go ahead with

final regulations. This will take time, and I urge the Department to make publishing a final rule its top priority.

As for the other items in the proposed rule package, what we have before us is the result of a deliberative process, one that included a thorough examination of the current regulations, an extensive effort for input from a wide range of stakeholders, and intensive consultations with the Congress. Mr. Chairman, I ask for unanimous consent that a copy of the proposed rule be included in the hearing record.

A critical component of this deliberative process was the Department's report last year about how the FMLA and its related regulations were functioning in the workplace. It includes a chapter of anecdotes from people whose lives were made better because the FMLA exists. With the FMLA they were able to cope with their own or a family medical crisis, while enjoying the security that comes from knowing that your health insurance is continuing, and your job awaits you when you return. For employers, it appears FMLA is generally working well, especially where employees were taking leave to care for a newborn child, or other planned absences. However, some employers and others expressed frustration at the challenges of running time-sensitive workplaces while trying to comply with the FMLA rules.

This report is a comprehensive guide to how the FMLA is working in the real world, and it is so important that I ask for unanimous consent to have the report placed into the hearing record.

Mr. Chairman, the courts too have had their say on interpreting the FMLA. Of these court cases, the most notable was the Supreme Court's 2002 decision in *Ragsdale* vs. *Wolverine Worldwide* that the Department overstepped its bounds by putting forth regulations that required employers in certain situations to provide more leave than what the statute allows. The Supreme Court viewed this as a "categorical penalty" on employers and found that it was inconsistent with the plain language of the statute to require an employer to provide more than the 12-week maximum of FMLA leave. With this proposed rule, the Department's regulations would be revised to reflect the Ragsdale decision, as well as resolve other issues arising from lower court decisions.

Returning to the Labor Department's report for a moment, one issue made clear is that there is friction in the workplace over aspects of the FMLA that relate to unscheduled intermittent leave. Intermittent leave refers to an employee, who has a medical certification to take FMLA leave, and they do take the leave, but they don't tell their employer until after the fact, sometimes 2 days after the fact. In this age of cell phones, blackberries and the like this seems incredible to me.

This lack of notice is a special concern for me, for example once you get beyond Salt Lake City, Utah is mostly rural and rural hospitals, police, ambulance, and fire departments operate with small staffs. If someone doesn't show up for work, with no notice, important safety concerns can arise. I was pleased to see that the Department is taking a step in the right direction by proposing a rule that would encourage workers to follow their employer's call-in procedures if they want to use FMLA leave.

I was also pleased to see that the Department proposes to recognize physician assistants as health care providers in the context of providing "continuing treatment" for those taking FMLA leave. This will be very beneficial to my constituents in rural Utah, where all too often people have to travel a significant distance to visit a physician, while a physician's assistant is located right in their own small town.

The Labor Department has proposed useful measures to update its regulations, but I won't go into a detailed discussion about them, as I am sure Assistant Secretary Lipnic will expound upon the major points. But I note that despite these proposed changes, important issues remain. For example, refining the definition of a "serious health condition" continues to be a contentious issue, one, which I note, we did not undertake to do when the 1993 legislation was drafted.

In conclusion, I note that much has happened in the past 15 years since we first passed FMLA and happily this includes wide agreement of the benefits of the act. As the FMLA has become part of our social landscape, covered workers and their employers have recognized the importance of balancing work and family obligations. I want to thank the Labor Department for its extensive work on its FMLA regulations, and for its consultations with my staff as you considered your regulatory options. In my opinion, the Department has a well-considered, sensible proposal, one that is certainly needed to reflect the lessons learned since 1993.

Thank you Mr. Chairman.

Senator DODD. Well, thank you very much, Senator. We'll make sure they're all included, and I appreciate you raising the issue.

In fact, let me—because the Senator has raised the issue and I—having been the author of the Family Medical Leave Program for the caregivers of our returning soldiers from Afghanistan and Iraq, passed unanimously through the Congress. Bob Dole, as I mentioned upstairs, had called and asked me to author the legislation. He called, of course, for paid leave program for 6 months for people. We discovered that, if I'm correct, 30 percent of the caregivers had had to relocate in order to take care of that veteran, and one out of four had lost jobs, as a result of providing care for that veteran coming back and coming out of the hospitals and needing that assistance and support as they sort of re-gathered their lives.

When we passed Family Medical Leave, there were interim regulations that were adopted in order to get moving. I want to underscore the point that Senator Hatch has raised here, and I'd like to recommend that you consider interim regulations that would allow this to move forward while we wait for the permanent regulations. Too often that can take a lot of time, and obviously you've got a lot on your plate. But, in fact, we did interim regulations for FMLA 15 years ago, I could, I think, make a strong case that given the numbers of people we're talking about here—I think we're talking about 3,000 or 4,000 people here, it's a very small audience of people who would be affected by this leave program, that maybe we could try and get some interim regs adopted, so this could become more available, more rapidly for people.

I just raise that with you, I know you've got testimony to give, and let me welcome you to the committee, and thank you for being here, and we're anxious to hear what you have to say.

STATEMENT OF VICTORIA A. LIPNIC, ASSISTANT SECRETARY, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Ms. LIPNIC. Mr. Chairman, Chairman Kennedy, Senator Murray, Senator Hatch, thank you for inviting me here today to testify about the Department of Labor's 15 years of experience in administering the Family Medical Leave Act and to discuss the Department's proposals, issued earlier this week, to revise the regulations under the FMLA. It's an honor to be with you today.

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

Senator DODD. That will be done.

Ms. LIPNIC. Thank you.

I will say at the outset, having worked with our enforcement personnel over a number of years at the Labor Department, and talked with many around the country, I have observed that few laws generate the kind of support and desire to make sure that the law is working properly, as does the FMLA. Not that we don't 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 the law.

I also want to say at the outset—as you, both you and Senator Hatch mentioned—that this rulemaking issued this week includes an extensive discussion of the leave entitlements for military families as sponsored by you and signed into law by the President on January 28.

The Department takes its commitment to the service members and their families very seriously, and because one of the provisions providing additional FMLA leave protection cannot go into effect until the Secretary of Labor defines certain terms by regulation, we are moving as expeditiously as possible. We've already reached out to the Department of Defense and Veterans Affairs as well as groups representing service members and their families to obtain their input.

We believe that our proposal will allow us to finalize these regulations as quickly as possible, and that is certainly our goal.

To that end, the Department approached this rulemaking overall in a very careful, deliberative and transparent process. We began a review of the regulations in 2003, holding stakeholder meetings that year and the following year, with more than 20 groups representing employers and employees.

In December 2006, we published a request for information, seeking public comment on many aspects of the regulations, and also asking for more information and data about the public's real-world experiences with 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 the report in June 2007.

Our goal in publishing that report was to do a number of things. First and foremost, to let the record speak for itself, and second,

as we said at the time, to 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 last summer to brief the HELP committee in a bipartisan fashion, and very much appreciated the opportunity to do that.

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's 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 overwhelming value of the law to the workers. Second, that the FMLA is working well in the majority of cases, 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 our record, is that not all workplaces experience the FMLA in the same manner. There are certainly broad consensus that the FMLA is valuable for workers and their families. There were 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—in the 15 years since the law first went into effect, and the Department's first interim final rules went into effect—much has happened. Numerous court rulings examining the act and implementing regulations, statutory and other regulatory developments, such as passage of the Health Insurance Portability and Accountability Act, that directly or indirectly impact administration of the FMLA.

As we said in our 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 condition, or to care for family members recovering from those conditions.

The FMLA seems to be working very well when employees are absent for scheduled treatments related to their own serious health condition, or that of a family member. Employers, however, often expressed frustrations 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 Request for Information report indicated that time sensitive industries, such as transportation operations, public health and safety operations and assembly line manufacturers may be especially impacted by employees taking unscheduled, intermittent FMLA leave.

The Department also learned from the Request for Information 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. It also appear that, despite much work by the Department, many employers still do not fully understand their rights under the act, or the procedures they must use when seeking FMLA leave.

These aspects of the Family Medical Leave Act can have ripple effects that result in conflicts and misunderstandings between employees and employers regarding designation and the full protection of the law. Without action to bring clarity and predictability for FMLA leave takers and their employers, the Department cautioned the RFI report that employers and employees may be 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 million took FMLA 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, for example 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 act. This experience is from the perspective of both leave-takers and employers who must manage the taking of leave.

The Department is also fully aware that its proposal does not address all of the issues identified during its lengthy review of the FMLA. However, the Department believes that its proposal is an important step in the right direction, one that will allow the FMLA to function more smoothly for America's working families and their employers.

I'm happy to address the specifics of the proposed rule in the questions and answers, and they are detailed in my written testimony. I want to note that we evaluated all of the comments to our record, ever mindful of the peace of mind that the FMLA brings to workers and their families, as they face important and often stressful situations.

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 smooth communications among employees, employers and healthcare professionals, and to update and clarify spe-

cific, problematic areas of the current FMLA regulations without limiting employee access to FMLA leave.

And with that, I will be happy to take your questions.

[The prepared statement of Ms. Lipnic follows:]

PREPARED STATEMENT OF VICTORIA A. LIPNIC

Good morning, Chairman Dodd, Ranking Member Alexander, 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 Department believes that the FMLA is a beneficial law that has served Americans reasonably well. The recent expansion of the law to provide military family leave, along with the experience gained from 15 years of enforcing the rights of workers to take job-protected leave, 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 can be accessed at *www.dol.gov/esa/whd*.

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 are moving as expeditiously as possible. 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, and 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 the taking of 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 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 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 condition or that of a family member.

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.

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

[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*.

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 all of the issues identified during its lengthy review of the FMLA. However, the Department believes that its proposal is an important step in the right direction—one that 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 H.R. 4986, the National Defense Authorization Act for FY 2008, amends 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 H.R. 4986). The provisions of H.R. 4986 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when President Bush signed the bill into law. The provisions of H.R. 4986 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."

Because a significant number of U.S. military servicemembers are currently on active duty or call to active duty status, the Department is committed to issuing final regulations under the military family leave provisions of H.R. 4986 as soon as possible. Even before H.R. 4986 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 to discuss its views on the new military leave entitlements.

Accordingly, in the interest of ensuring the expeditious publication of regulations, and as it did in the initial notice of proposed rulemaking under the FMLA in 1993, 58 FR 13394 (Mar. 10, 1993), 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. Because there is a need to issue regulations promptly so that employees and employers are aware of their respective rights and obligations regarding military family leave under the FMLA, 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.

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, if finalized, should 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 nonconsecutive 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 5 years or more need not be counted. 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 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. Quite simply, if an employee is voluntarily performing light duty assignment work, 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).

[4] Wage and Hour Opinion Letter FMLA–55 (Mar. 10, 1995).

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 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 2 business days to 5 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 7 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 2 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.

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 medical information,[5] provide additional reasons for the Department to reexamine the process used to exchange medical information under FMLA.

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

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 protections for employee medical 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 employee consent 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 medical privacy regulations are met, the proposal permits an employer to contact an employee's health care provider directly for purposes of clarification 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.

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 1 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 6 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.

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 3 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. In addition, to the extent that some employers have chosen to provide their own more stringent definition of the term "periodic" for FMLA purposes, this change will provide clarity to both employees and employers and guards against employers making quick judgments that deny FMLA leave when employees otherwise should qualify for FMLA protections.

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 has evolved. Since 1995, 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]

While the Department recognizes the importance to many employees of paid leave, the current regulations have placed employees who substitute such leave for FMLA leave in a more favorable position than their coworkers who are taking vacation or personal leave for non-FMLA reasons. The proposed rule, therefore, 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.

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 admin-

[6] Wage 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).

istering 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, expeditiously 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.

Senator DODD. Thank you very much, Madame Secretary. I appreciate that very, very much.

Let me thank you, first of all, I mean, there are going to be some criticisms, but I want to thank you for your kind comments about the legislation, as well. I recognize that, and reading over your testimony last evening, and it's not always been the case. We've, in the past, had some experiences when there was nothing good to say about this law, and as you point out, this has become an issue, given the number of people who have be able to take advantage of the law. The overwhelming majority of people have done so, I think, responsibly.

They're obviously—with any law, there are going to be instances when people exceed what the law was designed to do, and striking the balance between the needs of employees and their responsibilities, and the need of employers and their responsibilities, and trying to keep that balance in place. That will be the subject of my questions. Since there are three of us here, we can move around, make it rather informal. If anyone wants to jump in, or add a comment or so, please do; Senator Hatch or Senator Murray do so, as well, so we'll try and make this a bit more conversational.

One of the concerns—and you heard Senator Kennedy raise this in his comments—was this idea of requiring the employee to make it possible for the employer to inquire of the healthcare provider, in a sense, to corroborate, I guess. There are certain, really, serious issues under HIPAA. We all know—and I just recently, calling up to check on someone in the hospital, I mean, they are very careful to say, "Well, you know, we just got out the permission of the patient—," even someone inquiring as to their condition, was a sensitive subject matter.

The employer, obviously, calling up to inquire here can raise serious privacy issues for people and, in a sense, could discourage someone, in a sense, because there may be other issues they don't necessarily want an employer to be aware of that would have nothing to do with their relationship as an employee and an employer.

So, that decision, "I'm going to take Family Medical Leave, but this guy wants to talk to my doctor about me, you know, I don't want that, I need to be there with my family, but this is pretty dangerous for me, in a way, so I guess I won't make that, I guess I'll just back up." I don't think any of us want to do that. I think again, that changes that balance.

It's never perfect. But it seems to me, by insisting upon that, we're overreaching a bit, here. There have got to be other ways, we've inquired that there's—it's fair for, as I recall and you correct

me here—an employer to request some documentation, a note or whatever else to corroborate the circumstances. That worries me.

Again, there's, the second point being, again, the one that Senator Kennedy raised is, when you've got people with permanent conditions—I mentioned diabetes being one, I mean, this is not a condition that comes and goes. Chronic asthma—a long list of things. The idea that people would have to go back and corroborate, in a sense, that they still have asthma, they still have diabetes is, well—if it weren't tragic, it'd be almost humorous, in a sense—the suggestion, somehow, that you're going to have a miraculous cure. Now, that can happen, but the likelihood that it's going to occur is pretty limited, in a sense.

So, why are we adding to that burden under those circumstances? I wonder if you'd address those issues for me.

Ms. LIPNIC. Sure, I'd be happy to, Senator.

Let me say, as I said in my oral testimony, the medical certification process, and how it works currently, is something that the Department has heard about extensively, and we had the stakeholder meeting in September where we had the healthcare providers participate. Many had expressed a lot of frustration with how the process works, currently.

I think it's important to understand, under the current regulations, and as provided for by the statute, employers—if they request—are entitled to a complete and sufficient medical certification form. The statute lays out, in great detail, what goes into that medical certification form—the timing and duration of the illness, the sufficient medical facts to justify whether or not the employee has a serious health condition.

I think part of the frustration, in fact, on the part of healthcare providers that has been expressed to us, is that they think that the certification is too onerous.

What we have heard a great deal about—and looking at these regulations—is that there is a tremendous amount of back and forth that is going on right now between employers and employees and healthcare providers about trying to resolve these issues that come up on the current medical certification form.

Part of what our goal is—in trying to smooth out all areas within these regulations, but particularly as to this medical certification process—is to allow a better flow of information and to eliminate both the "gotcha" game that seems to be going on in some instances by employers, where they may get a current medical certification form and reject it, out of hand, because it's not initialed in the right box, or doesn't have the right information, or the employers are looking for more information. Also eliminate the situation where employers are going back to employees constantly, saying, "You've got to give us more information. We need to know that this medical certification form is sufficient," and again that is laid out in the statute.

Our approach to that was to do a number of things. First of all, in terms of the privacy—and that's why I mentioned how the rules work currently—employers currently contact an employee's healthcare provider. They do so, under the current regulations, through an employer's healthcare provider. In other words, the em-

ployer must have a healthcare provider, and they have their own healthcare provider contact the employee's healthcare provider.

The one thing that we are recommending be changed, is that the employers no longer have to have a healthcare provider make the contact directly with the employee's healthcare provider.

Now, there are two reasons for that. One is, HIPAA intervened—the Family Medical Leave Act is 1993, HIPAA is 1996—so employees who must, if requested by the employer, provide that complete medical certification, would have to have a HIPAA authorization form on file with their healthcare provider, in order to enable their healthcare provider to disclose any kind of medical information to the employer—whether it's to the employer's healthcare provider, or whether it's to the employer directly. So that—the privacy issues are governed by HIPAA at this point.

Second, as to the point of essentially removing the employer's healthcare provider from the equation, we are recommending that—and this is a change that we're also putting into place, and again, we're trying to eliminate this "gotcha" game, and we're trying to eliminate this sort of endless loop between employers and employees on these medical certifications.

We're saying that employers must now provide, in writing to employees, what is wrong with their medical certification form. They just can't reject it out-of-hand, they can't just say, "It's not sufficient," they've got to tell the employees, in writing, what's wrong with it, and they've got to give the employee a chance to cure that deficiency.

In so doing, we would hope that the employee would, then, get out of this kind of endless loop, have the chance to go back to his or her healthcare provider, get the information and resolve these issues in a much quicker fashion.

Or, if the employee chooses, and would tell his or her employer, "Go ahead and contact my doctor," that HIPAA authorization would already have to have been filled out by the employee's doctor. But, only the contact between the employer directly, with the employee's healthcare provider, can only take place after the employer has told the employee, in writing, "Here's what's wrong with this medical certification form," and give the employee a chance to cure that deficiency.

Again, we're trying to eliminate this back and forth and a lot of this "gotcha" that seems to be going on.

Senator DODD. I believe I follow that, I think I do, anyway. Again, sitting there, I'm an employee, it's going to make me a little dizzy just thinking about the steps and hurdles to get through all of this.

I appreciate your point about making sure the employer lets the employee know that there's something—this is specifically what's missing in the certification.

Ms. LIPNIC. Right.

Senator DODD. I'm surprised it's taken us that long. it seems to me that's fairly common sense, then just rejecting it. I mean, why has it taken us this long to get that kind of a suggestion?

I'm still uneasy about the idea that—because that could go on for quite a while, in a sense. The quickest way to, maybe, get around it one would think, is then of course, just to sign those HIPAA au-

thorizations so the employer, either through their healthcare provider, whatever, could contact and be in touch with the employee's healthcare provider, and that opens up a door. While it may make it easier, there's pressures there. Again, it strikes me that that's a pretty dangerous step to take, given the concerns people have about—the only reason in that circumstance is to determine whether the leave is necessary. But you're learning a lot more than whether or not the leave is necessary, you're going to have access to a lot of information, potentially, that would seem to exceed that which the employer needs to know to make a determination as to whether or not that individual ought to have a few days off to be with—either because of their own illness or a child's illness, or a parent, or someone else. That seems to me to take that balance, and kind of shift that pretty heavily in the direction that it's going to discourage employees from doing what I think we want them to do.

It's not just a question that they should have a right to do this. It's in our interest that they do it. C. Everett Coop's testimony, others—this helps everybody. While it can be a burden on the employer for a time, in some cases, there's a larger value to this than just the employee, the notion that he's trying to get away with something.

Too often, I think that's what this attitude was that they brought to the debate. I still find that permeating some of this conversation—that this is somehow a scam, and that people are trying to take advantage of their employer by doing this. That's what I'm worried about when I hear about this, getting HIPAA authorizations. That can have a chilling effect on someone's desire to get that kind of approval to go forward. That's my concern with that.

Ms. LIPNIC. Senator, I appreciate that concern, and your point about trying to find the right balance.

Senator DODD. Yes.

Ms. LIPNIC. It is exactly what we've been trying to do in many aspects in these regulations. HIPAA, as I said, which is a later enactment from the FMLA, would certainly govern those privacy issues.

The other thing I do want to point out is—even under the current law, and we are actually making this clear in our proposed regulations—employers are not allowed to get access to the entire medical record of the employee. The employer has the right to get the complete and sufficient medical certification form as spelled out in the statute, but employees cannot be compelled to sign a release to give over their entire medical records to their employer.

Senator DODD. I appreciate that.

I want to turn to Senator Hatch and Senator Murray very quickly—correct me if I'm wrong—did you address for me, adequately, the issue about these permanent conditions?

Ms. LIPNIC. I did not, and I did want to mention that, quickly.

One of the proposals that we have in our rulemaking is to essentially codify what has been the Department's enforcement practice for a number of years now, where the medical certification can be asked for of employees on an annual basis. We have had that as an enforcement policy for awhile.

Now, as Senator Kennedy mentioned, the example of his son, who has a chronic condition. This is a tension that we saw in the comments between employers and employees and, again, the healthcare providers when employees have some kind of chronic condition—let's use asthma as the example—and the healthcare provider says that it's a lifetime condition, the employee's being treated for it—the employer has no ability to know what kind of attendance that they can expect or predict from that employee.

So, as a matter of enforcement policy we did, a number of years ago, institute a policy where employers can get an annual certification. Part of this is trying to get at this, where healthcare providers will certify the condition as lifetime, with not much more information for the employer to be able to try to figure out how they can potentially staff around this person's condition.

