



April 11, 2008

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Wage and Hour Division, Employment Standards Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210.

RE: Family and Medical Leave Act Notice of Proposed Rulemaking 29 CFR Part 825
Docket ID: ESA-2008-001
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Document Title: The Family and Medical Leave Act of 1993
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Electronic comments submitted through the Federal eRulemaking Portal
<http://www.regulations.gov>.

On behalf of the more than 100,000 bipartisan members of the American Association of University Women, I write to share AAUW's comments in response to the U.S. Department of Labor's Notice of Proposed Rule Making (NPRM) regarding the proposed changes to the regulations of the Family and Medical Leave Act (FMLA).¹

AAUW strongly supports the Family and Medical Leave Act, and was instrumental in its passage. While AAUW is pleased about some of the proposed rule changes, AAUW is equally concerned about some of the proposed rules as well. For example, AAUW is particularly concerned that the Department's new rules would make it more difficult for employees to utilize paid leave while on FMLA leave – often the only way people can afford to take such leave. AAUW is also concerned about new requirements that add additional steps before employees can access FMLA leave, such as increasing the notice requirements for employees to take leave and increasing medical certification and fitness for duty requirements. Lastly, AAUW believes there are medical privacy concerns about the proposed rules because of the changes in direct contact between employers and the employees' health care providers.

AAUW supports regulations that ensure workers can take full advantage of their FMLA protections, and strongly opposes any changes that would limit the scope of the FMLA or inhibit workers' ability to take full advantage of the law.

AAUW's Support for the Family and Medical Leave Act

AAUW believes that creating work environments that help employees balance the responsibilities of work and family is good public policy—good for workers, good for families, and good for business. AAUW's member-adopted 2007-2009 Public Policy Program supports family and medical leave policies, which for women are critical to

“equitable access and advancement in employment.”² AAUW efforts in this area include long term advocacy from 1983 to 1992 to pass the Family and Medical Leave Act, which was finally signed into law in 1993.

The FMLA is a groundbreaking law that helps employees balance the increasing demands of work and family at little or no cost to employers. More than 50 million covered and eligible employees have used the FMLA to take care of themselves and their families during times of critical need without jeopardizing their health insurance benefits or job security.³ In January 2001, the bipartisan Commission on Family and Medical Leave released a study reporting that almost 90 percent of covered employers said that complying with the FMLA brought no or minimal increase in their administrative costs.⁴ Further, while the vast majority of employers reported the FMLA had no impact on business practices, productivity, and outcomes, some employers reported cost savings associated with lowered employee turnover, as well as improved employee morale.⁵

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

By any measure, the FMLA is a real success story: it ensures that America has productive and successful workers and healthy and secure families.

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

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

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

In addition, the lack of available data is an unfortunate reminder of U.S. Department of Labor’s own failure to conduct objective studies on the FMLA and its implementation in recent years. The Request for Information from 2007 took great pains to criticize the 2000 study of the FMLA undertaken by Westat and commissioned by the Department

(“2000 Westat Study”). But the 2000 Westat Study, even with its limitations, has been invaluable and represents the best available source for information on FMLA usage and coverage. The Department has neglected to undertake significant efforts to update this research, thus leaving an information void. While the 2007 Request for Information solicited data from the public on a long list of questions, in many cases it is the U.S. Department of Labor that is best positioned to gather the relevant data to provide answers. To pursue changes to the FMLA regulations without such scientifically valid data, however, is unwarranted and inappropriate.

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

Responding to the Notice of Proposed Rulemaking: AAUW’s Key Issues

Increased Documentation to Prove Family Relationships: Section 825.122(f)

Under the current rules, there are several documents that an employee may submit to show that the family member for whom the worker needs FMLA leave is a qualifying FMLA family member, including submitting a simple statement to the employer to that effect. Under the proposed regulations, the statement would now have to be sworn and notarized. AAUW opposes to this new provision. The Department has offered no corroborating data or provided a rationale as to why this change is necessary, nor to AAUW’s knowledge has the Department received widespread complaints about abuse of this aspect of FMLA eligibility requirements. AAUW is concerned that this arbitrary change would simply erect an unnecessary barrier for certain employees to take leave; we should be lessening the bureaucracy employees need to wade through to access FMLA leave, not adding to it.

Serious Health Condition

AAUW was very pleased to see that the Department proposes no major changes in the definition of “serious health condition,” and that the Department further decided not to create an exclusionary list of conditions that would qualify for this definition. While the current regulations do set parameters to help define these conditions, they do not include an exhaustive list of conditions deemed “serious” or “not serious.” As explained in the preamble of the FMLA regulations, the U.S. Department Labor “did not consider it appropriate to include . . . the ‘laundry list’ of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally ‘serious,’ rather than apply the regulatory standard.”⁶ The regulations are intended to create a reasonable standard that can be applied with sufficient flexibility to adjust for differences in how individuals are affected by illness—what can be a serious life threatening illness for one individual can be a minor illness for someone else.

