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My congratulations go to the Viejas Bank of Kumeyaay Indians for these significant contributions.

FAMILY AND MEDICAL LEAVE  
CLARIFICATION ACT

**HON. WILLIAM F. GOODLING**

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

*Friday, May 19, 2000*

Mr. GOODLING. Mr. Speaker, today I introduce a bill that would make reasonable, and much needed change to the Family and Medical Leave Act (FMLA) of 1993. The Family and Medical Leave Clarification Act will help implement and enforce the FMLA in a manner consistent with Congress' original intent.

I do not think anyone would dispute that the FMLA has helped those with serious family and medical crisis. However, some of the troublesome results are difficult to ignore. There is compelling evidence of problems with the implementation and the FMLA, problems affecting both employers and employees. The FMLA is still a relatively young law. In fact, the final rule implementing the Act was not published until 1995. As with any new law, there are some growing pains that need to be sorted out.

Testimony before the Committee on Education and the Workforce has established evidence of myriad problems in the workplace caused by the FMLA. These problems include: the administrative burden of allowing leave to be taken in increments of as little as six minutes; the additional burdens from overly broad and confusing regulations of the FMLA, not the least of which is the Department of Labor's ever-expanding definition of "serious health condition;" and inequities stemming from employers with generous leave policies in effect being penalized under the FMLA for having those policies.

Mr. Speaker, the FMLA created a Commission on Leave, which was charged with reporting the FMLA's impact. Upon release of the Commission's report in April 1996, we were told that all was well with the FMLA. But contrary to these assertions, the report was not a complete picture. In fact the Family and Medical Leave Act Commission admitted its report was only an "initial assessment." Its two year study began in November of 1993, just three months after the Act even applied to most employers and more than a year before the release of final FMLA regulations in January of 1995.

Simply put, the Commission's report was based on old and incomplete data studies long before employers or employees could have been fully aware of the FMLA's many requirements and responsibilities.

Mr. Speaker, the first area the FMLA Clarification Act addresses is the Department of Labor's overly broad interpretation of the term "serious health condition." In passing the FMLA, Congress stated that the term "serious health condition" was not intended to cover short-term conditions for which treatment and recovery were very brief, recognizing specifically in Committee report language that "it is

expected that such conditions will fall within the most modest sick leave policies."

Despite Congressional intent, the Department of Labor's current regulations are extremely expansive, defining the term "serious health condition" as including, among other things, any absence of more than three days in which the employee sees any health care provider and receives any type of continuing treatment, including a second doctor's visit, or a prescription, or a referral to a physical therapist. Such a broad definition potentially mandates FMLA leave where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve.

The FMLA Clarification Act elects Congress' original intent for the meaning of the term "serious health condition," by taking word-for-word from the Democrat Committee report, and adding to the status, the then-Majority's explanation of what types of conditions it intended the Act to cover. It also repeals the Department's current regulations on the issue and directs the agency to go back to the drawing board and issue regulations consistent with the new definition.

My bill also minimizes tracking and administrative burdens while maintaining the original intent of the law, by permitting employers to require employees to take "intermittent" leave, which is FMLA leave taken in separate blocks of time due to a single qualifying reason, in increments of up to one-half of a work day.

Congress drafted the FMLA to allow employees to take leave less than full-day increments. Congress also intended to address situations where an employee needed to take leave for intermittent treatments, e.g., for chemotherapy or radiation treatments, or other medical appointments. Granting leave for these conditions has not been a significant problem.

However, the regulations provide that an employer "may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." Since some employers track in increments as small as six or eight minutes, the regulations have resulted in a host of problems related to tracking the leave and in maintaining attendance control policies. In many situations, it is difficult to know when the employee will be at work.

In many positions, employees with frequent, unpredictable absences can severely impact an employer's productivity and overburden their co-workers when employers do not know if certain employees will be at work. Allowing an employer to require an employee to take intermittent leave in increments of up to one-half of a work day would ease the burden significantly for employers, both in terms of necessary paperwork and with respect to being able to provide effective coverage for absent employees.

Where the employer does not exercise the right to require the employee to substitute other employer-provided leave under the FMLA, the FMLA Clarification Act shifts to the employee the requirement to request leave to be designated as FMLA leave. In addition, the Act requires the employee to provide written application of foreseeable leave within five working days, and within a time period extended as necessary for unforeseeable leave,

if the employee is physically or mentally incapable of providing notice or submitting the application.

Requiring the employee to request that leave be designated as FMLA leave eliminates the need for the employer to question the employee and pry into the employee's private and family matters, as required under current law. This requirement helps eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations which even attorneys have a difficult time understanding.

With respect to leave taken because of the employee's own serious health condition, the FMLA Clarification Act permits an employer to require the employee to choose between taking unpaid leave provided by the FMLA or paid absence under an employer's collective bargaining agreement or other sick leave, sick pay, or disability plan, program, or policy of the employer.

This change provides incentive for employers to continue their generous sick leave policies while providing a disincentive to employers considering discontinuing such employee-friendly plans, including those negotiated by the employer and the employees' union representative. Paid leave would be subject to the employer's normal work rules and procedures for taking such leave, including work rules and procedures dealing with attendance requirements.

Despite the common belief that leave under the FMLA is necessarily unpaid, employers having generous sick leave policies, or that have worked out employee-friendly sick leave programs with unions in collective bargaining agreements, are being penalized by the FMLA. In fact, for many companies, most FMLA leave has become paid leave because the regulations state that an employer must observe any employment benefit program or plan that provides rights greater than the FMLA.

Because employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions, nor can they count FMLA leave under "no fault" attendance policies, the regulations prohibit employers from using disciplinary attendance policies to manage employees' absences.

Mr. Speaker, the Family and Medical Leave Clarification Act relieves many of the unnecessary and unreasonable burdens imposed on employers and employees by the Department of Labor's implementing regulations, without rolling back the rights of employees under the FMLA. Finally, my bill encourages employers to continue to provide generous paid leave policies to their employees.

I urge my colleagues in joining me in co-sponsoring this measured and necessary mid-course correction to providing effective FMLA processes.

HONORING THE LATE STATE  
SENATOR DONALD L. GRUNSKY

**HON. SAM FARR**

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

*Friday, May 19, 2000*

Mr. FARR of California. Mr. Speaker, today I honor an outstanding legislator and trial lawyer who was a long time resident of Santa