It's not perfect. I think the difficulty in all of these situations, when you're dealing with medical conditions is, one person's condition, you know, will impact that person one way, and someone else impacted differently. I think what we're trying to do is get the information better and more complete up front to—between employers and employees and the healthcare providers that we think would actually alleviate many of these requests to get repeated certifications.

Senator DODD. I thank you for that. Senator Hatch. I just wanted to follow the traditional——

Senator HATCH. If it's OK with Senator Murray and you, Mr. Chairman—I always do what you tell me to do.

Senator DODD. That's right, make me look bad, go ahead.

[Laughter.]

Senator HATCH. That's not unusual from time to time.

Senator DODD. You do it very easily, all the time.

Senator HATCH. That's right.

On your report on the RFI last June, you identified the definition of "serious health condition" as one of the biggest problems with the current regulation. Now, you've touched on this a little bit, but why aren't you proposing to fix this problem in your proposed rulemaking?

Ms. LIPNIC. Senator, we looked, and when we first issued the request for information we asked for all—many suggestions about how could we better define and give some greater certainty to what constitutes a "serious health condition." It's a two-part definition under the statute, that got turned into a six-part definition in the regulations.

That six-part definition has been the subject of a lot of criticism, certainly. I think, from the employer community, that it took a very expansive view of what constitutes a serious health condition.

We are proposing a couple of changes in the definition. One is, where there is a requirement that employees have to be incapacitated, essentially, sick for more than 3 days, and have two visits to a healthcare provider, we are cabining off those two visits and saying that they must take place within 30 days of the period when the individual has been sick.

We're doing that because we want to give some greater certainty to that part of the definition. Under the current open-ended definition, the 10th Circuit has interpreted that in a very restrictive way

and said that those two visits must take place within the 3 days that the individual is sick. We think that that is a far too restrictive reading.

Then as to the separate definition within "serious health condition" which has to do with chronic conditions, and the issue of chronic conditions is probably the one that we have probably heard the most about, and that I think in terms of trying to reconcile all of the aspects of the Family Medical Leave Act is the most difficult to deal with, both for employers and employees.

The current definition for chronic health conditions says that the individual has to have periodic visits to the healthcare provider. We are defining those periodic visits as twice within a year.

I can well imagine that we will get many comments from employers that would have suggested that we should have taken a far more restrictive view of serious health condition, but I will tell you, we asked for someone to give us a good way to define, better define serious health condition, we did not see anything in that, in our record, and I think most importantly, we didn't think it was appropriate for us to take a more restrictive view. Because, the fact is, of the 7 million people who took Family Medical Leave in 2005, we don't know how many people took it for colds, and how many took it for cancer. Nobody knows that. We did not think it was appropriate for us to make any kind of significant changes to that definition that would then restrict the eligibility. It's not a perfect definition, by any means, but it's what we have to work with.

Senator HATCH. Well, I don't envy you your job.

I'd like to commend the Department for moving so quickly on the new Military Family Leave provisions that were signed into law last month. Can you identify for me, what are the major issues, if any, with that particular law?

Ms. LIPNIC. Well, there are a couple, and obviously, it's certainly our goal to get those implemented as quickly as possible. We laid out in our proposed rulemaking many of the issues that we had identified.

Among those is, we believe that it would be best for us to rely on a certification from the Defense Department or the Veterans Administration to verify—so that the employer has some means to verify that the individual is entitled to the leave.

There are two provisions, as you know, in that new entitlement. One is for the 6 months of leave for someone who's injured, the other is for any qualifying exigency and there is very limited legislative history about what that term "any qualifying exigency" should be to give the protection of 12 weeks of family medical leave to military families.

Now, we have had good discussions already with the National Military Families Association. They have given us a list of what they've suggested ought to qualify as that "any qualifying exigency" but that's obviously a very broad term, and we want to make sure that we can define that in the way that serves these families in the best way possible, and also doesn't leave them in a position—as they said to us—they don't want to be in a position where employers don't want to hire them, because they think they have too much leave available to them.

So, again, trying to find the right balance on that. There are any number of other issues that go into very technical details about how the current regulations work, and those we are seeking comment on, as well.

Senator HATCH. Thank you, Mr. Chairman, my time is up.

Senator DODD. Thank you very much, Senator Hatch.

Senator Murray.

Senator MURRAY. Thank you very much. I understand that the Department received around 15,000 comments last year in response to its request for information on Family Medical Leave Act, correct?

Ms. LIPNIC. That's correct.

Senator MURRAY. I also understand that your Agency's last really major attempt to collect data through a largely distributed survey, much more scientific, was 2000—8 years ago, is that correct?

Ms. LIPNIC. Nineteen ninety-nine to two thousand, yes.

Senator MURRAY. So, about 8 years ago.

That really leads me to believe that the Department's viewpoint on employer concerns with the law was kind of shaded by anecdotal information rather than scientific, or large survey. So, it sort of begs the question, why now? Why did the Department choose to issue new regulations 8 years after a major survey, and sort of, incidentally, in the President's last year of office?

Ms. LIPNIC. Senator, when we issued the request for information, we did ask for data that anyone wanted to supply to the Department and we have——

Senator MURRAY. Are you talking about last year or 8 years ago?

Ms. LIPNIC. Correct, last year, when we——

Senator MURRAY. Which was just, sort of, a sampling survey—15,000 isn't a lot of——

Ms. LIPNIC. That's correct. We made no representations in the report that that was a scientific survey. We asked for data, we looked at that and we supplemented the data that we have through those surveys that were done in 2000 of employers, establishments and employees.

Senator MURRAY. Was your draft proposal based mostly on the information that you got a year ago, then? The request for information that you put out last summer? The proposals that you have out there?

Ms. LIPNIC. The Notice of Proposed Rulemaking is based largely on case law, and particularly where we are resolving splits in Circuits around the country—and also on the information that we got to the request for information; and also, though, on that information from those 2000 surveys of——

Senator MURRAY. It seems kind of odd. Eight years later that you're requesting this information, or actually putting out proposals 8 years after you've asked, I mean, laws have changed dramatically, so, it seems sort of odd to me.

Ms. LIPNIC. Well, the only thing I would suggest, Senator, is again, a lot of the recommendations that we're making are based on cases that have developed over the last 15 years. Not every choice by any regulatory agency is data-driven, a lot of it is resolving conflicting cases between Circuit courts and——

Senator MURRAY. Well, in looking at what your recommendations are, they just sort of strike me as what the employer community has been saying for some time, so I was wondering if this was scientific data. I looked back, you hadn't done anything, really, scientifically since 2000. So, it just seems really odd to me, 8 years later, sort of, as I said, incidentally, in the last year of the President's time in office, that all of a sudden we're getting some recommendations that are really, to what I read, what the employers have been asking, so let me ask you—was there any consideration given to any proposals that would expand coverage rather than pursuing new hurdles for workers as they try to get family and medical leave?

Ms. LIPNIC. Any expansions to the law would have to be done statutorily. Now——

Senator MURRAY. Even regulation-wise, you didn't look at anything that might change it on behalf of the workers?

Ms. LIPNIC. No, as a matter of fact, we did make a number of changes within our regulatory authority that we think benefit workers.

For example, under current law, when employees come back to work and they are in a light-duty assignment, that light-duty assignment, the time that they are at work, counts against their 12 weeks of Family Medical Leave entitlement. Our view—and a number of courts have interpreted it that way, and that's the current regulatory policy.

Our view was, when you are at work, you're not on leave, and therefore, you should not be burning your FMLA 12-week entitlement. So, we made that change.

We have a number of places where we've put in clarifying language to make it clear, for example, we had a lot of requests on this issue of a family member, does this particular family member have to be the only person in his or her family who is needed to care for their father or mother? We had, in fact, many, many requests from employers saying, "Can't you specify, we need some verification that that employee is the one individual in his or her family who has to care for that family member?" We said, "No," and in fact we made it clear that employers can not ask for that, and that if the employee has someone in his family that he has to take care of, he's entitled to the protections of the Family Medical Leave Act.

Senator MURRAY. So, that was one new regulation you did put in place. But it just seems to me, many of the ones we've been talking about do put in place new hurdles, or really, sort of intimidation for employees, as the Chairman has talked about, that I find sort of disconcerting.

But, I do want to hear from the other panels, I know we have very little time, so I'll stop there.

Senator DODD. Well, thank you very much, Ms. Lipnic. There's probably some additional questions for members of the committee. We will leave the record open and ask you to respond.

Senator Hatch, I don't know if you have any additional questions for this witness?

As has been suggested here, these are proposed regulations. I would anticipate if I were you, probably a response from many of

us up here regarding these proposed regulations, and hope that you would take those into consideration as you're looking at these ideas, before they become permanent regulations.

I, once again, reiterate the point Senator Hatch has made about the leave policy for veterans coming back, and make the suggestion to you about the idea of an interim way that might allow us to move forward more rapidly, here, in the anticipation of permanent regulations. As I said, having done this before, there is precedent for it, and there might be a—not that it's easy to do, I understand that, but in order to get to this, it may be of some help if you can get some interim regulations and allow us to begin to serve these people.

With that, we thank you very much.

Ms. LIPNIC. Thank you, Senator.

Senator DODD. Thanks for being here today.

Let me ask our second panel to join us, Debra Ness, I mentioned earlier, the president of the National Partnership for Women and Families, Marcel Reid from ACORN, Kristen Grimm, president of Spitfire Strategies, and Kathie Elliott, director of Employee Relations, Central Michigan University. We thank all four of you for being here, we'll let you get seated.

Debra, Mr. Reid, Ms. Grimm, nice to see you. Ms. Elliott, thank you for being here, as well.

I'm going to ask you, if I can, to keep your remarks to 5 minutes, if you would. I know that's not easy, considering you've got a lot of things you want to say, but I'll now ask the consent that all of your full statements, any supporting data, material that you think would be helpful for the community to have at this moment would be included in the record. I'm not going to rigidly hold you to 5 minutes, but just sort of keep in mind. I think there's some light somewhere around here that blink—I guess they're right in front of you, I think on those—are there lights there? So, if you can kind of keep an eye on that it would be helpful so we can get to the Q&A period.

Debra, we'll begin with you. Thank you very much for being here.

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

Ms. NESS. All right, Senators, good afternoon.

I am Debra Ness, President of the National Partnership for Women and Families. The National Partnership has been working on issues that are important to women and families for more than three and a half decades. We are very proud of our history as the organization that led the campaign for passage of the Family Medical Leave Act and today we lead a coalition of more than 200 organizations that are working to defend and expand this groundbreaking law.

I'm especially pleased to be here today, because this month marks the 15th anniversary of the FMLA. This law has helped tens of millions of women and men meet their family responsibilities without sacrificing their jobs. It has profoundly changed both our culture and our expectations about the workplace. It's been good for business, as well as good for workers and families.

Many of us here today are veterans of the very long fight to pass this law. We overcame relentless scare tactics from businesses that claimed the law would be the end of them. Fifteen years later, though, the Family Medical Leave Act is well-established, and businesses have flourished during this period.

It's important for us to remember those scare tactics when we talk about expanding the law, because opponents will use them again. They are the same unfounded predictions, designed to block progress today, just as they were 15 years ago. If we have the courage to move past them, I am convinced we will prove, once again, that family-friendly workplace policies work well for everyone.

This is an exceptionally sweet anniversary for us, because this year also marks the very first ever expansion of the Family Medical Leave Act. Now, military families—the families that have sacrificed so much for this country—can use the FMLA to take up to 26 weeks of leave to care for soldiers that are injured or made ill during combat.

Now, we're thankful for all who helped make that law happen, but a very, very special thank you to you, Senator Dodd, for your extraordinary leadership in making that law happen.

But at the same time we celebrate this victory, we are so worried about efforts to chip away at the progress we have made. As we sit here today, the National Partnership is preparing comments on the regulations, the 500-plus pages of proposed regulations that Victoria Lipnic just spoke about.

We will do everything possible to ensure that no regulations make it harder for workers to take the leave that they need. But frankly, we do think it is absurd that 15 years later, the Administration is forcing us to defend gains of the past, instead of us helping, focusing on how to expand the law to help workers going forward in the future. I promise you, we won't be deterred from those efforts.

We estimate that since 1993, between 60 and 100 million workers have used the FMLA. But, unfortunately, millions more who desperately needed it, didn't take it because they either weren't eligible, or they couldn't afford to take the unpaid leave the law provides, and that needs to change.

This hearing is about the next chapter, and we are committed to helping you write that chapter. Right now, for too many workers, a serious illness or the birth of a child, sets in motion a series of events that leads to loss of job, loss of health insurance, and economic catastrophe. That's because about 40 percent of private sector workers are not covered by the FMLA, and many of those who are, can't afford to go without the paycheck.

We need to expand FMLA so it covers all workers. We need to provide some income support so that workers can afford to take the leave that they need, and 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 the necessary services to deal with domestic violence.

We especially need to see paid leave adopted nationwide. Last year, Senator Dodd, you and Senator Stevens introduced the first-ever bipartisan bill to provide wage replacement for workers on family or medical leave. This bill would create a Family Leave In-

surance Fund, paid for by small contributions from both employers and workers. I can tell you, there is very strong and deep support for this kind of law.

The kind of program that you're proposing would be good for business, as well as for workers. We know the cost of losing an employee is generally much greater than the cost of providing short-term leave to retain employees. As you pointed out yourself, right now, the United States stands alone among industrialized nations in its lack of a national program to help workers afford leave.

A Harvard/McGill study showed that out of 173 nations, only 4 did not guarantee paid parental leave, and those four are Liberia, Papua New Guinea, Swaziland and yes, the United States. So, we can do better.

With the economy in trouble, with families struggling, with more workers caring for older families than ever before, we need to do more than talk about family values, we need to put those family values to work. So, let's expand the FMLA so that more workers can take the leave they need without jeopardizing their economic security, or their family's well-being.

Thank you very much.

[The prepared statement of Ms. Ness follows:]

PREPARED STATEMENT OF DEBRA NESS

Good afternoon. I am President of the National Partnership for Women & Families. The National Partnership is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care, and policies that help workers in the United States meet the duel 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 in the United States. The coalition reaches across a wide spectrum of concerned citizens, including religious, women's, seniors, veterans, and disability groups.

Our leadership of this coalition is a natural extension of our original role as drafter of the FMLA and leader of the coalition of more than 200 organizations advocating for its passage.

I am especially pleased to be here today because this month 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 12 weeks of 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. It also helps ensure that men have the time to care for children and other families members, and take on more responsibilities at home.

To celebrate this anniversary, the National Partnership for Women & Families launched a new Web site, *www.thanksfmla.org*, for workers to learn about the FMLA and to share their stories about how the law has helped in their lives. Although the Web site just went up, we are already receiving many stories and I will be sharing some of those with you today.

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 the same scare tactics again and predictions that the sky will fall. 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 their country, and we are thrilled that 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 that the Department of Labor is proposing new FMLA regulations. As my testimony will make clear, the FMLA is working and working well. It 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.

THE FMLA IS WORKING WELL

Since 1993, workers have used the FMLA more than 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. For example, 75 percent of leave takers earn less than $75,000 a year.[2] A significant number of leave takers are men (42 percent)[3] who use the FMLA for both their own serious illness (58 percent) and to care for seriously ill family members (42 percent).[4] When taken, leave is usually quite short: the median length is just 10 days.[5]

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. There are times I'm out of work for days. [I]f 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]
>
> Thanks to the FMLA, I was able to take 3 months off work with full salary in order to take care of [my husband] when he was reduced to a state of complete dependency. . . . I was secure in the knowledge that I could come right

[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) (herinafter "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 national survey of its own. 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*, conducted by Westat for the U.S. Department of Labor, Washington, DC, 2000 (hereinafter "DOL 2000 Report") at 3–7.

[3] *Id.*

[4] *Id. uT1at 4–17.*

[5] *Id.* at 2–4.

[6] DOL 2007 Report at iv.

[7] *Id.* at 1.

[8] *Id.* at 2.

back to my job, and I developed a keen sense of loyalty to my employer which has more than once prevented me from looking for work elsewhere.[9]

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/neutral effect on productivity (83 percent), profitability (90 percent), growth (90 percent), and employee morale (90 percent).[10] 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:

> 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.[11]

The Department devoted a great deal of its 2007 report to the use of intermittent unscheduled leave and the problems employers claim to have with this part of the FMLA, and we fully expect that this will be an issue in the Department's proposed regulatory changes. But because it has not surveyed employers or employees on this issue since 2000, the Department's analysis was based heavily on anecdotes and self-reporting from employers regarding the use of unscheduled intermittent leave. The data, however, shows that unscheduled intermittent leave is a very small part of the leave taken under the FMLA and that the vast majority of FMLA-covered establishments do not have any problem with unscheduled intermittent leave. From DOL's 2000 survey of employers we know that "81 to 94 percent of covered establishments that report that intermittent FMLA leave did not adversely impact either their productivity or profits, or may have had some positive effect."[12]

Intermittent leave is critically important to certain employees because of the health conditions they or their family members face. Just last week, the National Partnership received the following story regarding FMLA use from a woman in Illinois:

> I have benefited from FMLA, because my father is suffering with prostate cancer and my mom has type 2 diabetes and severe arthritis. I took intermittent FMLA to help my parents through this rough stage in their lives. My dad is 83 years old, and does not wish to go to a nursing home, he has good days and bad days. I am the only child of my parents, and they depend on me for everything. I don't know what I would do without FMLA benefit. I hope they will not take it away.[13]

PAID FAMILY AND MEDICAL LEAVE

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 and to all working families and to make paid family and medical leave an option for working families that 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 percent of employees who have needed but not taken family or medical leave say they could not afford to take the leave.[14] More than one-third (34 percent) 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.[15]

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[9] *Id.* at 5.
[10] DOL 2000 Report at 7–5 and A–2–68 Table A2–7.5.
[11] DOL 2007 Report at v.
[12] *Id.* at 159.
[13] E-mail Received by the National Partnership for Women & Families, *www.thanksfmla.org*, on February 6, 2008.
[14] DOL 2000 Report at 2–16.
[15] *Id.* at 4–5—4–6.

Last week 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.[16]

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.[17]

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.[18] 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.[19]

Providing paid family and medical leave for workers to perform essential caretaking responsibilities for newborns and newly-adopted children. Parents who are financially able to 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.[20]

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.[21] 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.[22]

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 percent of an employee's total compensation.[23] 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, paid family and medical leave helps small business owners because it allows 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 8 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

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[16] E-mail Received by the National Partnership for Women & Families, *www.thanksfmla.org*, on February 5, 2008.

[17] The David and Lucile Packard Foundation. 2001. The Future of Children: Caring for Infants and Toddlers. Richard Behrman, ed. Los Altos, California: The David and Lucile Packard Foundation. 11(1).

[18] DOL 2000 Report at 4–5 and A–2–31 Table A2–4.1.

[19] Kaiser Family Foundation. 2007. *The Uninsured: A Primer. Key Facts About Americans Without Health Insurance. http://www.kff.org/uninsured/upload/7451–03.pdf.*

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

[21] Families and Work Institute, Highlights of the 2002 National Study of the Changing Workforce, 2002.

[22] AARP Public Policy Institute, *Update on the Aged 55+ Worker*, 2005.

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

would be issued through employers' regular payroll system, to make it simple to administer, with prompt reimbursement from the Family Leave Insurance Fund.

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 a week for paid family and medical leave. Seventy-six percent of the total sample were supportive. Hispanics and African-Americans were even more strongly supportive—86 percent and 84 percent respectively. Neither gender nor age affected support for the proposal: 73 percent of men and 78 percent of women supported it as did, as noted above, a large majority of respondents of all ages.[24]

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.[25] 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 percent 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 percent do so to care for a new baby and 12 percent do so to take care of another family member.[26]

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 5 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. Washington created a committee to explore funding options for the bill. In the short-term, the committee has recommended using the general fund of the State.

WAGE REPLACEMENT OR INCOME INSURANCE CAMPAIGNS IN OTHER STATES

We are seeing more States engaging in efforts to provide the necessary income for workers to be able to take the leave they need. In the past year, New Jersey, New York, Illinois, and Oregon have all introduced family insurance legislation similar to California's program that would provide wages while workers are on family leave.

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

[24] Lake Research Partners, *Nationwide Polling on Paid Family and Medical Leave Poll*, conducted June 20–27, 2007.

[25] 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.

[26] California Employment Development Department, Press Release, July 1, 2005 (available at *http://www.edd.ca.gov/nwsre105–36.pdf*).

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.[27]

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.

Senator DODD. Thank you very, very much, and thank you for your generous comments about the Family Medical Leave program for the military.

I made the mistake, when we were talking about this earlier, I talked about it being a paid leave. That was the original idea, but the Administration objected to a paid leave program for the caregivers of veterans, and I regret that. That was the original idea, that was the idea that Bob Dole actually recommended, coming out of that Wounded Warriors Commission that he and Donna Schulayla chaired, and we weren't able to get the paid part of that included, which is going to add to the burdens of getting this done. Again, a lot of these people don't come from families that can afford to take the kind of time, the 24 weeks that we're talking about here, to provide that kind of assistance. That's almost impossible in many cases. So, we're going to work on that, as well.