The current regulations defining “serious health condition” reflect the practical reality that serious health conditions that require family or medical leave can sometimes be of

a fairly short duration. Current FMLA regulations also appropriately acknowledge that the relevant consideration for leave eligibility is the impact of the medical condition on a worker's need for leave, and not the particular diagnosis. The existing regulations properly define a serious health condition by applying objective criteria to a worker's individual case, including duration of the illness and number of treatments, rather than categorically excluding any set of health conditions from FMLA coverage.

Definition of Serious Health Condition: Sections 825.113, 825.114, and 825.115

The Department has suggested two changes to the current definition of serious health condition. The first involves the part of the definition that considers a serious health condition one in which the employee experiences three or more days of incapacitation and two or more visits to a health care provider. Under the current regulations, there is no specific time frame for these health care visits; under the proposed regulations, the two visits must occur within 30 days of the beginning of the period of incapacity. The second proposed change involves the part of the definition that deems a serious health condition to be a chronic condition that requires "periodic" medical visits. Currently, there is no definition of "periodic;" under the proposed regulations, "periodic" is defined as twice in a 12 month period.

AAUW recommends that the proposed rules state that these time frames are a minimum, and clarify that employers are free to use a more expansive definition if they'd like. Additionally, some consideration as to whether the new timeframes might prompt employees to visit a health care provider unnecessarily and potentially incur unnecessary healthcare costs should also be made. AAUW does not believe the idea of time frames are inherently unreasonable, however additional study of how best to implement these new time frames needs to be conducted before they can be effectively and fairly implemented.

Increments of Time for Intermittent Leave: Section 825.203

AAUW fully supports the Department's decision to maintain the size of the increments of intermittent leave available to workers. As noted in our comments to the Department's earlier Request for Information, AAUW believes the current regulations addressing intermittent leave appropriately balance workers' need for flexibility and employers' interest in having adequate staff to cover their workplace needs. Leave flexibility not only benefits workers; it also benefits employers by maximizing workers' ability to meet workplace demands in the face of family and health challenges.

Paid Leave Substitution: Section 825.207

Under the current regulations, employees can typically utilize their earned vacation or personal leave time while on FMLA leave. The need for this substitution clear: it allows employees to receive a steady paycheck while on FMLA leave. Under the proposed regulations, employees would have to follow the employers' current personnel policies for taking vacation/personal leave in order to utilize that paid time off during their FMLA leave. There are several ways this new requirement could create a conflict: an employer may not allow vacations during certain times of the year, or may require a certain number of days' notice and/or paperwork approvals of vacation time. Some

employers also have rules about intermittent leave, requiring that vacation be taken certain increments.

AAUW strongly objects to this proposal. In the fifteen years since the law's passage, one of the biggest challenges in FMLA coverage clearly arises from its unpaid status. For example, 78 percent of eligible employees who have needed FMLA-covered leave have not been able to take it because they could not afford it, or they cut their leaves short because they cannot go too long without a paycheck.⁷ AAUW believes we should be putting our energy into expanding the FMLA to cover more workers, and into making paid family and medical leave and paid sick days available to all. The proposed regulations would do exactly the opposite – putting paid leave out of the reach of even more working Americans.

AAUW also believes the Department's proposed change is contrary to Congressional intent regarding the FMLA. Congress was keenly aware of employees' need to receive a paycheck while on leave, if possible, and provided that employees could substitute paid leave while on FMLA leave in the statute. Most importantly, the language in the statute applies no limits to the use of paid vacation or personal leave while on FMLA leave. In contrast, for sick leave, Congress set forth certain limits which protect the employer's rules governing sick leave.⁸ The different statutory language for these similar provisions clearly signals Congressional intent: the provisions were intended to function differently.

The Department has purported that this regulatory change is necessary because they believe the current rule gives an "unfair advantage" to the employee who uses FMLA leave and vacation leave simultaneously – an advantage over a coworker who uses her vacation or personal time for non-FMLA reasons. But this is not an advantage, it is merely both realistic and practical—it was, in fact, Congress' attempt to make unpaid FMLA leave—with its important job protections and healthcare coverage—affordable for workers who could not otherwise afford to take such time without a steady income.

Finally, in its recently passed expansion to the FMLA for military family members, Congress included language exactly like that in the current FMLA statute regarding the substitution of paid leave. Therefore, AAUW is persuaded that Congressional intent on this issue had been underscored yet again, and that the Department's proposed rule changes are misguided.

Employee Failure to Make Health Insurance Premium Payments: Employer's Responsibilities: Section 825.212

AAUW supports the addition of this commonsense provision to the current regulations. The additional language clarifies that if an employee's health insurance lapses because the employee failed to pay her share of the premium while on FMLA leave, the employer has the responsibility to reinstate the employee's health insurance when the employee returns to work.

Employer Notice Provisions: Section 825.300

The Department has proposed several changes to this section, but few actually address the issue of improving employee knowledge and understanding of the FMLA. In fact, AAUW is concerned that some of the new regulations may actually harm employees by making it more difficult to take FMLA leave.