Ms. Reid, thank you for being here.

STATEMENT OF MARCEL REID, PRESIDENT, DC ACORN, WASHINGTON, DC

Ms. REID. Thank you. My name is Marcel Reid, and good afternoon, Senator and friends. I represent DC ACORN, I'm actually the President of DC ACORN, and I wanted to speak about my own experience with the Family Medical Leave Act.

But, first of all, to tell you a little about ACORN, we are the largest grassroots organization in the country. We have 375,000 member families, in 105 cities. We have worked for a very long time on something I call the poverty tax, and that is lessening the burden on the poor, because everything that they do is more expensive.

The Family Medical Leave Act, which I took advantage of, because of illness in my family, is excellent. I thank you so much for it. It allowed me to spend time with my mother at the end of her life, when she was waging her final battle against an extremely aggressive form of cancer.

I was able to take advantage of this, because I had a very good job, and I made a decent salary, and I had savings and money put aside so that I could take the time off. But even taking the time off, I actually had to confront my employer to have the time off.

When I was told about the Family Medical Leave Act by the suggestion of my mother's doctor, I went to my employer, and they immediately started putting hurdles up so that I could not take it. They wanted to have a complete report from her doctor, they want-

[27] 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.

ed this, they wanted that. In the interim, I was supposed to stay there, while I tried to gather this information for them.

I decided to take a risk, go ahead and turn in the information as I understood it was supposed to be turned in, and take that time with my mother. So, I completely sympathize with people who don't have the option of doing that. Who, if they lose that job, don't have another job down the line for them. My experience was that, I was financially able to do so. The law backed me up.

But I have to say that employers in my experience has been—employers will put up unnecessary hurdles, if they can, to prevent you from taking the time off.

I do a lot of grassroots organizing, and a lot of the people that I organize have all of the same concerns that anyone else does. But they don't have the option to take advantage of the Family Medical Leave Act, because they're either frightened for their jobs, or they don't think they'll have an opportunity to survive economically. You know, if they don't lose their job, they just don't have the money.

I think that it would be very good if this law were passed so that they would have some income, some small amount of money that would allow them to spend time with their family members, or themselves, if they're ill.

Thank you.

[The prepared statement of Ms. Reid follows:]

PREPARED STATEMENT OF MARCEL REID

Good afternoon Senators and friends, my name is Marcel Reid and I am a member of the DC chapter of ACORN—the Association of Community Organizations for Reform Now. I am here today to share with you my personal story about my own use of the FMLA and to urge you to protect and expand this vital law.

ACORN is the country's oldest and largest grassroots community organization of low- and moderate-income families. We have over 350,000 members in 105 cities—fighting to improve our lives and get our members involved in their communities and in the civic process. I like to say ACORN's work helps reduce what I call the "Poverty Tax"—the extra tax that poor people pay every day because they have fewer resources and more hardships.

For years, ACORN has taken the lead in fighting for a living wage and other protections for workers and their families. We see the FMLA as an important protection. At the same time we recognize that because it is unpaid—many low- and moderate-income families will never enjoy its intended benefits.

Today I want to share my own personal experience with FMLA to illustrate why our organization is committed to protecting and expanding this law. I hope you will truly hear what I have to say, because I care a great deal about this issue.

I took leave under the FMLA in 2003 to be by my mother's side during her final struggle with an extremely aggressive cancer.

Now, I think I'll just go out on a limb here and say that none of us in this room would be here today if it weren't for our mothers. I owe my mother everything—and there was no where I could have been during that time other than by her side, caring for her when she needed me like she had done for me all my life.

Taking time off to be with my mother was one of the best decisions I have ever made. During those final weeks together, we grew even closer and I would not give up that time for anything.

But my mother also taught me to be an honest woman. I'd be lying if I told you that taking that leave was not a sacrifice.

At the time I took my leave, I had a fairly good job with a fairly decent salary, yet it took me nearly a full year to right myself financially. I was forced to use up my savings and—because loss income compounds itself—I wound up over charging on my credit cards as well.

Despite the financial setbacks I suffered, I know I was one of the luckier ones. I know many other ACORN members—and families like ours—who cannot even DREAM of taking advantage of FMLA because they simply can't afford the unpaid time off. Just another example of the Poverty Tax I mentioned—robbing low- and

moderate-income people of their ability to meet their basic needs and support their families. We can do better.

My mother's last lesson for me was how to die with dignity, and for that I am eternally grateful. I believe that every worker deserves the right to say a final goodbye and every worker needs to be able to take care of themselves and their family when real need arises—without worrying about financial ruin.

I understand that the Department of Labor has come out with regulations that would make the FMLA *less* accessible to workers. Well, I'm here to say that's heading in the WRONG DIRECTION. We should be sitting here today coming up with ways to insure that *every* American worker can take job protected PAID LEAVE when they need to. To reach its full potential—and for workers and their families to do the same—this law needs to be *more* accessible and affordable for workers—not *less*.

Our workers and our families are America's greatest resource. We are only human. We are *fully* human. It's time we started treating each other that way.

My mother lived her life hoping to see the world better and in a small way I hope sharing the story of her death will help do that. Thank you for listening to my story. I appreciate the opportunity to speak to you today.

Senator DODD. Thank you very much. I'm a huge supporter of ACORN. ACORN's been doing a great job on this foreclosure issue, and have been really helpful across the country in assisting families trying to stay in their homes. They've been around for a long time, but right now, it's been a huge benefit. Not for as many people as I'd like, unfortunately, but it's still out there making a difference for many. So, thank you very much for what you do.

Ms. REID. Thank you.

Senator DODD. Appreciate it.

Ms. Grimm.

STATEMENT OF KRISTEN GRIMM, PRESIDENT, SPITFIRE STRATEGIES, WASHINGTON, DC

Ms. GRIMM. Thank you, Mr. Chairman. Thank you all for this opportunity to testify before you today on this issue so critical to the health and welfare of families of this country.

My name is Kristen Grimm, I'm the President and founder of Spitfire Strategies, a for-profit consulting firm based here in Washington, DC that provides strategic communications advice to social change organizations, such as nonprofits and foundations.

I was stuck dealing with the paid leave situation very early on when I started my company. I started in July, I hired a Managing Director in October, which was a really glorified title, considering there were two of us. By December she was pregnant.

I didn't actually know how to work QuickBooks yet, and I hadn't figured out if we were taking off Columbus Day or Veteran's Day, but suddenly I had to worry about a maternity leave. It was a problem, because she was a great person, and she'd come from a really established organization, and I was a start-up. If I didn't come up with something, I was going to lose her, and she was what I needed to build my company.

She and I went back and forth, and we decided that we would have a 12-week maternity policy, 6 weeks paid, and 6 weeks unpaid. As a small business owner who had to foot that bill, and deal with that time off of my one other person working there, it was really scary. I didn't have government or anybody helping me out with that.

I took the chance, and it worked out really well, I will say. Five and a half years later, Gwen is still with me, we have 30 employees

in three cities. So, I'm really glad that I did it, it was a big risk, but I worry that other small businesses may not be taking this risk, because they don't have any way to mitigate this risk, of dealing with paid leave—which you have to deal with, because every employee you hire actually has a family. So, they will have a family obligation.

It's a particular privilege to appear before this subcommittee given our longstanding work at Spitfire, advocating on behalf of children and families, and for the policies benefiting them.

But today, I come before you not merely as an advocate of such policies, but also as someone who was personally impacted by them, in this case, as an entrepreneur of a small business, whose ability to remain competitive and successful is predicated upon attracting and retaining a team of talented professionals. That is but one of the reasons I am so supportive of your legislation, Mr. Chairman, the paid Family Medical Leave Act to provide employees 8 weeks of paid leave to welcome a child into the family.

To be sure, there are circumstances nearly every American can identify with. As a President of a small company, I believe paid leave that enables people to work and also care for their families, is the kind of policy that will make our economy more competitive and dynamic, much as its parent legislation did before it.

Mr. Chairman, when I founded Spitfire in 2002, we were the very definition of a small start-up business. As I said, we were two people. Since that time, we have grown to employ a team of high-performing, 30 men and women. I'd be lying if I said this was easy.

As I'm sure members of the subcommittee can appreciate, particularly those who have owned a business themselves, growing a business while remaining competitive at the same time is a constant struggle. Every successful business must put a quality product on the market that fulfills a need, but to continue to do that, you must be able to support a talented pool of employees. Today's professionals are not merely looking to be well-compensated financially. In an era of skyrocketing healthcare costs and insecure retirements, they also seek benefits that afford them a decent quality of life.

At a time when two-owner families are the norm in our society, the professionals we seek for our firm want some measure of flexibility in their lives, as well as the ability to spend time with their children, or tend to an aging parent and grandparents, because long-term care is so expensive.

Since founding Spitfire, we've had six employees get married, and three have healthy children. One, sadly, had a husband diagnosed with cancer, and needed to care for him until his death last year. Each of my employees needs help balancing work and a family, I don't believe they should have to figure this out on their own.

Spitfire offers what I believe is a competitive package to help our employees strike that balance, starting with 120 hours of paid holiday leave, including the week off between Christmas and New Years, plus 160 hours of paid time off for vacation and sick leave, annually.

We offer up to 12 weeks of pregnancy and maternity leave, 6 of which is paid, 6 of which are unpaid, and we offer paternity and domestic partner leave for a birth or adoption. We also offer 3 days

of paid bereavement leave for employees who have lost an immediate family member, and in special circumstances, grant unpaid time off to take care of significant personal business.

The law doesn't require we do any of this, but we do so voluntarily, why? Some may wonder what kind of a strain it puts on business. Others may want to inquire whether our employees are happier or more productive.

Mr. Chairman, no business man or woman who spends money for nothing in return will be successful. But in my experience, paid leave to care for family matters is money well-spent. For instance, we have many women at our firm, many who hold senior-level positions. I am confident that these are the best people in the field at what they do. Quite simple, I don't think we would have been able to attract or retain many of them, were they not assured the ability to take the time necessary to start, or appropriately care for, a family.

Do we miss our employees when they leave? Yes. But no one can be productive on the job worrying about a sick mother in the hospital, or whether their child has appropriate after-school care. I, myself, have taken time off from work to deal with a sick parent, and while I'm the boss, I can tell you, it sends a good message to the rest of the team that they have the same level of benefits as I do.

As I said, we already do this voluntarily. Other than disability insurance, which helps pay for part of maternity leave, Spitfire pays the freight, as it were. The paid Family Medical Leave Act, on the other hand, would reduce that burden—either by ensuring that 8 weeks would be paid on a shared basis by the employee, the employer, and government, or providing our firm with a tax benefit, because our policy of 12 weeks exceeds that of the Federal Government's.

In either case, paid leave is a win-win for business, a win-win for family, and thus a win-win for the country. It helps our businesses stay competitive and dynamic, it supports our families, as the historic Family Medical Leave Act has for 50 million Americans. Indeed, as someone who has worked for almost 2 decades in the field, I believe this legislation will make every bit the historic impact that law has in the past decade and a half.

Mr. Chairman, thank you for this opportunity to testify this afternoon. I look forward to the passage of this legislation, and hope we can see a day in which every business in America has this policy. Surely, it is an idea whose time has come.

Thank you.

[The prepared statement of Ms. Grimm follows:]

PREPARED STATEMENT OF KRISTEN GRIMM

Thank you Mr. Chairman and Mr. Ranking Member, members of the subcommittee—thank you all for this opportunity to testify before you today on an issue so critical to the health and welfare of the families of this country.

My name is Kristen Grimm. I am President and founder of Spitfire Strategies, a consulting firm based here in Washington, DC that provides strategic communications advice to social change organizations, such as non-profits and foundations.

Mr. Chairman, it is a particular privilege to appear before this subcommittee given our longstanding work advocating on behalf of children and families and for the policies that benefit them.

But today, I come before you not merely as an advocate of such policies, but also as someone who is personally impacted by them—in this case, as an entrepreneur of a small business whose ability to remain competitive and successful is predicated upon attracting and retaining a team of talented professionals.

That is but one of the reasons I am so supportive of your legislation, Mr. Chairman, the Paid Family and Medical Leave Act, to provide employees 8 weeks of paid leave to welcome a child into the family or to care for themselves or a sick family member. To be sure, these are circumstances nearly every American can identify with. As a small businesswoman I believe paid leave is the kind of policy that will make our economy more competitive and dynamic, much as its parent legislation, the Family and Medical Leave Act, did before it.

Mr. Chairman, when I founded Spitfire in 2002, we were the very definition of a small start-up business—a team of 2, including myself. Since that time, we have grown to employ a team of high-performing 29 men and women, with a 30th employee likely added this month. We are growing.

I'd be lying if I said it was easy.

As I am sure members of the subcommittee can appreciate, particularly those who have owned a business themselves, growing a business while remaining competitive at the same time is a constant struggle. Every successful business must put a quality product on the market that fulfills a need. But to continue to do that, you must also be able to support a talented pool of employees.

Today's professional is not merely looking to be well-compensated financially—in an era of skyrocketing health care costs and insecure retirements, they also seek benefits that afford them a decent quality of life. At a time when two-earner families are the norm in our society, the professionals we seek for our firm want some measure of flexibility in their lives as well—the ability to spend time with their children or tend to aging parents and grandparents because long-term care is so expensive. Since founding Spitfire, we've had six employees get married, and three have healthy children. One, sadly had a husband diagnosed with cancer and needed to care for him until his death this last year. Each of my employees needs help balancing work and family. I don't believe they should have to figure this out on their own.

Spitfire offers what I believe is a competitive package to help our employees strike that balance, starting with 15 paid holidays and 160 hours time off for vacation and sick leave annually.

We offer up to 12 weeks of pregnancy and maternity leave, 6 of which is paid, 6 of which are unpaid. We also offer paid paternity and domestic partner leave for a birth or adoption.

We also offer 3 days of paid bereavement leave for employees who have lost an immediate family member and in special circumstances grant unpaid time off to take care of significant personal business.

The law doesn't require we do any of this—but we do so voluntarily. Why? Some may wonder what kinds of strain it puts on business. Others may want to inquire whether our employees are happier or more productive.

Mr. Chairman, no businessman or woman who spends money for nothing in return will be successful.

But in my experience paid leave to care for family matters is money well spent. For instance, we have many women at our firm, many working at a senior capacity. I'm confident these are the best people in the field at what they do. Quite simply, I don't think we would have been able to attract or retain many of them were they not assured the ability to take the time necessary to start a family.

Do we miss our employees when they are on leave? Of course. But no one can be productive on the job worrying about a sick mother in the hospital.

I myself have taken time off from work to deal with a sick parent—and while I'm the boss, I can tell you, it sends a good message to the rest of the team that they have the same leave benefits as I do.

As I said, we already do this voluntarily—and other than disability insurance which helps pay for part of maternity leave, Spitfire "pays the freight," as it were.

The Paid Family and Medical Leave Act, on the other hand, would reduce that burden—either by ensuring that 8 weeks would be paid on a shared basis, by the employee, the employer and the government, or by providing our firm with a tax benefit because our policy of 12 weeks exceeds that of the Federal Government's.

In either case, paid leave is a win-win for business, a win-win for family—and, thus, a win-win for the country. It helps our businesses stay competitive and dynamic. It supports our families, as the historic Family and Medical Leave Act has for 50 million Americans. Indeed, as someone who has worked for almost two decades in this field, I believe this legislation will make every bit the historic impact that law has in the past decade-and-a-half.

Mr. Chairman and Ranking Member, thank you for this opportunity to testify this afternoon—I look forward to the passage of this legislation and hope we can see a day in which every business in America has this policy. Surely, it is an idea whose time has come.

Thank you.

Senator DODD. That's pretty good.

What does Spitfire do?

Ms. GRIMM. We work with foundations and nonprofits to help get children covered, and keep the oceans clean—that sort of stuff.

Senator DODD. Well, I'd hire you in a minute.

Ms. GRIMM. Excellent. Good, I hope that was on C-Span.

[Laughter.]

Senator DODD. I hope so, too. That's very, very good.

Katie, thank you, thank you for being here, too.

STATEMENT OF KATHRYN ELLIOTT, ASSISTANT DIRECTOR, EMPLOYEE RELATIONS, CENTRAL MICHIGAN UNIVERSITY, MOUNT PLEASANT, MI

Ms. ELLIOTT. My name is Kathryn Elliott, and I am the Assistant Director of Employee Relations at Central Michigan University in Mount Pleasant, MI.

I commend the subcommittee for holding this hearing on the Family Medical Leave Act and appreciate the opportunity to provide testimony to you today.

By way of background, I am a certified senior professional in human resources, with over 13 years experience in human resource management. As the Assistant Director of Employee Relations, a significant part of my job involves helping to manage employee medical leaves of absence.

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

Please know that I do not sit before you today as merely an HR professional, but as an employee who has personally benefited from the act's provisions on several occasions, and for that, I thank you.

As a single mother of three young children, I have used the FMLA to take 12-week absences following the birth of my children. My need for FMLA, though, continues today, as one of my sons has a congenital eye condition, which requires me to take full days off work to take him to see his ophthalmologist, over 2 hours from our home. My mother also suffers serious medical conditions that require me to take time off from work, so I'm part of the sandwich generation.

Therefore, my perspective on the issues before us today is based on real experience, but 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 Medical Leave Act was premised on this principle. While I believe that HR professionals work diligently to assist employees in striking this balance, after years of experience administering FMLA leaves, I am also confident that this impor-

tant statute is in need of some targeted modifications to ensure that it serves the best interests of both employees and employers.

Undoubtedly, the Family 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 it to, resulting in few challenges for either employers, or employees.

Key aspects of the regulations governing the medical leave provisions, however—which provides 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 for both employers, and employees.

HR professionals have struggled to interpret various provisions of the FMLA, including the definition of "serious health condition," "intermittent leave," and "medical certifications."

Central Michigan University, just like any other covered employer, has its share of challenges administering intermittent leave requests. In my written statement, I've outlined three specific cases at my organization that demonstrate the challenges employers experience in implementing the medical leave portion of the FMLA.

In one case, an employee in the University's library was certified for FMLA intermittent leave for asthma and migraine headache. The medical certification placed no parameters on frequency or duration of leave. The employee proceeded to exercise her intermittent leave rights on a regularly, irregular basis. In 2005 alone, she was absent 76 times under intermittent FMLA, and that was an improvement over the prior year's absence frequency. Each of these absences was unscheduled and unanticipated. Each absence left the office with no way to plan for temporary coverage, and customer service suffered.

From January 2005, through the end of October, this employee worked a full, 40-hour work week only 7 times. After her FMLA leave balance exhausted at the end of October, she did not miss another scheduled day during the balance of the calendar year. Her absences resumed in 2006 when her FMLA leave balance was restored.

Mr. Chairman, 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. Although not perfect, this proposal should, in fact, improve FMLA administration in the workplace.

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

SHRM applauds the subcommittee's examination of the FMLA to gauge whether this leave law is meeting the needs of both employ-

ees and employers, and appreciates the opportunity to provide 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.

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

[The prepared statement of Ms. Elliott follows:]

PREPARED STATEMENT OF KATHERYN ELLIOTT, SPHR

INTRODUCTION

Chairman Dodd, Ranking Member Alexander and distinguished members of the subcommittee, my name is Katheryn Elliott and I am the Assistant Director of Employee Relations at Central Michigan University in Mt. Pleasant, MI. 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 have a master's degree in Human Resource Administration and I am a certified senior professional in human resources with over 13 years experience in human resource management. My experience includes work in government as well as the public and private sectors. As the assistant director of employee relations, it is my job to ensure employer compliance with State and Federal laws, employee union contracts, and internal policies. Within this framework, a significant part of my job involves helping to manage employee medical leaves of absence.

It is my privilege to 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 I do not sit before you today as merely an HR professional, but as an employee who has personally benefited from the act's provisions on several occasions. As a single mother of three young children (twin boys, age 7 and a 4-year-old daughter), I have twice used the FMLA to take 12 week absences following the birth of my children. Spending the first 3 months of their lives with my children was an opportunity and a blessing that I will always be grateful for and I would not have had were it not for the job protection provisions of the FMLA. My need for FMLA continues today but for different reasons. One of my sons has a congenital eye condition which requires me to take full days off work to take him to his treating ophthalmologist over 2 hours from our home. My mother also suffers from serious medical conditions that require me to take time off from work. The benefits afforded under the FMLA allow me to take time off as necessary for the care of my loved ones 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—many of whom, especially in my home State of Michigan, are struggling financially—and above all a deep respect for the process which you undertake today. 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, 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. 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 targeted modifications 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 it's 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.

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 6 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.

Central Michigan University, just like any other covered employer, has its share of challenges administering intermittent leave requests. I would estimate that of the hours we devote annually to FMLA administration for our nearly 1,300 eligible staff members, approximately 80–90 percent of our time is spent managing intermittent leave. Of that, approximately 80 percent of our efforts annually are spent managing 2 to 4 cases in which absence patterns, employee behavior, and vague medical documentation would have us (cautiously) draw the conclusion that we are dealing with employee misuse of the FMLA.

Three recent cases demonstrate just how difficult administration of the act can be in cases of intermittent leave.

Case 1: Office professional employee employed in the University's Library

The University Library operates an inter-library loan service. This is a critical service for students as well as faculty. It supports research and learning by allowing faculty and student access to materials not part of our own holdings. The exacting nature of the work, coupled with very tight staffing and a very spare budget, provides virtually no opportunity to plan for extra or temporary help in the office. In 2004 and 2005 a clerk in this office was certified for FMLA intermittent leave for asthma and migraine headache. The medical certification placed no parameters on frequency or duration of leave. The determination of when leave was needed was left to the employee. The employee proceeded to exercise her intermittent leave rights on an "irregularly regular" basis. In 2005 alone, she was absent 76 times under intermittent FMLA—and that was an improvement over the prior year's absence frequency.

Each of these absences was unscheduled and unanticipated. Each absence left the office with no way to plan for temporary coverage. Her supervisor was occasionally able to shift time away from her other duties to deal with the must urgent customer service problems—but that's no way to run a business. Customer service for faculty, students, and other members of the inter-library loan consortium suffered—and there was little the office could do about it. The office reported that some consortium members were considering cancelling their library exchange relationship with our University because of the erratic service and delays in responding to exchange orders.

From January 2005 through the end of October, this employee worked a full 40 hour week only 7 times. After her FMLA leave balance exhausted at the end of October, she did not miss another scheduled day during the balance of the calendar year. Her absences resumed in 2006 when her FMLA leave balance was restored.

Case 2: Custodial employee employed in the University's Building Services Department

The University employs 91 custodians to provide environmental support services on campus. These custodians are represented by a collective bargaining agent. One custodian has had an ongoing absenteeism problem that has been exacerbated by his use of FMLA intermittent leave. At various times he has been certified for FMLA leave for miscellaneous lower back problems, upper respiratory problems, and more recently for "panic attack/anxiety disorders." Each of these certifications has given control of the timing and duration of intermittent leave to the employee. He decides when he is going to be out and for how long. In 2004, this employee had 48 intermittent leave episodes. In 2005, the frequency jumped to 104 episodes. In 2006, the frequency dropped to 34 episodes, but the duration of each episode increased. Although this employee's position was rated at 1.0 FTE, his absences resulted in a 4-year cumulative average effective FTE of just over 55 percent. In those years, with one exception, he worked just enough hours to qualify him for FMLA in the next calendar year. In one of those years, he did not qualify for FMLA because he had not worked the requisite 1,250 hours in the prior 12 months. His absences were reduced to almost none until early April of that year, when he was able to qualify for FMLA, having at that point met the "hours worked" requirement. Beginning with his FMLA qualification in April, he resumed his "normal" absence pattern.

While the Building Services Department has more flexibility in the use of temporary employees as compared to the Interlibrary Loan Office, the use of temporary staff in a collectively bargained environment generates a tremendous recordkeeping burden on the employer. Temporary staff has to be tracked on a daily basis, and their movement and assignment reported to the local union for monitoring purposes. This is time consuming and costly. In addition, while this employee is on FMLA leave, the University is covering not only his wages, but also the wages of his temporary replacements.

Case 3: Office professional employee in Facilities Management Business Operations

This is an emerging case to demonstrate what employers can see develop and how we are virtually helpless to address our concerns.

This professional employee began her employment with the University in April 2006. In her first year of employment, her supervisor counseled her for excessive absence due to illness. On October 31, 2007, her supervisor met with her to point out that her absences in the 12-month period from October 1, 2006 through September 30, 2007 were in excess of 80 hours. The employee was asked if she was familiar with the FMLA and advised that if she felt she had an FMLA qualifying condition she should submit medical documentation to support this. Her response was:

1. That the first doctor she saw would not place her on FMLA, and
2. That she had found another doctor who she would meet with the following week to see if he would place her on FMLA. Barring that she and her supervisor would need to "revisit the issue and come up with another solution."

On November 6, 2007, this employee submitted FMLA paperwork indicating that she suffered from migraines which might limit her ability to work up to twice monthly for a period of 2 to 24 hours each occasion. In the days that remained before the University shut down for year end, (12/21/07) this employee missed 5 full work days for her FMLA condition. Two of those days fell on Mondays and two on Thursdays.

In January, per departmental policy, the employee was required to recertify her FMLA qualifying condition. Her certification, received January 7, 2008, almost 2 months to the day from her original certification, and issued by the same treating physician, stated that this employee was *improving*, but might be unable to work as many as 9 times a month for periods of 2 to 24 hours each occasion. As of February 11, 2008, this employee has missed 6 full work days for her FMLA condition. Three of these occurrences fell on Mondays and three fell on Thursdays.

In addition to the employer's concern about the substantial increase in possible time off, there is a clear pattern of absences on Mondays and Thursdays. We, as her employer, are left in a difficult situation. Second opinions are difficult if not impossible to obtain under the FMLA, and we find ourselves in the uncomfortable position of not wanting to second-guess the documentation of a medical professional (and there certainly is no means by which we could), and yet we see a pattern of absence which seems unusual. Our only option, given the current regulations, is to notify the treating physician of the pattern of absences and ask if the pattern is consistent with the diagnosis, but again we must rely on the physician to address the matter with their patient. If the physician, for whatever reason, makes no change to the original documentation, the department must simply accept the absences and wait for a new recertification year. This position manages a call center of the University, which must be staffed at all times. In this employee's absence other staff must be pulled away from their accounting and payroll tasks (all extremely time sensitive) to cover the departmental phones.

The aforementioned case points to another concern that can very often complicate the administration of leaves under the act. Regularly, medical documentation is vague or open ended, making it difficult for departments to know what absenteeism pattern to expect from an employee and giving him/her unlimited discretion to claim an FMLA absence, but without an attendant responsibility to provide clear and thorough documentation.

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.

As you know, 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, dif-

fering 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.

SHRM was pleased to learn that earlier this week the Department of Labor issued proposed rules to update the Family and Medical Leave Act regulations. Although SHRM is still reviewing the details of this substantive rule, it appears that a number of the Department's proposed changes would, in fact, improve FMLA administration in the workplace. While our evaluation of the proposal continues, it does appear that the proposed rule stops short of significantly improving the definition of a serious health condition. Despite this shortcoming, SHRM believes this regulatory action is an important step toward restoring the balance intended by Congress between employers' needs for employees 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 given the problems administering current 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 respectfully requests that Congress fix the documented shortfalls of the FMLA before considering additional leave benefits under this important workplace statute.

CONCLUSION

SHRM applauds the subcommittee's examination of the Family and Medical Leave Act to gage 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, families, and employers.

Senator DODD. Well, thank you very, very much, Ms. Elliott, I appreciate your testimony—all of you, very, very good testimony, very, very helpful, and thank you all for being here.

Let me raise some questions, if I can, for you. As I do so, since it's just me and you here, we can—if there's a response to a question and someone would like to raise an issue in the midst of it—we can do this very formally, or informally, let's try and do it a bit more informally, if you can, as well.

I didn't raise the issue and I intended to, with the Secretary regarding the intermittent leave policy, and I'll submit that in writing, Ms. Lipnic, to you, as well. We covered a couple of the other issues, but the intermittent leave issue has also been an issue raised, about how do you give advance notice in an emergency? The obvious question, so I'll save that for you.

Let me raise Debra, with you—as someone whose spent a long time working on these issues—what do you see as the barriers to expanding the legislation? How do you suggest we overcome these? You've been involved in this along the way, and so have an appreciation of the history.

Ms. NESS. Well, as I said in my comments, we hear some of the same arguments opposing expansion of the Family Medical Leave Act as we did back in the early eighties when we first began this

campaign for making workplaces more family-friendly. Generally these dire predictions don't materialize.

You yourself noted the last survey the Department of Labor did of employers, and employees, showed that about 90 percent—over 90 percent—of employers said that it neither had no effect or a positive effect on growth, on profitability, and on employee morale.

We know, for example, that the State of California passed a paid Family Medical Leave law in 2004. The dire predictions of economic dislocation, so far, have not materialized in California. Fortunately, there are seven States in the past year that have begun to explore similar types of paid Family Medical Leave laws in their own States.

But, I think one of the problems we have is that we really need a major paradigm shift, in terms of how we think about the workplace. The realities that families face today are very different than what they faced decades ago. In three-quarters of families, both parents are working. There isn't a full-time caregiver at home, and so we need to bring our workplace policies, our workplace thinking, up to date.

Lots of folks think of these work/family policies as a luxury, as a nice fringe benefit. They really aren't. They're all about economic security, economic survival for families. The ability to take leave at a crucial time, and time of emergency, time of illness, can make the difference between whether somebody can continue to put food on the table, keep their job, keep their health insurance, or begin a spiral down into economic disaster.

I think we've reached a point where we talk a lot about the importance of strong, healthy families, we say families are the backbone of our society, but we've done very, very little as a nation to really put those kinds of values to work. Our policies don't reflect it.

Senator DODD. Let me ask you this, you listened to Ms. Elliott, who's admittedly a beneficiary of a Family Medical Leave policy in terms of her own child, and mother, father, that has an illness to deal with, but yet raises some questions and suggests we should not probably go forward with all of this until we straighten out the problems with the existing law. How would you—how do you answer Ms. Elliott's concerns?

Ms. NESS. Well, I would say first of all, I would certainly acknowledge the fact that there are individual cases of abuse of the law. But I don't think that that means that we need to dramatically change the law, or dramatically change the regulations. I think we don't have data that really are scientifically sound. It would be good, for example, for the Department of Labor to repeat the kind of survey that it did in 2000, so we could really understand in a more scientific way, what's really going on, what's working well for employers, and what's working well for employees.

For every story of an employer that experiences that kind of dislocation that you described, I think there are employees who find themselves in positions where they desperately need leave, and their efforts to get it are thwarted by an employer who really doesn't want to give them the leave.

So, rather than talk about anecdotes, and rather than be confused by management or disciplinary problems, I think we really

need some sound data on how the law is working, and whether it's working well, or not, from both the employee and the employer perspective.

Senator DODD. Let me ask you this, Debra. The Secretary mentioned, which didn't surprise me, since I'm aware of this, but there's actually no way to determine of the 7 or 8 million people that took Family Medical Leave in 2005, is that right, whether or not people took it because of a serious illness, or whether or not people had the flu? Is it appropriate to be asking that there's some sort of data that we ought to be accumulating here as to looking over the people who take family and medical leave, what are the reasons that people are taking it, so we can develop some data?

Ms. NESS. I think that would be enormously helpful. We are still going on data that is 8 years old. We know, for example, that about half of people take the leave for their own serious illness or chronic health condition, but we don't know how that breaks down.

We know that people take it, in other cases, for family reasons. The other half, probably about half for parental leave purposes, and probably about half are taking care of another family member, but we don't have much more data than that, it would be very helpful for us.

Senator DODD. Is there anything intrusive about that request?

Ms. NESS. I think there are ways to ask for information about why people are taking leave without intruding in their personal medical situations.

Senator DODD. You're not before the committee right now, Madame Secretary, but I want to talk with you about that. I'm sort of surprised, given everything else the Department of Labor has done on this issue whether or not we have some restrictions in the law that we passed that prohibit you from gathering information that would give us a better picture or not. I know you're sitting right there so—let the record reflect that she was happy to reply to that.

[Laughter.]

Ms. Reid, thank you again for what you do. I was wondering here, just—you cited the problem you had with your employer at the time, and again, sort of similar it seems to me to some of the testimony we heard earlier from the Secretary and others about the proposed new regulations that would require additional information at a time when you feel the need to actually be there, creating some logistical issues.

I'm also interested in terms of how ACORN works. ACORN works with, of course, the very poorest in our society, and how we could make people more aware of this. Despite the fact that we've talked, about 50 or 60 million people have actually taken advantage of this. You have to be, and again, it's—I've noticed in various places I've been, there are actually notices of what rights employees have, but it's pretty fine print, and you've got to read it, and sometimes there are acronyms and words to describe things, and if you're less well-educated, you might not know what all of this means, and whether or not you'd qualify—what should we be doing to make sure that more people are aware and knowledgeable? Particularly among those who are working in some of these very low-paying jobs, and may have similar problems, and may not be able

to afford to do this—I'll put aside the argument of the paid leave for a second, but just raising the level of awareness—how do we do a better job with that? How could the Department of Labor help in that regard?

Ms. REID. I've worked in personnel for a very long time. What I've found is when people are first hired, they should be given a packet, and explained what some of their benefits are. Not just handed a packet. If they have limited abilities to read, or they're not very good at speaking English, or something of that nature, they can't read the packets that they're given, and they don't go through them.

I, myself, often receive huge amounts of information and don't read it all. But the important pieces of information should be explained to them—the days they have off, the access that they have to the Family Medical Leave Act, the access to disability insurance, social security withholding—I think they should know that. The same as when they're exiting a job, they should have that information spelled out to them in a way that's accessible.

Very often in low-paying jobs, all of those things are posted, but these people never have an opportunity to read it. They have very short lunch breaks, their time is very monitored—they're not reading any of this, they're just running back and forth to work, and no one's explaining it to them.

So, I think that that is an excellent way for employers to make it accessible.

Senator DODD. Now, let me ask you this, I was curious, you went through this—what seemed to be a little, some tension between you and your employer at the time you decided to take this time. What happened when you got back to work? How did it affect your relationship with your employer?

Ms. REID. Well, when I got back to work, they immediately attempted to demote me, and I hired a very good attorney and it didn't happen. But, in my case, they attempted to demote me and it just turned into a very protracted and very long battle. The problem is that I worked for a good, a fairly decent employer. Of the four people at my job that took off FMLA, all of them were retaliated by, in some form or another.

Senator DODD. Well, I'd like to—that's more data maybe we ought to be collecting to some degree, we talked about the problems that people have taking it, but I suspect we probably don't know a lot about follow up in terms of what happens when people come back. I've often wondered whether or not you're thought of as being less of a faithful, loyal, dedicated employee if you're out there.

I know, for years I've heard, of course, the anecdotes—particularly from women—about sort of, I'll call it, I don't mean to say lying, but come up with every excuse rather than admit there's a family issue—talk about plumbers not showing up and tires going flat, but the idea that you'd admit to an employer that, actually my children was sick, or there was a day off from school and the babysitter didn't show up—all these other ideas, never wanting to admit that there's a family issue. Admission of a family problem is an indication you're not quite as dedicated as you ought to be. People will manufacture—I ought to use a better word, rather than

lying—manufacturing, sort of, excuses that seemed more palatable to the employer, maybe more understandable.

Sometimes dealing with individuals who never had to worry about whether or not the babysitter showed up or the caregiver showed up or the child care center was closed or whatever else happened. Whether or not people react to that, somehow, once they discover that you've got family issues, to what extent do people, then, pay a price for having exercised this right, in fact, done what they've done. Do you want to comment on that?

Ms. REID. I've worked next to women who have had children, and not mentioned them, because they were on a career path, and they thought the best thing to do is just simply not mention their children. I don't think they were any less of a mother than anyone else, they just thought that it would impede their progress, and so they, they just simply didn't talk about their children, they didn't have pictures out, they didn't mention it.

Senator DODD. Well, it may be worthwhile, if the Department of Labor does another survey, they might inquire in the surveys as to what has been the reaction of employers with employees coming back, and how they're being received, and what sort of problems emerged, and to what extent. I hope not to the level you had to go through—hiring a lawyer to protect against being demoted because you spent time with a dying mother, in those circumstances.

Thank you very much.

Ms. Grimm, now that I've promoted your business here and—just a lot of questions, you answered a lot of them in your testimony, but you were very, very good and made a strong case—it almost seems, the questions seem a bit redundant here, but let me—obviously you're competitors—how are you doing as a business in all of this? I mean, I presume an awful lot of your competitors may not be quite as aggressive as you've been in providing these kind of leave policies for your employees. Or have they? Maybe I'm wrong in my assumption.

Ms. GRIMM. I honestly don't know. I mean, for me, I started a company, I didn't have a lot of people to look to, but I will say that, just early on, I figured out if you allow people to have time to deal with their family issues, it helps them be more productive at work. So, I don't look at a lot of Department of Labor surveys myself, but I come to work and look around and see if people are working, and it's good when they are.

Senator DODD. You've recognized that you—as I recall you said in your testimony, that obviously, you lose someone for awhile, it causes a problem, I mean, no one would be foolish to suggest otherwise.

Ms. GRIMM. Yes, well you need to have a Plan B, but I think that's just good business, again, it's whether or not it's planned, somebody happily gets pregnant, and you have a Plan B, which is how are we going to get through this? Are you bringing in temporary help, are you having other people, you know, hold the fort while they're gone.

Or, in some instances, you just don't know. I had an employee whose son just had tremendous problems breathing, and she kept having to miss work, because literally, they were in the emergency room constantly. You can't plan for that, after a while, as a com-

pany, you just know—if you're 30 people, there's going to be something going on with somebody all the time, and you deal with it as a company.

You create a climate where they can count on us, and we can count on them. I mean, there's plenty of times I send my employees out on Sunday to go do something which is on their family time, and they go, uncomplaining, because they know I'm going to be OK when they have to take a child to a doctor's appointment on Tuesday.

Senator DODD. Yes, I was going to raise that issue, I don't know how you, it's hard to demonstrate that from a data standpoint, but I've heard this so often anecdotally about employers who, where there's a recognition that that's the case, that there is a sense of loyalty and retention and productivity that is—I guess you could make the case that either before or after policies go into effect, you might be able to do some comparison on that regard, in terms of those issues. Of course, you've had these policies all along.

But clearly, the anecdotal evidence from your experience is that there is a deep appreciation. I presume there have been people who've tried, you've got very good employees, people have tried to hire them away from your company?

Ms. GRIMM. Yes.

Senator DODD. I don't know the answer to the question, but I'm suggesting by your comments, here, that you've been able to retain people because of these policies, too.

Ms. GRIMM. I have very low turnover at my office.

Senator DODD. That's good to hear, as well.

What incentives do you think that—our legislation talks about employers who employ 50 or more people, that was the definition, that's an excessive definition of small businesses, the one I had to accept when I wrote the legislation. But 25 is normally the definition of, 25 or less is the definition of a small business, and obviously a lot of people work at these smaller businesses—a lot of women work at smaller businesses. Have you looked at the paid leave proposal we've suggested?

Ms. GRIMM. I have, and as I understand in both options, would be a benefit to me. I mean, one is—I think when you're building a business, you do want to build to, ultimately, I hope 1 day I'll be a 50-person office, or a 51-person office, and at that point, I don't suddenly want to have to look at Department of Labor regulations, so I think it does really help.

But it would help me now to know that either through tax breaks—some sort of tax incentive to the company, or if there was some kind of shared system between the employee/employer and government, it would help a lot, being able to offer some of these leave policies, especially when I know, we've been talking about women a lot, which I really appreciate, but I have a lot of men who have just gotten married in my office, and I fully expect they're going to want to do paternity leave, and they could very likely end up being the primary caregiver, and I want to make sure that policies are in place for them, too, to be able to take paid and unpaid leave.

Senator DODD. My experience with men has been that usually they take about 6 weeks of that 12 weeks.

Ms. GRIMM. Yes.

Senator DODD. That second 6 weeks, they want to get back to work.

[Laughter.]

Ms. GRIMM. It's a new generation, Senator.

Senator DODD. That's just empirical data I've collected in my own office, I've noticed. "Don't you need me back there this week to do these jobs?"

Ms. GRIMM. Yes.

Senator DODD. Well, you sound like you've read the bill, because the idea is a shared cost between employer, employee and the government. As Debra pointed out, and I believe you've done a survey, Debra, is this right on the—it actually had some rather positive responses. You indicated that, but—

Ms. NESS. Yes, there's a survey this year in which we asked people how they would feel about contributing a small amount toward a Family Leave Insurance Fund, and——

Senator DODD. Well, why don't we explain what we're talking about, we're talking about a dollar a week?

Ms. NESS. A dollar a week per employee, and a dollar a week per employer. And high seventies——

Senator DODD. For the insurance fund we're talking about.

Ms. NESS. Yes, to an insurance fund.

Senator DODD. Yes, it was, it had like a 75 percent——

Ms. NESS. Yes.

Senator DODD [continuing]. Yes, response to it. Of course, that is exactly what you're talking about, that also relieves that kind of pressure economically.

Ms. GRIMM. Exactly. Especially for the ones that are unplanned. Again, I did have an employee whose husband was in the Army, he got diagnosed with cancer and was going to die. She had two young children, and you know, she had to take a significant amount of leave, and unplanned for, for us.

Senator DODD. Time is running short here on this, Ms. Elliott, but let me, and I'll submit some of these questions to you, as well, but you raised the very issues we raised with the Secretary earlier, about intermittent leave and serious illness.

Senator DODD. Why don't you share—how would you define serious illness? You heard, that visiting the doctor twice a year is what the Department of Labor is talking about, and I gathered from the conclusion of your testimony that that's just too lax a definition in your mind, is that right?

Ms. ELLIOTT. No, actually, and SHRM did provide some feedback to the Department of Labor's request for information on that matter.

No, I wouldn't say that two times is too lax. I would take this opportunity to speak to, perhaps the question that I think has been raised here with regard to chronic conditions and requirements—

Senator DODD. Yes.

Ms. ELLIOTT. To recertify on a regular basis. Simply not to take a position, per se, but to also point out that though chronic conditions may be lifelong, advances in medicine, treatment plans and some changes within even the employee might make the condition either improve or worsen through time. So, when we have—and we

have examples at CNU with an employee who had migraines, and then through treatment of the migraines, and another condition, we saw a great improvement in her FMLA usage—a decrease in her FMLA usage. She no longer needed that.

Were we to have taken her original certification, a lifelong condition, and gone with that, we might not have had the benefit of understanding that her condition was improving.

Senator DODD. How about the issue of the intermittent leave policy? You know, that idea, and again—it's been suggested, the idea obviously when you have emergencies that pop up, giving notice 2 days in advance of an emergency sometimes seems inherently contradictory.

Ms. ELLIOTT. Well, certainly there will be times when you can't give notice in advance, but certainly the majority of needs will give you advance notice, such that you can call your employer.

I think, it was my understanding that really, we were leaning more toward the question of, shouldn't an employee, at least within the 2 days—is it too much to ask the employee within 2 days of the commencement of the absence, to make notice to the employer? I think certainly that is something the employer has a right to have communicated to them, as soon as possible.

Senator DODD. When there's a known event, you're talking about?

Ms. ELLIOTT. When an event, even unplanned, should happen, I think in most cases there should be an opportunity for the employee to contact the employer.

Now, there will be cases when the employee themselves are in the emergent situation, and certainly can't pick up the phone from where they are.

Senator DODD. Why wouldn't we do a—you listened to your seatmate here, Ms. Grimm, talk about what she goes through to provide for her employees, and how much it would help her as a new, emerging, successful smaller business here, to be able to have an insurance program such as we've described here, whether it be a contribution shared by employers, employees—why should we wait to do that? I mean there seems to be a trend where employers are beginning to recognize the value of leave policies here, from the very points that have been raised, I don't think it's some sort of a conversion on the road to Damascus here, it's the realization, this is good business. You want to attract good, bright, smart people and keep them. You're in a competitive environment, having good policies that reflect family needs is smart business. So, we get people doing that—it's a cost.

Here we all have an advantage, if there's a shared responsibility in this, minimizing the cost to business that are trying to grow, why should we wait, in the sense? There are always going to be issues raised about these policies, they're going to change, nothing's—it's organic, I understand that, as the world changes we're going to be back reviewing these policies, and we should. We shouldn't be afraid of that, in my view.

But, I'm quite mystified by why we should wait to move to the next phase of this, given the direction we seem to be going in?

Ms. ELLIOTT. Well, that's a very good question, and thank you for asking that. I think that may apply to both expansion efforts, as

well as those that SHRM is in support of, which is to further define the regulations as they exist today so that it's easier for employers to administrate.

On the matter of intermittent leave, I actually have a couple of comments related to that, and becoming an employer of choice, as all of us would want to be. When we're an employer of choice, we have a much better candidate pool from which to select, we get the best and the brightest talent, the most qualified workers. Many employers are choosing to provide packages which go above and beyond that which is required, and I would offer two responses to that.

First is, that mandated benefits, in my opinion, this is my opinion only, I don't believe mandated benefits improve employee morale or commitment to the employer. I don't believe that an employee who is receiving the mandated benefit of minimum wage is any more or less committed to their employer than someone who doesn't have that, because, I mean, it is a mandated benefit, it is there. Overtime provisions under the FLSA are there. It is when an employer can become an employer of choice, and reach beyond that, that you see the higher level of commitment.

But, with regard to shared cost of an insurance policy, and I'm just now becoming familiar with this idea, and it's a very interesting concept—one that I would like to see explored further. Having said that I'm just becoming aware of that, I then would ask, because I don't know, within this proposal, within this idea, this concept of shared pooling of resources, and then in turn, paying the employee for their absence—is there a comparable support of employers, such that an employer whose employee is benefiting from the pool, may also receive some sort of credits to support additional staffing needs that they may have? Or administration of that family medical leave? So, I am more in a position to ask questions now than to offer comments.

Senator DODD. Well, I appreciate that, and I'm going to apologize to all of you, we've got a vote on, and I've got about 2 minutes to make it to the floor of the Senate to cast a ballot. What I'm going to do is leave the record open. I have some additional questions, but also other members may have as well.

Senator DODD. I apologize to all four of you, they're excellent points, you've been excellent witnesses, and I'm very grateful to all of you.

I note here, as well, members of Congress, here—no one's ever suggested a Member of Congress ought not to get paid when they take family and medical leave, and many do. In fact, they'd be chastised if they didn't, politically, probably highly criticized if they didn't have enough sense to make a choice between being here for a committee hearing, or being with a family member that was in need of their help. But no one has ever suggested they ought not to be paid for the period they're away from Congress during those moments. I'm hopeful that some of my colleagues here who are resistant to this idea of sharing these costs would recognize how beneficial it could be to all of us.

You've been great witnesses, I thank you all, very, very much, and we'll look forward to your comments to the additional written questions.

The committee will stand adjourned.
[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR CLINTON

I would like to thank Chairman Dodd and Ranking Member Alexander for holding this hearing, on an issue so near and dear to my heart.

The Family and Medical Leave Act has helped more than 60 million men and women seeking to balance the demands of work and family. Many of us on this subcommittee worked on this landmark legislation when it was enacted more than 15 years ago. Chairman Dodd, who led the effort to write and enact the FMLA years ago, continues to be a strong leader in working to safeguard and expand the FMLA's protections. I am proud that earlier this year, Chairman Dodd and I worked together to introduce and secure passage of legislation to extend FMLA benefits to the family members of wounded service members for 6 months, a key recommendation of the Dole-Shalala Commission on Care for America's Returning Wounded Warriors.

While we should applaud the progress we have made to support America's hard-working families, there is still a lot of work to do. Forty percent of workers are currently ineligible for FMLA benefits because they work part-time, are new to their jobs, or work for small employers. Likewise, close to half of all private employees have no paid sick leave, and many more are unable to take time off to care for a sick child. We should be strengthening the FMLA to cover more working families and provide paid sick leave, as well as enact other measures to give employees the flexibility they need to care for themselves, their children, and their loved ones.

I am troubled that the Administration's proposed regulations seem to be walking us away from this goal, by placing a number of roadblocks in the path of employees who are trying to obtain leave under the FMLA. The regulations would make it more difficult for employees to claim paid leave when it is available to them, by requiring that the employers' leave policies take precedent over the FMLA; by requiring employees with chronic health conditions to obtain an annual certification that they are able to do their job or risk being transferred to a different job; by allowing employers to communicate directly with medical providers for the purposes of understanding the employees condition; and much more.

The FMLA has made all the difference in the lives of Americans who otherwise would not be able to take time off from work to care for a sick child or parent. We should be building on that foundation, not eroding it. I look forward to working with my colleagues in the Senate to submit comments to the Department of Labor on these proposed regulations, and I call on my colleagues to join me in working to enact legislation to expand rather than narrow the FMLA's ground-breaking protections.

Thank you.

PREPARED STATEMENT OF SENATOR ALEXANDER

I would like to commend the Department of Labor for recent action to update the 15-year-old Family and Medical Leave Act

(FMLA) regulations. The Department's proposal seeks to strike an appropriate balance by streamlining the regulations after 15 years of court decisions interpreting the FMLA, and by making the regulations more user friendly for employees and employers.

President Reagan once said, "Government must keep pace with the changing needs of our State and its people to be sure that government can fulfill its legitimate obligations." This certainly rings true in the case of the FMLA. When the Department issued its regulations to implement the FMLA 15 years ago, its decisionmaking was based upon assumptions, not experience. This was to be expected, as the FMLA was not only a new law, but very different from other labor and employment laws, such as those that deal with wages and work hours.

What the Department had to do back in 1993 was to look at the parameters of the statute and then make its best guesses as to how to implement the law. It had to answer questions such as "How should employers tell employees about their FMLA rights?" and "How should employees request FMLA leave?" Since the Department had no experience in administering a leave law, ultimately it produced regulations based on what the regulators expected would happen at the time. Now the Department has the benefit of 15 years of real world experience as it seeks to update those regulations for the future.

Again, I want to thank the Department for its thoughtful, careful review of the issues, and for its consultations with Congress as it considers appropriate regulatory changes. What has emerged is a proposed regulation that, as President Reagan said, keeps pace with the changing needs of our Nation and its people. Fifteen years of experience with the FMLA—along with a diligent study of the issues and dialog with stakeholders—has resulted in a balanced, common-sense proposal that I hope will garner bipartisan support.

PREPARED STATEMENT OF RETAIL INDUSTRY LEADERS ASSOCIATION (RILA)

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.

PREPARED STATEMENT OF MATTHEW MELMED, EXECUTIVE DIRECTOR, ZERO TO THREE

Chairman Dodd and members of the subcommittee, my name is Matthew Melmed. For the past 13 years I have been the Executive Director of ZERO TO THREE, a national non-profit organization that has worked to advance the healthy development of America's babies and toddlers for 30 years. I would like to start by thanking the subcommittee for its interest in building upon the successes of the groundbreaking 1993 Family and Medical Leave Act. I would also like to thank the subcommittee for providing me the opportunity to discuss the critical importance of paid family leave for our Nation's youngest families, those with newborns, infants and toddlers.

THE IMPORTANCE OF UNHURRIED TIME IN THE FIRST YEAR OF LIFE

Science has significantly enhanced what we know about the needs of infants and toddlers, underscoring the fact that experiences and relationships in the earliest years of life play a critical role in a child's ability to grow up healthy and ready to learn. We know that infancy and toddlerhood are times of intense intellectual engagement.[1] During this time—a remarkable 36 months—the brain undergoes its most dramatic development, and children acquire the ability to think, speak, learn, and reason. The early years establish the foundation upon which later learning and development are built. If experiences in those early years are harmful, stressful, or traumatic, the effects of such experiences become more difficult, not to mention more expensive, to remediate over time if they are not addressed early in life.

Research demonstrates that forming secure attachments to a few caring and responsive adults is a primary developmental milestone for babies in the first year of life. During the earliest days and months, children learn about the world through their own actions and their caregiver's reactions. They are learning about who they are, how to feel about themselves and what they can expect from those who care for them. Such basic capacities as the ability to feel trust and to experience intimacy and cooperation with others develop from the earliest moments of life.

According to the groundbreaking report released by the National Academies of Science, *From Neurons to Neighborhoods: The Science of Early Childhood Development*, a young child's parents structure the experience and shape the environment within which early development unfolds.[2] Early relationships are important for all infants and toddlers, but they are particularly important for those living in lower-income families because they can help serve as a buffer against the multiple risk factors these children may face. These early attachments are critical because a positive early relationship, especially with a parent, reduces a young child's fear in novel or challenging situations, thereby enabling her to explore with confidence and to manage stress, while at the same time, strengthening a young child's sense of competence and efficacy.[3] Early attachments also set the stage for other relationships and play an important role in shaping the systems that underlie children's reactivity to stressful situations.[4]

All infants need ample time with their parents at the very beginning of their lives to form these critical relationships. The better parents know their children, the more readily they will recognize even the most subtle cues that indicate what the children need to promote their healthy growth and development. For example, early on infants are learning to regulate their eating and sleeping patterns and their emotions. If parents can recognize and respond to their baby's cues, they will be able to soothe the baby, respond to his or her cues, and make the baby feel safe and secure in his or her new world. Trust and emotional security enable a baby to explore with confidence and communicate with others—critical characteristics that impact early learning and later school readiness.

In addition to building secure and healthy early attachments, unhurried time at home with a newborn allows parents the time they need to facilitate breastfeeding and ensure that their children receive the immunizations necessary to lower infant mortality and reduce the occurrence and length of childhood illnesses. Paid leave also reduces economic anxiety by providing job security and consistent income during a time in which it is essential for parents to focus on their new families rather than worrying about how to make ends meet. Time at home also benefits employers

by reducing staff turnover and the subsequent training and hiring costs associated with new staff.

FAMILY AND MEDICAL LEAVE

The 1993 Family and Medical Leave Act allows employees to take up to 12 weeks of unpaid, job-protected leave to care for newborns, newly adopted and foster children, and seriously ill family members, including themselves. Of the more than 60 million Americans who have taken time off from work under the FMLA since it was enacted 15 years ago,[5] 18 percent did so to take care of a new child.[6] Although FMLA has had great success, far too many workers are still unable to take leave. More than 3 in 4 eligible employees (78 percent) reported that they could not afford to take the leave that they needed because it was unpaid.[7] Furthermore, since the law only applies to employers with at least 50 employees, a full 40 percent of the workforce is currently not covered by the Federal law.[8]

Recent surveys show that the vast majority of Americans support paid leave programs:

- Nearly nine in ten (89 percent) parents of young children and 84 percent of all adults support expanding disability or unemployment insurance to help families afford to take time off from work to care for a newborn, a newly adopted child, or a seriously ill family member.
- Nearly all working women (93 percent) report that paid sick days are an important benefit. In a list of 10 employment benefits, only health insurance was ranked higher than paid leave.

In light of this overwhelming support, action should be taken at the State and Federal level to enact legislation to allow parents (biological, foster, or adoptive) on leave to collect unemployment insurance or State disability insurance to enable them to spend time with their infants in the first year of life.

WHAT ARE STATES DOING TO SUPPORT PAID FAMILY LEAVE?

A few States have existing paid family leave laws. For example, California has the country's most comprehensive paid family and medical leave insurance program. Over 13 million workers can receive partial wages (55–60 percent of wages) to take up to 6 weeks of leave a year to care for a newborn, newly adopted or foster child, or to care for a seriously ill family member, and up to 50 weeks of leave a year to recover from their own serious illness, including pregnancy- or birth-related disability.[10] According to a recent report by the National Partnership for Women and Families, significant developments and victories have been made in other States in 2006 State legislative sessions. Highlights include:

- In 2006, paid leave bills were introduced in at least 21 States.
- In Arizona, Washington, and Wyoming, State employees can now donate accumulated annual leave and/or sick leave to other employees who need time off to care for family members.
- In Tennessee, legislation passed allowing State employees with children enrolled in schools to take off up to 1 day a month from work to participate in their children's school activities.

CONCLUSION

Paid family leave is an issue that States continue to grapple with as more mothers with very young children enter the workforce—currently, 59 percent of mothers with children under the age of 3 work.[11] Each day an estimated 11.6 million children under the age of 3 spend some or all of their day being cared for by someone other than their parents.[12] Before heading back to the workplace, parents need time to bond with their babies and enable them to form the all-important attachments that will help give them a good start in life.

I urge the subcommittee to consider the very unique needs of our Nation's youngest families as you explore ways in which to improve the Family and Medical Leave Act.

Thank you for your time and for your commitment to our Nation's infants, toddlers and their families.

ENDNOTES

[1] Shonkoff, Jack and Phillips, Deborah. 2000. *From neurons to neighborhoods: The science of early childhood development*. Washington, DC: National Academy Press.
[2] Ibid.
[3] Ibid
[4] Ibid.

[5] National Partnership for Women and Families. 2007. *Family and Medical Leave Act. http://www.nationalpartnership.org/site/PageServer?pagename=ourwork__fmla__FamilyandMedicalLeave* (accessed February 11, 2008).
[6] U.S. Department of Labor. 2000. *Balancing the needs of family and employers: Family and medical leave survey*. Washington, DC.
[7] Ibid.
[8] Ibid.
[9] National Partnership for Women and Families. 2007. *Where families matter: State progress toward valuing America's families. http://www.nationalpartnership.org/site/DocServer/Final__2006__Round__Up.pdf?docID=2161* (accessed February 11, 2008).
[10] Ibid.
[11] U.S. Department of Labor Bureau of Labor Statistics. 2006. *Women in the labor force: A databook*. Table 5. *http://www.bls.gov/cps/wlf-table5-2006.pdf* (accessed February 12, 2008).
[12] U.S. Department of Education. 2006. *National household education surveys program of 2005: Initial results of the 2005 NHES early childhood program participation survey*. Table 1. *http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2006075* (accessed February 11, 2008).

PREPARED STATEMENT OF JOE SOLMONESE, PRESIDENT, HUMAN RIGHTS CAMPAIGN

Mr. Chairman and members of the committee, on behalf of the Human Rights Campaign (HRC), America's largest civil rights organization working to achieve gay, lesbian, bisexual and transgender (GLBT) equality and our over 700,000 members and supporters nationwide, I submit this statement in response to the Department of Labor's proposed rulemaking and in support of expansion of the Family and Medical Leave Act (FMLA) to cover all families, including those headed by same-sex couples.

The FMLA has been a lifeline for thousands of families in times of crises. The protection afforded by the act has allowed workers to care for themselves and their loved ones without fear of losing their job and consequently, their income. The recent expansion of this act to include members of the armed services is a testament to the importance of ensuring all Americans have access to time off to care for their families. Unfortunately, same-sex couples and their children are not covered by the FMLA. The HRC believes that expanding the FMLA to ensure GLBT families are fully included is a necessary and important next step in the history of this landmark act.

Given the success of the FMLA, the current Administration should seek ways to expand the law and to extend coverage to all workers and their families, including those led by same-sex couples. The HRC has always supported the act's goal of striking the right balance between the needs of employees and those of employers. We have grave concerns however, that provisions in the Department of Labor's Notice of Proposed Rulemaking (NPRM) published February 11, 2008 disrupt that balance. Specifically, we believe that the proposed regulations may place unnecessary limits on employees' ability to use FMLA leave in times of need.

I. THE FMLA IS SUCCESSFUL AND SHOULD BE EXPANDED

The passage of the FMLA, which provides workers with up to 12 weeks of leave each year to care for certain close family members or to address serious personal health concerns, was a groundbreaking step forward for millions of Americans. However, FMLA coverage is still incomplete. Under current law, millions of GLBT Americans in committed, long-term relationships are unable to take leave to care for a same-sex partner and their children. GLBT workers experience the same levels of stress, lack of productivity, distraction and fear of job loss as do others when their domestic partners become ill, are hospitalized or cared for by others. It does not however, guarantee these employees the same leave opportunities to care for their loved ones.

Some States and private employers have filled this gap in coverage by offering family medical leave for workers to care for a domestic partner. An expansion of the FMLA is needed in order to cover millions more of America's families.

This story of a same-sex couple from Indiana highlights the disastrous consequences of this gap. Tina was fired from her job when she missed work to care for her partner, Danielle, during a serious illness. When Danielle fell unconscious, Tina rushed her to the hospital. Tina stayed by Danielle's side for 10 days, until she recovered enough to go home to their children. Because same-sex couples are currently excluded from FMLA protections, Tina's employer was not obligated to

allow the 10 day leave necessary to assist her life partner. As a result, Tina lost her job.

For millions of workers, the FMLA has been an unmitigated success. It has proven essential in achieving greater employee retention and reducing turnover.[1] However, because gay and lesbian employees are not guaranteed up to 12 weeks of family or medical leave to care for a partner or partner's child without fear of losing their job, the FMLA does not fulfill its purpose of protecting working families.

We strongly encourage expansion of the FMLA to cover all American families—straight, gay, lesbian, bisexual and transgender. Many State and local governments and private employers already include families headed by same-sex couples for purposes of family leave. They recognize that an inclusive workforce is a competitive workforce. These employers realize that not applying the FMLA protections to all workers greatly limits the act's intent to provide a stable and continuous workforce by helping employees retain their jobs when a family emergency strikes.

The HRC Foundation tracks employers that provide FMLA-like benefits to employees with same-sex domestic partners. As of January 1, 2008, the HRC Foundation was aware of 328 major corporations extending FMLA benefits to include leave on behalf of a same-sex partner. Currently 13 States offer some type of health benefits to domestic partners and seven States include unmarried partners in State family and medical leave acts.[2] The experience of these governmental and private employers shows that extending FMLA eligibility benefits both employees and employers alike.

The HRC also supports efforts to expand FMLA coverage to include paid leave for all families. Far too few working Americans have a single day of paid sick leave—and low-wage workers are hit the hardest. Providing paid sick days is essential for working Americans and their families so that they have time for regular, preventive medical check-ups which reduce the number of lost work days. Expanding the FMLA to provide for paid leave would assist all of America's working families.

Workers with same-sex partners and children need the ability to take paid time off to care for themselves and their families without losing a paycheck and compromising their economic stability. Due to the inherent inequity in access to Federal benefits for same-sex couples and their children, including the benefits provided by the Family Medical Leave Act (FMLA), using an employer's paid leave structure is often the only option when tending to the long-term illness of a partner or other family member. For those families whose employers do not provide paid leave, there are no options beyond missing work, as well as a paycheck, or losing a job entirely.

Corporate America and State and local governments have recognized that one key to remaining competitive is to have an inclusive workforce. It is time for the Federal Government to follow the lead of these employers and extend sick leave benefits to families headed by same-sex couples.

II. THE PROPOSED CHANGES TO EXISTING FAMILY AND MEDICAL LEAVE ACT REGULATIONS ARE PROBLEMATIC

The Department of Labor's proposed regulations place a number of unnecessary roadblocks in the way of employees who desperately need FMLA leave. The Federal Government should help facilitate the leave process for employers and employees by adopting common sense rules to guide them. Particularly problematic are the proposed regulations that would eliminate the "2-day" rule in the case of unforeseeable leave, otherwise known as emergencies. Instead of having up to 2 days after the absence to call in, employees would be required to do so prior to the start of their shift, thereby negating the purpose for which the rule was initially created—to cover emergencies.

The proposed regulations would also allow private settlements without any oversight from the Department or the courts, thereby opening the door for employees to be unfairly persuaded to forego their leave rights. Given the absence of Federal employment protections for the gay, lesbian, bisexual and transgender workers, this provision is of particular concern to HRC. Any regulation regarding private settlements should ensure employees have adequate safeguards against employers' abuse.

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[1] Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* Table § 6.2.3, Table 6.5 (2001), http://www.dol.gov/esa/whd/fmla/fmla/toc.htm.

[2] The following States under their respective State FMLAs extend benefits that include same-sex couples: California and the District of Columbia extend benefits to registered domestic partners; Connecticut, New Jersey, and Vermont provide benefits to parties in a civil union; Hawaii provides benefits to reciprocal beneficiaries; and Oregon and Rhode Island provide benefits to family members which includes same-sex domestic partners; New Mexico provides benefits to same-sex spouses so long as they were married out-of-state in a State that recognizes marriage for same-sex couples.

Finally, the proposed regulations would require further release of employee medical records to employers along with the right to contact an employee's health care provider directly. Refusal on the part of the employee to allow this access may result in a loss of FMLA rights. While we agree employers should be provided with information regarding the needs of their employees, conditioning FMLA rights on the surrender of one's privacy forces workers to choose between time off to care for an illness and the confidentiality of their medical history. This wholesale release of medical information could be particularly damaging for HIV/AIDS positive individuals as well as some transgender individuals. These groups often face discrimination and harassment based on their medical information and may feel they have no choice but to forgo FMLA leave to keep their records private.

The proposed changes to regulations could have widespread consequences and should be supported by scientifically accurate data. The HRC encourages the Department of Labor to conduct comprehensive data collection, including representative data from GLBT families. The anecdotal evidence and available data presented in the Notice of Proposed Rulemaking do not provide a true estimate of employees eligible for FMLA and FMLA usage. The inherent inaccuracy between employees "eligible" in one sense and not "eligible" in another cannot produce truly accurate results. Millions of American GLBT families are not covered by the current law. Should an illness befall their partner or partner's child, they are not eligible to receive FMLA leave to provide assistance in the same manner in which an employee in an opposite-sex marriage would be eligible. To assist in remedying this inherent inaccuracy, we suggest additional questions that reflect the lack of coverage for same-sex partners in order to determine the true number of employees that are "eligible" for FMLA leave.

III. CONCLUSION

Mr. Chairman, the Human Rights Campaign strongly opposes any effort to roll back FMLA coverage and supports the expansion of the act to cover families headed by same-sex couples and to include paid leave. We applaud the recent expansion of the FMLA to cover members of our armed services. The recent expansion of the FMLA to cover service members is the first expansion of the act in its 15 years and demonstrates that there is real progress to be made. We urge the committee to maintain this momentum and to continue to expand the act to ensure all American families are covered by the important protections promised by the FMLA. Thank you.

PREPARED STATEMENT OF MOMSRISING

MomsRising is a fast-growing online grassroots organization that works to promote and advocate for family-friendly policies. The policies that form the core of MomsRising's agenda are spelled out the word MOTHER. "M" is for paid maternity and paternity leave; "O" is for open flexible work; "T" is for technology we choose and other afterschool programs; "H" is for healthcare; "E" is for excellent childcare; and "R" is for realistic and fair wages.

Our membership is open to everyone who is a mom, and everyone who has a mom. Less than 2 years old, we are approaching 150,000 members across the United States, and adding new members at the rate of 500–3,000 per week.

Our rapid growth speaks to the fact that we have touched a nerve. Americans are struggling to balance work and family. They join MomsRising because we are pressing for laws that let workers fulfill their responsibilities at work without giving short shrift to their families. They join MomsRising in part because we support the Family & Medical Leave Act (FMLA), a 15-year-old law that is immensely popular and is used by thousands of workers each and every day.

Like other Americans, MomsRising's members not only want Congress to defeat any efforts to weaken the FMLA—they want Congress to expand it. Today, three quarters of American mothers are in the labor force. Yet we have a support structure from the 1950s. We need to ensure that our policies catch up to the reality of America's families. That means protecting the FMLA and expanding it to cover more workers who need leave for more reasons. It also means providing paid leave, so that all workers can take time to care for family members or recover from serious illness.

Right now, we are far behind most of the world in terms of family-friendly policies. A study of 173 countries by Dr. Jody Heymann of Harvard and McGill Universities found that only Liberia, Papua New Guinea, Swaziland and the United States did not provide some form of paid leave for new mothers. We can and must do better.

Our lack of family-friendly policies is terribly costly. It drags down mothers' wages. While women without children make 90 cents to every man's dollar, women with children make only 73 cents to a man's dollar and single mothers make only about 60 cents.

Because of this, America's families are in trouble. A full quarter of families with children under age 6 live in poverty. It's appalling that having a baby is a top cause of "poverty spells" in this country—a time when a family's income dips below what it needs for basic living expenses like food and rent. That's only going to get worse as the economy struggles.

When women aren't paid what they deserve, their families suffer. When children grow up in poverty, our economy suffers. That's why we believe that family-friendly workplace policies are so essential.

When so many people in our country are having the same problems at the same time, we have a structural problem that needs to be addressed, not an epidemic of personal failings. It's time to take it seriously, adopt policies that make life better, and make America a more family-friendly nation.

Last year, MomsRising was instrumental in convincing lawmakers in Washington State to adopt paid family leave. We ask Congress to also take steps to build a more family-friendly country. We urge you to make paid leave—including family leave, sick leave, and maternity and paternity leave—available to all workers by expanding the FMLA, and by passing both the Healthy Families Act and the Balancing Act.

Our members care deeply about this. They send tens of thousands of emails to Congress and State legislators each time we send out an e-outreach. They have held hundreds of house parties and film screenings to increase support for these policies.

We are passionate about building a family-friendly nation because we want to strengthen families, improve our economy, and build a better world for our kids.

America is ready. We hope Congress is too. Please, take the next steps now. Thank you.

AMERICAN CIVIL LIBERTIES UNION (ACLU),
WASHINGTON, DC 20005,
February 27, 2008.

Hon. CHRIS DODD,
Chairman,

Hon. LAMAR ALEXANDER,
Ranking Member,
Subcommittee on Children and Families,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

RE: ACLU Supports the Family Medical Leave Act

DEAR CHAIRMAN DODD AND RANKING MEMBER ALEXANDER: On behalf of the American Civil Liberties Union (ACLU) and its more than half a million members and activists and 53 affiliates nationwide, we thank the subcommittee for its hearing this month on the Family and Medical Leave Act (FMLA) and for bringing new attention to the achievements of and continued need for the FMLA. We applaud, once again, congressional leadership that, 15 years ago, made the FMLA a reality. We are pleased that the 110th Congress will examine the role the FMLA has played to improve workers' rights and decrease gender discrimination in the workforce.

As a result of the FMLA, eligible workers are entitled to 12 weeks of unpaid leave to care for their own serious health conditions or that of a parent or child and to take family leave in connection with the birth or adoption of the employee's child. The FMLA has allowed more than 50 million Americans to take protected leave and maintain their job security.

Though simple and straightforward on its face, this Federal law struck a mighty blow against entrenched and historical discrimination against women in the workplace. The record revealed, at the time of the law's passage, that too many employers relied on invalid gender stereotypes when administering leave policies. Their assumption that women were naturally or better suited to respond to exigent family circumstances meant that women's employment opportunities were minimized and their role in the workplace marginalized. Passage of the FMLA attacked these outdated modes of thinking. It moved us ever closer to achieving equality of opportunity in employment by requiring gender-neutral family leave benefits in work-

places across the country and by recognizing that both men and women must balance family responsibilities with work.

As we celebrate the gains the FMLA has brought about, we must also take note of the work that remains and stand vigil against actions that would narrow the scope of the law. Today, nearly 40 percent of workers are ineligible for FMLA leave because of statutory exclusions for new employees, businesses with fewer than 50 employees and part-time employees. These exclusions should be re-examined because they ignore the needs and reality of many low-wage workers and undermine our efforts to promote workplace equality for women. Additionally, we are concerned about the Department of Labor's recent new regulations. For example, some of the proposed regulations impose additional requirements for workers who seek leave and allow employers direct access to the employee's health care providers.[1] Access to family leave should not be made more difficult and conditioned on an invasion of workers' privacy. Upon initial review, we fear that is exactly what the new regulations will do.

The ACLU looks forward to working with the subcommittee to expand and strengthen the benefits conferred by the FMLA. Should you have any questions, please don't hesitate to call Vania Leveille at 202–715–0806 or vleveille@dcaclu.org.

Sincerely,

MICHAEL MCLEOD-BALL,
Chief Legislative and Policy Counsel.

VANIA LEVEILLE,
Legislative Counsel.

PREPARED STATEMENT OF JASON A. STRACZEWSKI, DIRECTOR, EMPLOYMENT & LABOR POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

I would like to thank Chairman Dodd, Ranking Member Alexander and the members of the subcommittee for holding such an important hearing and I appreciate the opportunity to provide this statement on behalf of the members of the National Association of Manufacturers (NAM).

The NAM is the Nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states, and employing millions of workers. Headquartered in Washington, DC the NAM has 10 additional offices across the country. Our mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Because the NAM remains committed to protecting the interests of American manufacturers, particularly to ensure the survival of small and medium manufacturers in an intensely demanding globally competitive environment, the NAM respectfully submits this statement in an effort to increase the subcommittee's understanding of manufacturers' collective experience with the FMLA in day-to-day practical circumstances.

The important and valuable benefit of the Family and Medical Leave Act (FMLA) is unquestioned. But in the 15 years since enactment, a law which seemed fairly straightforward has been hindered by confusing and conflicting regulations and guidance. The NAM supports legislative and/or regulatory efforts to revise and improve how FMLA is administered so that this important employee benefit is protected. This statement will address the key concerns manufacturers have routinely identified:

- The definition of serious health condition is vague, making the FMLA difficult to understand for employees and unpredictable for employers to administer.
- Medical certification forms do not provide clear guidance on the duration and frequency of leave necessary; and,
- Unscheduled intermittent leave often results in fellow employees picking up the slack or employers unable to meet customer demand.

According to the U.S. Department of Labor's (DOL) recent report, millions of employees have benefited from family and medical leave. However, the FMLA was never intended to turn full-time jobs into part-time jobs. It was never intended to

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[1] *See* 29 CFR part 825.302 -825.303 (employee notice requirements for foreseeable and unforeseeable FMLA leave); 29 CFR part 825.305-307 (employer, rather than employer's medical professional, may clarify or authenticate medical information by contacting the employee's health care provider directly).

allow employees to take sporadic leave without any notification to employers. It was never intended to unfairly burden colleagues forced to cover the unpredictable absences of their co-workers. We can restore the balance intended by Congress between employers' needs for employees, and employees' need for time to attend to important family and medical issues. Employees will 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 comments that follow are based on and reflect the responses to a survey of Association members regarding their experience with the FMLA. Hundreds of members responded with anecdotes and specific data, representing over 900,000 employees. The Survey was conducted between January 2007 and February 9, 2007, and, thus, reflects the most current possible information. We believe the comments here are representative of the broadest possible spectrum of employer: large and small, with and without a union, in every state, without partisan concerns, but linked by common difficulties in administering federally-mandated leave in a manner that lives up to the goals of dignity and compassion of the FMLA without undermining the fairness built into the statute and the competitiveness of our Nation's businesses.

It is no secret that the manufacturing sector in the United States has recently suffered a series of challenges, foreign and domestic. As a recent study conducted by the NAM demonstrated, external overhead costs from taxes, health and pension benefits, tort litigation, regulation and rising energy prices add approximately *31.7 percent* to U.S. manufacturers' unit labor costs (nearly $6 per hour worked) relative to their major foreign competitors.[1] This constitutes a 20 percent increase in such costs in only 3 years. In today's market, every additional cost affects an entity's competitiveness and simply cannot be ignored. As NAM President John Engler recently wrote, in describing the threats that current market realities pose to the manufacturing sector:

> There are many challenges facing manufacturers in America. Structural non-wage costs such as taxes and regulations are more than *30 percent higher* than for our major trading partners. The underlying pressures that make it difficult to manufacture in the United States should be a top priority for policymakers.

Indeed, manufactured goods make up more than 60 percent of U.S. exports, totaling over $70 billion a month. But the demands of the global market have transformed the modern workplace into a flexible but demanding environment, one in which "just in time" defines not only inventories and deliveries, but work schedules, as well. It is an environment in which *reliable* scheduling of personnel and materiel is vital to an integrated business structure.

In such an environment, unscheduled absences and unenforceable attendance policies are not merely inconveniences. They are the "monkey wrenches" that bring the whole process to a halt. In the "24/7" environment of modern manufacturing, a night shift only makes sense when the day shift is fully staffed to take up and continue their efforts. Manufacturing and shipping schedules can be met only when staffing requirements can be *predictably* and reliably filled. But making sense of personnel requirements and scheduling needs has been made significantly more difficult by the current interpretations of the FMLA by the DOL.

We would like to make one thing clear from the outset: NAM members and the manufacturing sector in general are and have been at the forefront of providing laudable wages and benefits to workers. In 2006, manufacturing wages and benefits averaged over $69,000, which is approximately *21 percent higher* than in non-manufacturing jobs. In the history of American business, it is safe to say that the manufacturing sector *invented* employee benefits. Even today, when so many businesses have trimmed their benefits to only those mandated by law, the NAM survey indicates that nearly 30 percent of manufacturers offer paid maternity leave. Thus, the NAM strongly feels that with respect to the FMLA, Congress should not unnecessarily expand mandated leave. Furthermore, the NAM strongly supports the existing FMLA benefit Congress enacted and seeks to protect existing leave for workers. Our members already provide a great deal more leave than is mandated. What we are concerned with is the efficient and effective administration of the Federal leave law, an administration that yields predictability, that controls misuse, that eliminates fraud, and that preserves the enhanced benefits we offer for future generations of workers.

[1] The study, *The Escalating Cost Crisis*, may be viewed in its entirety at www.nam.org.

THE CHALLENGES

It is safe to say that the FMLA has achieved its principal goal: leave to care for oneself or one's family during health problems is available to and widely used by eligible employees. Yet there are a number of areas that continue to plague employers who are trying to provide the leave made available by law in a manner that is reasonable and cost-effective.

As currently interpreted by DOL, the FMLA has become the single largest source of uncontrolled absences and, thus, the single largest source of all the costs those absences create; missed deadlines, late shipments, lost business, temporary help, and over-worked staff. Indeed, it is not too much to say that the FMLA has had the unintended consequence of creating an epidemic of absences and has profoundly undermined what had been America's "secret weapon" in global economic battles: the work ethic and productivity of the workforce. There are several aspects of the FMLA that we believe are in need of reform. But among our members there is agreement that three facets of the law work in combination to create the largest number of problems: the definition of "serious health condition," the medical certification process and unscheduled intermittent leave.

Although it may not be possible to identify which of these elements is the direct cause of the absent workforce, the combined result is a staggering loss of work-hours and an all-but-incalculable loss of capital assets. For one major auto parts manufacturer, applications for FMLA leave increased *150-fold* in 10 years. In the year for which there is the most recent data, 20 percent of that employer's entire workforce applied for FMLA leave. Of this number, a troubling percentage was for intermittent leave for a supposedly "chronic" health condition. Indeed, for this company, the use of intermittent leave increased *five times* more quickly than that for regular FMLA leave.

Our data indicate that the experience of this company is typical of manufacturers. for example, NAM members responding to the survey of their concerns with the FMLA reported that 65 percent of the requests received for intermittent leave were made either on the day of the leave, *after* the leave was taken, or *without any notice*. In most of those cases, the employees had a medical certification on file with the employer that authorized intermittent leave based on a chronic condition. However, as will be discussed in greater detail below, a statistically unsupportable number of the intermittent leaves were taken on Monday and/or Friday, giving rise to the unavoidable conclusion that misuse is at work, and costly misuse at that. For the auto parts manufacturer discussed above, each 1 percent increase in the absenteeism rate costs over $8 million annually. Indeed, the idea that because FMLA leave is unpaid it is "cost-free," strikes NAM members as an idea that could only be thought up by those who have never met a payroll, those for whom a missed deadline never meant lost revenue, those who do not have to compete for business in today's challenging marketplace.[2]

SERIOUS HEALTH CONDITION

Many difficulties are created by the vague and confusing guidelines defining a "serious condition." In fact, the problems that flow from this ambiguous definition rank among the most serious for those who must administer the FMLA, from the difficulty in tracking leave to the cost of replacement workers and lost business. NAM members fully concur with the conclusion that the loose and unclear definition of "serious health condition" is at the root of a great deal of the unpredictable nature of unscheduled leave. The Association just as strongly believes that another basic problem is that those responsible for identifying and certifying a "serious health condition" have no similar responsibility for the impact of their decisions and no regulatory requirement for being credible. Thus, most health care providers when faced with vague guidelines, a woefully inexact definition, and the absence of any enforcement, do not hesitate to comply with the requests of their patients and "certify" that the ailment at issue qualifies for mandated leave as a "serious health condition." This practice has utterly undermined the congressional intent of providing leave for "serious" medical situations and made statutory leave for even the most minor incidents commonplace.

[2] As stated in the Economic Analysis written by Darby Associates and submitted by the National Coalition to Protect Family Leave to the DOL Request for Information, Feb. 16, 2007, the real cost of the FMLA is reflected in "higher labor costs, lower productivity, undesirable impacts on fellow workers, less effective organization, administration and personnel practices of affected firms, higher prices, and lower quality of service to patrons of the impacted companies." Economic Welfare Consequences of FMLA *at* 4.

One automobile parts manufacturer in Ohio reports that FMLA medical certification forms have been received for leg cramps, warts and crying spells. The case law under the FMLA is replete with numerous similar instances. It is no surprise, then, that most NAM members believe there is no requirement for a serious medical condition at all; rather, the FMLA has, to quote one manufacturer, become "a 'blank check' to be absent." The breadth of this problem is difficult to overstate. For a major participant in the automotive industry, the lack of effective guidelines regarding the definition of a "serious health condition" is the reason for an exponential growth in the use of FMLA to cover tardy and "leave early" circumstances, in addition to a sharp increase in FMLA absences on Mondays and Fridays. This situation is much worse by the cost and difficulty of the FMLA mechanisms available to challenge the opinion of a health care provider. Costly additional medical opinions serve to worsen the problem rather than providing a meaningful and effective solution, by adding to both expense and delay. Stated bluntly, for manufacturers, with current needs and tight deadlines, being told in 3 weeks after the condition at issue today isn't really "serious" does not even address, let alone solve the problem.

The NAM survey shows that the overwhelming majority of manufacturers provide paid sick leave to their employees. They did so before the FMLA was enacted and continue to do so. That is not the problem. For NAM members, the problem is that since leave has become a "right" enforceable under Federal law, and since that leave has been made so available by loose and vague DOL interpretations, manufacturers have simply lost control of personnel scheduling. Any FMLA reform must recognize that leave should be there for those who need it, but no federally mandated leave should be open to misuse—that is simply unfair to employees that show up for the job reliably. The experience of our members indicates that the lack of a clear, comprehensible, "bright line" definition of "serious health condition" has converted the FMLA from a statute mandating compassionate leave for serious medical problems to a national "get out of work free" law.

MEDICAL CERTIFICATION

A significant majority of our members responding to the NAM survey have experienced recurring problems in administering the FMLA, and a significant number of difficulties relate to the certification process. Our members report that the certification process is cumbersome, slow, imprecise and unreliable. The failure of the medical certification process to provide prompt and accurate verification of an ailment that qualifies for FMLA leave has led to widespread misuse of FMLA leave. This has led, in turn, to the disintegration of time and attendance programs at manufacturers throughout the country.

Vague documentation of the medical basis for leave and uncertainty about the validity of the leave were among the most frequently reported problems NAM members experienced. Association members reported that the certification forms and the process of obtaining the forms are vague, confusing, and all but impossible to enforce. This is a problem that affects everyone involved: employer, employee, *and* physician. NAM members repeatedly noted the difficulty in contacting the employee's medical provider to clarify the serious medical condition as a major administrative problem, often resulting in time-consuming and costly repeated requests to employees and health care providers. Indeed, for NAM members, the problems with certifications ranged from receiving late responses, to patently false responses, to no responses at all. When forms are returned, they often seemed designed to foster problems. One business in the Midwest reports receiving medical certifications that identify the time needed for medical leave as "unknown" or "indefinite." Attempts at clarifying these statements were unsuccessful and often rebuffed. Again, this experience is shared by many other of our members.

An example of the dilemma the imprecise language of the regulations creates is the following:

• A manufacturing employee in New York was approved for intermittent FMLA leave due to complications his wife was experiencing during her pregnancy. Following his return to work, he took additional, unauthorized leave, and then stated he did not understand his leave had ended. About 1 month later, he took leave without it being approved, under his own assumption that it may meet FMLA criteria. During the course of this case, the company attempted to obtain additional information from the physician, due to an incomplete certification form, so that an informed decision could be made. This led to a major battle with the union regarding the definition of what is a "complete" certification according to section 825.307, which was very time-consuming.

The company discovered it was at a complete disadvantage due to its inability to ask questions, obtain additional information or provide additional information. As

a result, the company was a three-time loser: unverified leave was taken; efforts to reach the physician were unavailing; and a bruising, inconclusive and costly conflict with the union ensued. Unfortunately, this dilemma is common because the cause of the problem lies in the ambiguous language of the regulation itself.

When faced with flawed certifications, the employer is in a quandary. One option is to require a second opinion but that is time-consuming, expensive and unnecessarily inconveniences the employee seeking leave. If there is a conflict of medical opinions, a *third* opinion may be required, further adding to costs, delays and inconvenience. In the meantime, in most cases, the employee has been granted the leave "conditionally." But the fact is, if the medical reason for the leave ends up not being "serious" the time on the job has already been lost. If the employer has the temerity to deny the leave until the certification process is satisfied as contemplated by the law, it faces grievances (if unionized), DOL investigations and lawsuits. Thus, a law with a compassionate purpose and a clearly stated intent not to burden the employer has become a costly millstone around employers' necks.

Based on its experience, a dessert manufacturer in Pennsylvania, who has had particular difficulty in obtaining prompt and accurate medical certification for spouse/dependent illnesses, suggests that a separate form be developed for this purpose. This employer learned that the employees had even less interest in pursuing completed certifications for family members than they exhibited for their own ailments. The difficulties faced by employers are mirrored by those of employees. Our members note that the cumbersome and often confusing medical certification forms are frequently resisted by health care providers. *Employees* report that their providers routinely stated that "we do not complete forms requested by employers" and certain providers have refused to comply. Other employees report that some doctors charge an exorbitant fee (in one case, $50) for completion of the form.

The NAM would strongly urge that any revisions of the certification form must simplify the process and make it clear to the employee and health care provider that the FMLA creates shared obligations, all of which must be fulfilled before the leave is awarded. The current regulatory scheme makes the burdens of the FMLA the sole responsibility of the employer. The ambiguities of the rules, the structural barriers to effective administration of those rules, the threat of DOL enforcement, lawsuits and grievances means that granting leave, even in the absence of the few procedural safeguards the law allows, is the norm. This must change.

FMLA leave, except in emergencies, must be requested, scheduled and verifiably certified *in advance*. Further, an employer must be permitted to require a request for leave form that includes an unambiguous employee authorization for the employer—not necessarily a health care provider—to make inquiries of the employee's health care provider, as needed. Privacy concerns can be met as they are under the Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA), and signed authorizations from affected employees should be a standard part of the FMLA leave process. Employers must not be the only party that must live up to its obligations or face sanctions. Finally, the requirement that only a health care provider may make inquiries on behalf of an employer regarding a medical certification is a needlessly burdensome procedure. Because most manufacturers employ no such personnel, this requirement has become an effective barrier to acquiring accurate and complete certifications.

The certification process must also be given validity. FMLA leave may be a "right" but it is a contingent right, to be granted only when pre-existing conditions are met. The first condition must be a properly and completely executed medical certification form submitted prior to the leave. The responsibility for obtaining the certification form must be placed squarely on the employee who will be benefiting from the leave. Barriers that prevent employees from obtaining properly completed certifications in a timely manner should be removed. For example:

- The provision that allows employers to contact the employee's health care provider only through employer's health care provider for purposes of clarification and authentication should be deleted. Because most manufacturers do not employ or have no effective access to their own health care providers, this provision constitutes a complete barrier to the acquisition of necessary information. Even where such providers are available to employers, it results in unnecessary employer expenses and/or delays the certification process. This provision equally inconveniences employees, who may be asked to go back to their medical provider a second or third time until the form is completed. It is a needless barrier that the ADA, which usually deals with much more serious health problems than those confronted under the FMLA, has successfully avoided. The ADA model should be adopted for the FMLA;
- The model certification form seeks insufficient medical information, especially with respect to the nature and duration of the ailment. Further, it must be clear that leave is the *result* of a completed medical certification and that the certification

is not the meaningless, after-the-fact document that current interpretations have allowed it to become. Absent some mechanism to require the prompt and complete cooperation of the health care provider and other regulatory changes, mere alterations of the certification form, however, do not promise to resolve the problems with the certification process;

• Allowing an employer to request medical recertification more frequently than every 30 days would be a material improvement and would assist employers in determining when leave is appropriate. This single change to 29 CFR §825.308(b) would have the effect of significantly reducing misuse of the FMLA and of returning the law to its original purpose; and,

• Permitting fitness-for-duty certifications in the case of a worker who is absent intermittently would yield immediate and important benefits. Many health care providers are unaware that their certifications are being used to validate absences unrelated to the ailment identified in the certification. Requiring the employee to visit his/her doctor for a fitness-for-duty certification before returning to work after FMLA leave would assist in furthering all treatment goals, would assure the employer that the employee may safely return to work, and ensure the safety of coworkers.

UNSCHEDULED INTERMITTENT LEAVE

The misuse of intermittent leave has reached epidemic proportions. On no other point have NAM members responded with such vehemence and detail. Intermittent leave is the point in the FMLA where all the unintended consequences of the law come together to cause an economic nightmare for manufacturers: unchallengeable ailments, unannounced absences, and unending burdens without remedy.

The most troubling aspect of unscheduled intermittent leave is its use for "chronic conditions." Under the current regulations, an employee may obtain a physician's certification stating that the employee has a chronic, recurring condition that may flare up, and that the employee will need intermittent leave as a result. As noted above, many of these certifications either do not identify the duration of the ailment or denominate it as "indefinite" or "continuing." Nonetheless, once that certification has been made, the employer is compelled to provide the employee with intermittent leave whenever the condition recurs.

Under current DOL and judicial interpretations of 29 CFR §825.308(b), the employer (i) may not require an employee to verify that the absences were caused by the chronic condition and (ii) may not, absent unusual circumstances, go back to the health care provider to learn if the original diagnosis/prognosis is still valid. The opportunity to miss work without threat of discipline or to follow an employer's normal attendance procedures has led to uncontrollable absences and incalculable loss. The problem is much more severe for manufacturers than for other employers.

According to a 2006 DOL survey of FMLA use, of the 144 million employees covered, 23.8 million took leave (17 percent); about 6.6 million, or 5 percent of total employees, took intermittent leave in the 18 months prior to the survey. That is 4.4 million or 3.3 percent annually.[3] However, respondents to the NAM's survey have had a different experience. First, virtually all of the respondents indicated that most of their employees are eligible for FMLA leave. But they then reported that *25 percent* of those eligible for FMLA leave had medical certifications already *on file* for a "chronic" illness that permitted unannounced, unscheduled intermittent leave. If *only* those workers used intermittent leave, manufacturers are experiencing a use of intermittent leave at nearly *eight times* the national average. For one major manufacturer, a staggering *60 percent* of all FMLA leave taken in the last 9 months was for a period of 1 day or less. Nearly all of this leave was *unscheduled*, nearly all of it *unannounced*. Even leaving aside arguments that Congress never imagined it was passing a national sick leave law for ailments so minor that 1 day or less of recuperation is all that was required for recovery, there is other data to indicate that this pattern of use is actually an unfair misuse of the law.

For example, the NAM survey reveals that when intermittent leave is taken for a whole day, *over 60 percent* of the absences were on Monday or Friday. When partial days were used for intermittent leave, 46 percent of the absences were on Monday or Friday. We do not pose as health statisticians, but simple common sense dictates that real health conditions are not sensitive to the day of the week. The evidence demonstrates that the current FMLA regulations provide no opportunity for employers to administer and manage their most valuable resource: the workforce.

[3] *FMLA Survey*, December 7, 2006, Department of Labor, at *http://www.dol.gov/esa/whd/fmla/fmla/foreword.htm.*

Because it is vitally important that this problem be addressed, it is important that you know what is happening on the manufacturing floor:

• A manufacturing employee was approved for intermittent leave under FMLA for migraine headaches. He claimed he was using FMLA for "therapy." After an unusual pattern of absences, the company took the time to observe his activities. His "therapy" proved to be deer hunting.

• An employee was certified for chronic hypertension. His ailment seemed limited to Mondays and Fridays. However, the employee admitted that during his absences, he was not seeking medical treatment but was rather receiving "care" at his girlfriend's house.

• A manufacturing employee on the night shift was approved for intermittent leave for migraine headaches. The company then learned that he also had a second job driving a school bus. The employee would often drive a bus early in the morning, even though he was not able to work for his entire shift the night before "due to migraines."

• An employee with a chronic illness missed over 30 days in a calendar year, almost all on Monday or Friday. On most days off, he was observed driving his ATV on his farm.

• A manufacturing employee was approved for intermittent leave under FMLA for migraine headaches. He has missed work for 12 of the last 15 Mondays.

• An employee has a medical certification on file for a chronic kidney stone problem. She misses blocks of days, either Monday and Tuesday, or Thursday and Friday, allegedly due to pains from the kidney stones. However, the employee admits she has received no treatment for the condition or the pain after her initial episode. In 2005, 45 days of work were missed. Upset co-workers reported to management that her absences coincide with her partner's days off.

In each instance, because of the presence of a medical certification for a chronic condition, the employer was prohibited from seeking and acquiring current, accurate validation that there was an ongoing ailment or treatment, that ailment was that for which the certification was submitted, or that the absence was related to the certified ailment. In sum, the current regulatory regime of the FMLA has devolved into a system of aiding and abetting misuse.

It is apparent that the lack of clear rules requiring employees to provide advance notice of FMLA leave, particularly employers' inability to insist that routine call-in procedures be followed, has led to a flood of absences which have caused scheduling nightmares for manufacturers. Although the regulations state that employers may insist that employees follow "usual and customary notice and procedural requirements" for requesting time off (*see* 29 CFR § 825.302(d)), this safeguard is illusory because the regulation further states that regardless of the company's customary procedures, employees cannot be denied FMLA leave if they otherwise give timely notice as provided in the regulations. Thus, employees with unscheduled intermittent leave routinely ignore mandatory shift call-in procedures (even if they are fully able to comply), wait 2 working days, as permitted by 29 CFR § 825.303(a), and then report their absence as FMLA-qualifying. In the meantime, manufacturers must scramble to cover the shift. This puts unnecessary stress and burden not only on the employer, but also on co-workers who must assume extra work at the last minute.

Not only are employers' routine call-in procedures subordinated to the FMLA rule allowing notice "within one or two working days of learning of the need for leave" (29 CFR § 825.303(a)), another provision of the FMLA regulations, 29 CFR § 825.208(e)(1), expands the time period to allow an employee to notify the employer that his or her absence was FMLA-protected up to 2 days *after* returning to work, even if the employee could have followed normal call-in procedures or provided notice earlier. The NAM recommends that any changes include the following proposals:

• Employers should be permitted to consult directly with health care providers about an employee's medical certification form and the relationship of the absences to the ailment. Especially with respect to chronic ailments which contemplate use of intermittent leave in the future, a written request for FMLA leave should be required, which includes an employee authorization for the employer to consult with the certifying health care provider;

• Fitness-for-duty slips from the certifying physician should be permitted following every intermittent leave to assure that the leave was for the health-related purpose for which the leave was certified. Such a procedure would ensure that the employee/patient is receiving appropriate treatment while, at the same time, ensuring the safety of the employee and their fellow co-workers;

• 29 CFR § 825.302(d) should be modified to provide that employees must comply with the employer's normal and customary call-in procedures for reporting absences (particularly unscheduled intermittent absences) if they are able to do so and that such call-in procedures take priority over the 2-day notice rule allowed in 29 CFR § 825.302 and .303. This is a reasonable modification that most employees are already familiar with when requesting other types of leave;

• No medical certification for a chronic ailment should be valid for more than 3 months and, once intermittent leave is used, the employer should be able to obtain confirmation from the health care provider that the certification remains valid;

• The "after-the-fact" notice rule contained in 29 CFR § 825.208(e)(1) must be modified to clarify that it does not eliminate the employee's duty to provide advance notice as soon as practicable as set forth in 29 CFR § 825.302 and .303; and,

• Most collective bargaining agreements and most company policies provide for a minimum of 4 hours' pay if a worker is called in to work or must leave work early, of the employers who completed the NAM survey, over 60 percent indicate that intermittent leave should be provided in a minimum period of 4 hours, regardless of an employer's time-keeping system. Some predictable level of administration must be allowed.

CONCLUSION

On February 11, 2008, the DOL issued a Notice of Proposed Rulemaking regarding the Family and Medical Leave Act. The NAM will be thoroughly reviewing this notice and providing additional comments. However, we would like to note that this recent action taken by the DOL is reasonable, balanced and will continue to allow employees to access the FMLA for the birth or adoption of a child or to take care of a family member with a serious illness, or seek treatment themselves when seriously ill.

Manufacturers, far more than most other employers, must have the ability to make and rely on schedules, plans and deadlines. Perhaps the most crucial element of all is a predictable and reliable workforce. But the plain fact is that the FMLA, as currently interpreted and enforced, has eliminated that predictability. The NAM and its members, who provide and have provided more generous benefits than those mandated by law, are committed to protecting existing rights under the law. However, no system of benefits can survive if its cost outweighs its value. We are approaching that point with the FMLA. NAM members, indeed, all employers, and our Nation's economy cannot blindly continue to support this flawed, unfairly misused and confusing system.

The NAM and its members are grateful for this opportunity to share its experiences, its concerns and its proposals regarding the FMLA with the members of the subcommittee. We look forward to the opportunity to work with Congress to improve this law so that it promotes predictability, fairness, eliminates misuse and preserves and protects the benefits manufacturers will continue to offer for future generations of workers.

COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION
FOR HUMAN RESOURCES (CUPA-HR),
KNOXVILLE, TN 37932,
February 13, 2008.

Hon. CHRISTOPHER J. DODD, *Chairman*,
Hon. LAMAR ALEXANDER, *Ranking Member*,
Subcommittee on Children and Families,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN DODD AND RANKING MEMBER ALEXANDER: On behalf of the College and University Professional Association for Human Resources (CUPA-HR), I write to thank you for holding the hearing today entitled *Writing the Next Chapter of the Family and Medical Leave Act—Building on a 15-Year History of Support for Workers*.

CUPA-HR serves as the voice of human resources in higher education, representing more than 10,000 HR professionals at over 1,600 colleges and universities across the country, including 85 percent of all U.S. doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and 465 community colleges. Higher education employs 3.3 million workers nationwide, in every state in the country.

CUPA-HR and its members understand the challenges today's employees face in balancing work and family demands and the importance of the Family and Medical Leave Act to America's workers and working families. Yet, while we fully support the protections offered by the FMLA, we feel it is important also to bring to your attention areas where the administration of the medical leave provisions of the FMLA have posed challenges for human resource professionals and undermined the intent of the act.

Higher education human resource professionals consistently have reported problems with administering medical leave under the confusing and sometimes contradictory FMLA regulations and interpretations. In fact, 85.8 percent of CUPA-HR members that responded to a recent survey reported experiencing challenges in administering FMLA leave for the employee's own health condition. The survey results reveal many of the specific issues human resource professionals are having with the regulations. For example:

- 55 percent reported problems with determining which injuries and illnesses qualify as serious health conditions;
- Over 55 percent said they experienced uncertainty about legitimacy of leave requests;
- Over 80 percent of respondents reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences; and
- 80.2 percent reported receiving vague information in a medical certification and almost half reported problems with authenticating and verifying information in leave certifications.

More details about the survey, the challenges our members have encountered with the FMLA and possible solutions to those challenges are in the attached comments we filed with the Department of Labor. We urge you to work with the Department as it moves through its current rulemaking to resolve these challenges and provide clear guidance for employees andemployers on the new leave requirements for military, so we all may work together to explore new policy options to address the needs of the 21st century workforce.

Very Truly Yours,

JOSH ULMAN,
Chief Government Relations Officer, CUPA-HR.

COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION
FOR HUMAN RESOURCES (CUPA-HR),
KNOXVILLE, TN 37919,
February 16, 2007.

RICHARD M. BRENNAN,
Senior Regulatory Officer,
Wage and Hour Division,
Employment Standards Administration,
U.S. Department of Labor,
Washington, DC 20210.

RE: Request for Information on the Family and Medical Leave Act of 1993

Dear MR. BRENNAN: I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) in response to the Request for Information (RFI) on the Family and Medical Leave Act (FMLA) published in the December 1, 2006, Federal Register. We appreciate the Department of Labor (DOL)'s interest in this issue and urge the DOL to improve the regulations in a manner that benefits both employers and employees and simplifies implementation of this important law.

CUPA-HR serves as the voice of human resources in higher education, representing more than 9,600 human resource professionals at nearly 1,600 colleges and universities across the country. Our members are responsible for administering the FMLA and ensuring their employers are in compliance with the act.

While CUPA-HR and our members fully support the protections offered by the FMLA, some of the DOL's regulatory requirements make administration and compliance with the law unnecessarily difficult and overly burdensome, particularly with respect to administering FMLA leave for the employee's serious health condition. In fact, 85.8 percent of the 360 CUPA-HR members that responded to a recent survey reported experiencing challenges in this area. (Survey attached as Exhibit A). The difficulties they have reported are similar to those discussed in the many Congressional hearings on the FMLA.

Set forth below, we provide in our answers to the specific questions asked in the RFI more details on the challenges our members have encountered. We also recommend changes to the regulations that will both address some of the challenges *and* benefit employers and employees alike. CUPA-HR is a member of the National Coalition to Protect Family Leave (NCPFL) and fully supports the coalition's comments as well.

Eligible Employee

The FMLA defines an "eligible employee" as one "who has been employed . . . for at least 12 months by the employer with respect to whom leave is requested . . ." 29 U.S.C. § *2611.*

In section II. A. of the RFI, the Department asks, among other things, for input on whether and how to address the treatment of combining nonconsecutive periods of service for purposes of meeting the 12 months required in 29 CFR Part 825.110(b).

The current regulations state:

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

The DOL should amend 825.110(b) so that it bars combining of nonconsecutive periods of service to meet the statute's eligibility requirements, except in cases where the employee retains a nexus to the employer during the break in service, such as during an academic sabbatical, administrative leave or a break in service under the Uniformed Services Employment and Reemployment Rights Act. Nothing in the FMLA supports counting prior employment toward the 12-month minimum service requirements. To the contrary, the FMLA language requiring employment "for *at least* 12 months" suggests a requirement of continuous employment.

Moreover, permitting prior employment to count toward the minimum service requirement makes tracking which employees are eligible for FMLA leave exponentially more difficult. The problem is illustrated by the recent decision in *Rucker* v. *Lee* Holding, No. 06–1633, 2006 U.S. App. LEXIS 31072 (4th Cir. December 18, 2006). In that case, the employee, Rucker, had voluntarily left his job as a car sales representative with Lee Holding in 1999. About 5 years later, the company rehired him. The court held that Rucker was eligible for FMLA leave even though he had only worked 7 months with the company because his prior service from 5 years ago counted toward the 12-month required tenure for FMLA eligibility.

The Department also asks whether it should require employers to determine leave eligibility at the time the leave commences, as is suggested in 29 CFR Part 825.110(d), or when the leave is requested, as is suggested in 29 CFR Part 825.110(f). Eligibility for leave only attaches at the time leave commences. Consequently, the DOL can only require employers to make that determination at that time.

Definition of "Serious Health Condition"

The FMLA requires that covered employers provide eligible employees with leave for the employee's own serious health condition or to care for a family member with a serious health condition. The regulations establish various standards for determining what qualifies as a serious health condition in 29 CFR Part 825.114(a). In a later part of the same section—Part 825.114(c)—the language reads, "unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems are examples of conditions that do not meet the definition of serious health condition . . ." *See 29 CFR Part 825.114(c).*

In section II. B of the RFI, the DOL asks if the regulatory tests set forth in 29 CFR Part 825.114(a) render inoperative the language in 29 CFR Part 825.114(c). The DOL also asks if there is any way to maintain the standards in 29 CFR Part 825.114(a), while giving meaning to 29 CFR Part 825.114(c) and the Congressional intent that the protections of the FMLA not normally extend to common colds, ear aches, etc.

In short, the standards set forth in 29 CFR Part 825.114 (a) do render the language on minor illnesses or injuries in 29 CFR Part 825.114(c) meaningless and conflict with Congressional intent. Under 29 CFR Part 825.114 (a), a serious health condition includes:

> "a period of incapacity . . . of more than three consecutive calendar days . . . that also involves (A) treatment two or more times by a health care provider . . . or (B) treatment by a health care provider on at least one occasion results in a regimen of continuing treatment under the supervision of the health care provider."

Many minor health conditions could include incapacity of more than 3 calendar days and multiple doctors' visit (including follow-up visits after the incapacity) or continuing treatment, such as antibiotics or other prescription medications.

The tension between 29 CFR Part 825.114 (a) and 29 CFR Part 825.114(c) has made it difficult to ascertain which injuries and illnesses qualify for FMLA leave. In fact, more than 55 percent of the respondents to a CUPA-HR member survey that reported challenges identified problems with determining which injuries and illnesses qualify as serious health conditions. Exacerbating the problem are conflicting DOL opinion letters on the 29 CFR Part 825.114 (a) and 29 CFR Part 825.114(c); one stating the common cold and other illnesses or injuries do not qualify as a serious health condition irrespective of 29 CFR Part 825.114 (a), and a later letter withdrawing that opinion and stating the opposite.

As noted in the comments provided by the NCPFL, the confusion over what qualifies as a serious health condition has led many HR professionals to err on the side of finding an illness or injury as FMLA qualifying. As result, the FMLA is more vulnerable to abuse and both employers and employees may questions the integrity of the act. Indeed, more than 55 percent of those who reported challenges with FMLA administration in the recent CUPA-HR survey said they had uncertainty about legitimacy of some leave requests.

Several small changes to 29 CFR Part 825.114 (a) could eliminate this conflict. For example, the DOL could increase the number of consecutive days the individual must be incapacitated to 5 full workdays or 7 full calendar days. In addition, the DOL should clarify that for an illness or injury to qualify as a serious health condition, the individual must have multiple treatments *during* the period of incapacity, not at a later date. Finally, the provision allowing an illness or injury to qualify as a serious health condition if the individual is treated on one occasion and receives a regimen of continuing treatment should be removed from the regulatory definition.

Substitution of Paid Leave

The FMLA allows an employee to elect or an employer to require the employee to substitute accrued paid sick, family, vacation or personal leave for any part of the 12-week FMLA leave entitlement (with some restrictions). The employer may impose the same limitations and restrictions on paid sick leave for FMLA purposes as it does for sick leave taken for reasons not covered by the FMLA. *See 29 CFR Part 825.207.* For example, if the employer usually only permits sick leave for absences of a half day or more, then the employee may only substitute the paid sick leave for FMLA absences in excess of a half day—meaning shorter time periods would have to be unpaid. The regulations, however, do not permit employers to place any limitations on the substitution of paid vacation or personal leave accrued. *See Id.*

The DOL asks in section II. D. of the RFI about the impact of prohibiting employers from applying their normal leave policies to the use of paid vacation and personal leave. Employers impose restrictions on the use of paid leave for a variety of reasons, including to ease associated administrative and paperwork burdens. Using the example above, many employers require employees to take paid leave in half-day increments for staffing, payroll administration and budget reasons. Also, by prohibiting restrictions on use of paid leave, the regulations force employers to treat employees using paid leave for FMLA purposes more favorably then those using accrued leave for other reasons. For example, an employer's policy may only permit vacation leave when the employee provides 2 weeks' notice, but an employee who wants to use the vacation leave for FMLA reasons need not provide the notice.

In short, the DOL should allow employers to apply their normal leave policies to use of paid vacation and personal leave for FMLA purposes.

Attendance Policies

The Department asks in section II. E if 29 CFR Part 825.215(c)(2) has impacted the employers' ability to provide perfect attendance awards and other incentives to encourage attendance. Reports from CUPA-HR members indicate 825.215(c)(2) would in many cases render perfect attendance awards or similar incentives ineffective. More than 55 percent of those reporting problems with FMLA administration in our membership survey said they experienced uncertainty about legitimacy of leave requests and close to 75 percent reported problems with notice and unscheduled absences from FMLA leave.

While these problems are a result of deficiencies in other parts of the regulations, they exacerbate 825.215(c)(2)'s odd requirement that absences from work protected by the FMLA not count against an employee's eligibility for a perfect attendance award or similar incentives. Plainly, a perfect attendance award has little meaning if it must be provided to employees who may not truly qualify for FMLA leave and are frequently absent without notice.

Intermittent Leave

The Department asks several questions in section II. F. of the RFI on the impact of unscheduled and intermittent FMLA leave.

The FMLA permits employees to take leave on an intermittent basis or to work on a reduced schedule when necessary. The statute is silent, however, on whether an employer may require employees to take the leave in minimum increments of time. The DOL regulations at 29 CFR Part 825.203 require employers to permit employees to take leave in the "shortest period of time the employer's payroll system uses to account for absences of leave, provided it is 1 hour or less."

Many employers have payroll systems capable of accounting in increments as small as 6 minutes. Tracking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked. In addition, CUPA-HR members have had difficulties scheduling around intermittent leave because it is hard to find a replacement worker for small increments of time and the regulations do not require employees to provide any advance notice of the need for leave.

The DOL Opinion Letter FMLA-101 (January 15, 1999) exacerbates this problem by stating that an employer must accept notice of need for leave up to 2 days *following* the absence.

These problems are evidenced by the overwhelming majority of respondents to our membership survey that reported problems with FMLA administration. More than 80 percent of respondents reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences.

The Department could eliminate many of these problems if it allowed employers to require employees to take FMLA leave in a minimum of half-day increments. In addition, the DOL should change the regulation so that employers can require employees to provide a week's notice of the need for leave, except in emergency situations or where the employee can show it was impossible to do so.

Light Duty

The DOL asks in section II. G. of the RFI if "light duty" work should count against the employee's FMLA leave entitlement and reinstatement rights. As we understand it, DOL views light duty assignment as including positions with essential job functions different than those normally performed by the employee.

The current regulations allow "an employee's voluntary and uncoerced acceptance . . . of a 'light duty' assignment while recovering from a serious health condition . . . In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of 'light duty.'" *See 29 CFR Part 825.220(d).*

Since the employee receives all the protections of the FMLA while on light duty and the assignment is voluntary, then the time spent performing light duty should count against the employee's FMLA leave entitlement.

The DOL also should permit mandatory light duty assignments that are consistent with the employee's medical restrictions. In many cases, light duty may be a better alternative than placing the employee on leave, as it allows the employer greater flexibility in meeting its staffing needs. Such a change also would better rationalize the FMLA with the accommodation provisions of the Americans with Disabilities Act and the light duty provisions of many workers' compensation laws. The DOL could set parameters to ensure that the mandatory light duty is consistent with the intent of the FMLA, such as barring the time performing *mandatory* light duty from counting toward the employee's leave entitlement.

Essential Functions

To qualify for FMLA under the current regulations, the illness or injury must prevent the employee from performing any *one* of the essential functions of the job. *See 29 CFR Part 825.115*. In section II. H of the RFI, the DOL asks for comments on the "implications of permitting an employer to modify an employee's existing job duties to meet any limitations caused by the employee's serious health condition as specified by a health care provider, while maintaining the employee's same job, pay, and benefits." Doing so would allow employers greater flexibility to meet staffing

needs, while also providing the employee with protections. It also would better rationalize the FMLA with accommodation provisions of the Americans with Disabilities Act and the light duty provisions of workers' compensation laws. In a similar vein, and as mentioned above, the DOL also should allow mandatory light duty assignments.

Waiver of Rights

Section 29 CFR Part 825.220(d) of the current regulations provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." In section II. I. of the RFI, the DOL notes that some courts have interpreted the language in 29 CFR Part 825.220(d) to prohibit settlements of past FMLA claims as well as prospective waivers. The case cited by the DOL, *Taylor* v. *Progress Energy*, 415 F.3d 364 (4th Cir. 2005), *vacated and rehearing granted* (June 14, 2006), held that the DOL or a court needed to approve any waiver of FMLA rights, including a settlement of past claims. As noted in the citation, the 4th Circuit vacated the *Taylor* decision and granted a request for rehearing.

The Department asks in the RFI "whether a limitation should be placed on the ability of employees to settle past FMLA claims." The DOL should not do so as it would discourage settlements of formal and informal FMLA claims and employers from offering a global release of claims in connection with a severance or settlement agreement or as part of a reduction-in-force program. A better course of action would be to revise the regulations so they explicitly allow an employee to settle any prior FMLA claims as is permitted under the Americans with Disabilities Act and similar laws.

FMLA Leave Determinations/Medical Certifications

The Department asks in section II. K. of the RFI if 29 CFR Part 825.307's restrictions on contact with the employee's health care provider result in unnecessary expenses for employers and/or delay the certification process.

Under the current regulations, it is extremely difficult for an employer to clarify and authenticate a medical certification. The employer must first provide the employee with the opportunity to cure any deficiencies in the certification. *See 29 CFR Part 825.305(d)*. If the employee fails to do so, the employer may have its health care provider contact the employee's health care provider if the employee consents.

These restrictions are purely a product of the regulation. *See 26 U.S.C. § 2613*. While the FMLA itself limits the type of information an employer can require as part of the certification process, it imposes no limitation on inquiries related to that information.

Interestingly, the other Federal statute under which employers are often required to provide employees with leave for medical conditions, the Americans with Disabilities Act (ADA), permits employers to communicate directly with the employee's health care provider. The FMLA restrictions particularly are problematic when employers face a request from an employee that triggers obligations under both the FMLA and ADA, given that the latter requires the employer to engage in interactive processes to accommodate the employee.

CUPA-HR members that reported challenges administering the FMLA have had significant problems with medical certification, with 80.2 percent reporting receiving vague information in a medical certification and almost half reporting problems with authenticating and verifying information in leave certifications.

The DOL should revise the regulations so that employers may directly contact the employee's health care provider as long as the employer's inquiry is limited to the certification requirements set forth in the statute. This will make the certification process far less burdensome, and reconcile the FMLA process with that of the ADA.

Conclusion

CUPA-HR appreciates the Department's interest in improving the FMLA and the opportunity to submit these comments. We urge the DOL to proceed with changes to the regulations we have detailed above.

Very Truly Yours,

JOSHUA A. ULMAN,
Chief Government Relations Officer,
College and University Professional Association
for Human Resources.

EXHIBIT A—SURVEY OF CUPA-HR MEMBERS

Have you or has your organization experienced any challenges in administering leave under the Family and Medical Leave Act for an employee's serious health condition?

	Response Total
Yes	309
No (Please skip Question 2 and click the Submit button at the bottom of the page)	51
Total Respondents	360
(skipped this question)	0

If you answered yes to Question 1 please indicate the areas below in which you or your organization has experienced challenges. (Check all that apply.)

	Response Total
Determining if an injury or illness qualifies as a serious health condition	172
Receiving vague information in a medical leave certification	247
Authentication and verifying information in a medical leave certification	138
Uncertainty about the legitimacy of leave requests	170
Tracking intermittent leave	253
Problems with notice of leave and unscheduled absences	229
Scheduling leave requests	76
Total Respondents	308
(skipped this question)	52

September 24, 2008.

Ms. Victoria Lipnic,
Assistant Secretary of Labor for Employment Standards,
Department of Labor,
200 Constitution Avenue, NW,
Washington, DC 20210.

Dear Ms. Lipnic: Thank you for your testimony before the Subcommittee on Children and Families on February 14. I regret that, due to the constraints of time, the committee members were not able to fully explore your views about many of the important issues surrounding the Family and Medical Leave Act.

As discussed at the hearing, several Senators had additional questions that they would like to ask you. These questions are enclosed, and unfortunately did not reach you when we initially sent them after the hearing. We would appreciate receiving your responses as promptly as possible, in light of the time-sensitive issues involved.

If you have any questions, do not hesitate to contact Averi Pakulis at 202–224–2823.

Sincerely,

Christopher J. Dodd.

Questions of Senator Kennedy for Victoria Lipnic

DATA GATHERING

Question 1. The last comprehensive data collection on the FMLA by the Department of Labor was conducted in 2000. In a February 16, 2007 letter to Secretary Chao responding to the Department's Request for Information, several members of Congress noted the lack of recent data collection about the numbers of employees taking FMLA leave and the types of leave taken. We urged the Department to gather additional information, including a comprehensive study similar to the 2000 analysis, before making any regulatory changes. Did the Department consider conducting another comprehensive study to gather objective data about how the FMLA is currently working before changing the current regulations? Why did the Department decide against this approach? Does the Department have any plans to gather additional objective data about the law's operation in the future?

Question 2. In support of its proposed changes to the notice requirements for workers seeking to take unscheduled leave, the Department relies on surveys submitted by private entities in response to the Request for Information. Does the Department have any knowledge of the methodological validity of these surveys? Shouldn't the Department gather its own survey data before changing the regulations?

Question 3. Does the Department rely on anything other than anecdotal evidence from employers to support allegations that unscheduled intermittent leave is abused?

Question 4. The questions in the Department's Request for Information were largely focused on the problems encountered by employers in administering the FMLA. Has the Department gathered any comprehensive data on the problems faced by workers who take leave or the consequences experience by workers upon their return from FMLA leave?

THE NEW REGULATIONS

Question 5. Under the proposed regulations, there are stricter limits on when a worker can substitute accrued paid time off for unpaid FMLA leave. When a worker who has already earned paid time off faces a health emergency (and, due to the unplanned nature of the crisis, cannot utilize the employer's usual and customary notice procedures to request paid time off) the worker can be forced to take leave without pay rather than using the paid time he or she has already earned. What is the reason for this change? Are employers more inconvenienced by the use of unplanned paid leave than the use of unplanned unpaid leave? Are there greater administrative difficulties involved?

Question 6. The proposed regulations change the definition of a chronic serious health condition to require two or more visits to a health care provider annually. Given that the Department has recognized that self-treatment is appropriate for chronic serious health conditions, do you anticipate that this change will place increased financial burdens on workers whose conditions can be managed by self-treatment? Will these workers be compelled to use FMLA time for unnecessary absences from work? Do you anticipate increased burdens on health care providers whose time and resources will be occupied with extra appointments?

Question 7. The proposed regulations also clarify that a serious health condition requiring continuing treatment requires incapacity for three or more days and two or more treatments within a 30-day period. Why do you believe that period of a worker's incapacity and the timing of visits to a health care provider must be within a defined time period? Doesn't this change unnecessarily narrow the definition of serious health condition?

Question 8. In the Request for Information, comments from employers suggested that more frequent certification was needed in response to "gaming or manipulation" of intermittent/reduced work schedule leaves. The current regulations allow employers to request recertification whenever the employer has information that casts doubt on the continuing validity of a certification. This seems to provide an adequate protection for employers seeking to pursue potential abuses of the law. Why did the Department decide that more frequent certification at the employer's discretion was necessary?

Question 9. The new regulations allow employers to directly contact a worker's medical providers if the worker has signed a HIPAA authorization. Since an incomplete medical certification results in a denial of FMLA leave, won't workers feel compelled to sign medical authorizations to increase the likelihood that they will be granted FMLA leave? Doesn't this new rule create a risk that medical authorizations will become a condition of employment?

Question 10. Under the new rule, employers who contact medical providers directly are ostensibly limited to obtaining information needed to certify eligibility for leave, and/or information necessary to "clarify " a worker's request for leave. How can compliance with these limits be monitored and enforced?

Question 11. Under the new regulations an employer is entitled to fitness-for-duty certifications every 30 days if an employee has used intermittent leave and reasonable safety concerns exist. What limitations are placed on an employer's discretion to determine that "reasonable safety concerns" exist? Are employers required to give advance notice to workers before they take leave informing them that a fitness-for-duty certification will be required upon return to work? Must employers have a uniformly-applied policy regarding specific positions and health conditions before requiring a fitness-for duty-certification?

Question 12. You testified that many workers do not fully understand their FMLA rights or the procedures they must use when seeking FMLA leave. How do the new

regulations address this problem? Do they require any verbal explanation to workers about their rights, or only written notification?

Question 13. The FMLA was intended to establish a minimum labor standard, mandating a statutory floor of 12 weeks of unpaid leave that all covered employers must provide. The 1993 Senate Report on the FMLA noted that the act was drafted with other labor standards laws, such as the Fair Labor Standards Act, in mind. In the preamble to the current regulations, the Department of Labor analogized the FMLA's enforcement scheme to that of the FLSA and concluded that "prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA." The proposed rules now explicitly state that workers may retroactively waive their FMLA rights, while the FLSA still prohibits such retroactive waiver. What factors contributed to the change in the Department's views on waiver?

Question 14. In several places the proposed regulations create obligations for the employee but it is unclear how it will be determined if the employee has met her burden and what the consequences are if that burden is not met. For example:

- Proposed 29 U.S.C. § 825.203 requires that an employee make a "reasonable effort" (as opposed to an "attempt") to schedule leave so as not to disrupt the employer's operations.
- Proposed 29 U.S.C. § 825.302(d) requires that an employee follow an employer's rules for notification of an absence "absent unusual circumstances."
- Proposed 29 U.S.C. § 825.302(a) requires that an employee respond to an employer's inquiry regarding why notice was not given sooner.

Please explain how it will be determined if an employee has met the burden created by the new regulations, who will make this determination, what sanction the employee faces if she does not meet the burden, and what recourse the employee has if she feels she has met the burden and the employer disagrees.

Question 15. Under the proposed regulations, what are the employer's responsibilities if the employer finds the medical certification to be "incomplete" and how do those differ from when an employer finds a medical certification to be "insufficient."

Question 16. Under the proposed regulations, are there any limits to who at the employer can make the contact with the employee's health care professional and have access to the employee's medical certification information? Can the contact be made by the employee's direct supervisor?

Question 17. Under the proposed new fitness for duty requirement for workers taking intermittent leave, how is "reasonable safety concerns" defined?

Question 18. Under the proposed new medical recertification requirement, (825.308(a)) from what point is the 6 months measured? From the date of the original certificate or from the last recertification?

Question 19. In selecting 5 years for proposed 825.110(b)(1) did the Department conduct analysis regarding how many employees will be denied FMLA leave because of this requirement and whether this requirement will fall more heavily on women? If such analysis was conducted, how was it done and what were the findings?

MILITARY FAMILY LEAVE

Question 20. The new military FMLA law passed by Congress provides up to 26 weeks of leave in a 12-month period for family members to care for injured servicemen and women. It also allows workers to take leave due to a "qualified exigency" that arises when a family member has been called to active duty. This law did not alter the FMLA's definition of "eligible employee," which limits FMLA leave to workers who have been employed by their employers for 12 months and 1,250 hours in the prior 12-month period. As a result, the FMLA may not protect many family members who seek to care for injured service members or who experience "qualified exigencies" associated with a family member's military service.

Last year, the President proposed military FMLA legislation to implement the Dole-Shalala report's recommendations. This legislation included a broader definition of "employee" in the context of workers taking family leave to care for an injured service member, allowing anyone "employed by an employer as of the date of the service member's diagnosis of injury and still employed as of the date leave is requested" to be eligible for FMLA leave.

Do you agree that adopting this broader definition of "eligible employee" would make a tremendous difference in allowing family members to care for an injured service member?

The Department estimates that among the 94.4 million employees who work for FMLA-covered employers, 18.4 million or 19.5 percent are not "eligible employees" because they do not meet the service requirements of the statute. Has the Department estimated what portion of Americans who would otherwise be eligible for 26

weeks of leave to care for injured servicemembers will *not* be "eligible employees" because they have not worked for the requisite amount of time? Isn't it possible that an even higher proportion of this population may be excluded because their families must frequently relocate to meet military obligations? What does the Department propose to do to address this issue?

[Editor's Note: Responses were not available at time of print.]

QUESTIONS OF SENATOR DODD FOR VICTORIA LIPNIC

Question 1. How do we collect more data about why people are using FMLA leave without being too intrusive? What are the privacy concerns that need to be addressed?

Question 2. What could the DOL be doing to raise awareness of employees' rights and employer and employee responsibilities under the FMLA? Beyond handing employees a packet at orientation and posting a sign, what type of comprehensive and accessible education program could employers create?

Question 3. How can we get data about what happens to employees when they return from FMLA leave? What can we do to solve problems of backlash against employees for taking leave?

Question 4. How can the paradigm be shifted so that intermittent leave is easier for employers and accessible when employees need it? What are the best steps to address this issue, which appears to cause the most concern among employers?

[Editor's Note: Responses were not available at time of print.]

[Whereupon, at 4:47 p.m., the hearing was adjourned.]

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