- *Employers no longer provisionally designate leave as FMLA leave.* Currently, leave may be provisionally designated as FMLA leave while the employer and employee exchange information. Under the proposed changes, this designation will no longer be available. Coupled with another problematic proposed change that allows employers more time (from two days to five days) to respond to workers' requests and to determine eligibility for FMLA leave, this provision is particularly troubling. Employees may be less likely to take leave because it will take that much longer to know whether they are covered, and the leave is not provisionally designated as FMLA leave in the meantime.
- *Allowing FMLA posters to be posted exclusively by electronic means.* The Department is proposing to allow an employer to meet the FMLA poster publication requirements by posting an electronic notice only if all of the employer's workers have access to computers. Electronic notice may be beneficial to some employees because they do not work at the employer's worksite or to some job candidates because they are applying online. AAUW believes electronic notice should be required as an addition -- rather than a replacement -- to employers actually posting an FMLA poster. Employees do not know enough about their FMLA rights, and AAUW believes the Department should be proactively looking for ways to increase that knowledge. Electronic notice, along with the current poster requirement, could be one of those ways.
- *Requiring Certain Employers to Distribute FMLA Notices Annually.* Under the currently regulations, employers with personnel handbooks can put the required FMLA notice in that publication. Those that don't have such a handbook must give an FMLA notice to employees when they request FMLA leave. The Department is proposing to require employers that do not use these handbooks to annually distribute notices regarding the FMLA. Given that the vast majority of employers use these handbooks, this notice requirement -- which on the surface looks like an improvement -- is insufficient. AAUW believes the Department should require that all employers should give annual notice of the FMLA's availability—both in paper and electronically.
- *Increasing the Amount of Information an Employee Receives when an Employer Responds to the Eligibility Request.* The Department's proposed change will require employers to provide more information to workers when the employer informs the employee of her eligibility for FMLA leave. AAUW supports this new provision.

- *Notifying Employees Who Use FMLA Leave How Much FMLA Leave They Have.* The Department's new rules propose that every 30 days in which leave is used, the employer give the employee notice that the leave has been coded as FMLA leave as well as how much FMLA leave the employee has remaining. AAUW supports this new provision.
- *Notifying the Employee as to Why Leave is not Designated FMLA Leave.* The Department proposes that if the employer does not designate the leave as FMLA leave, the employer must inform the employee as to the reason why the designation is being denied. AAUW supports this new provision.
- *Retroactive Designation of Leave.* Under the current regulations, employees may retroactively designate time off as FMLA leave in very limited circumstances. The Department's proposed changes will allow an employer to retroactively designate leave as FMLA leave whenever they choose. This lack of time frame for a retroactive designation is problematic. Theoretically, an employer could retroactively designate leave as FMLA leave at any time, and an employee may find herself without leave when she thought she had some remaining. As a result, AAUW believes there must be some time limit to make the new designation, and it should not be made unilaterally by the employer; there should be a requirement that the employee is consulted and notified.

Notice Requirements: Sections 825.302 and 825.303

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

The Department is proposing to increase and tighten the notice requirements for employees to take FMLA leave. AAUW does not support these changes because we believe they will make it more difficult for employees to utilize their FMLA leave. The Department has not provided sufficient rationale for these changes, and -- even more troubling -- is not providing for sufficient employee education to ensure that workers' leave is not delayed or denied because they don't know about these new requirements. If the Department does make these changes, AAUW strongly recommends that the denial or delay of FMLA leave should only occur if the employer can show that it was harmed by the employee's failure to meet a certain standard.

Insufficient and Incomplete Certifications: Section 825.305

Under the current regulations, an employer can deny an employee's FMLA leave request if the medical certification is insufficient, but must give the employee a chance to provide additional information if the certification is incomplete. The Department's proposed rule change requires that employees be given a chance to correct certification problems regardless of whether the defect makes the certification incomplete or insufficient. The Department also proposes that employers explain to employees in

writing why a medical certification is incomplete or insufficient, and further that they give the employee seven days to correct the problem. AAUW supports both of these provisions. However, there is a caveat: the employer should not be able to require responses to inquiries about an employee's health that are not relevant to the FMLA leave request, nor should the employer require a diagnosis -- which the Department has made optional in the proposed regulations.

Privacy Issues

While the Department proposes some needed improvements in this area, AAUW is very concerned that several critical provisions within the proposed regulations unnecessarily cross employee privacy boundaries. AAUW is further concerned that employee privacy may be infringed upon in such a way that could inhibit employees from exercising their right to utilize FMLA leave. AAUW opposes any changes to the medical certification regulations that would impose unnecessary barriers for workers seeking FMLA leave, and is particularly disappointed with that aspect of the proposed changes.

Medical Release and FMLA Application Certification Forms: Section 825.306

Employers routinely include a medical release with the FMLA forms that an employee has to fill out when they request leave, despite the fact that this practice violates the Department's rules regarding medical release forms. AAUW applauds the Department's intent to codify this prohibition in the new regulations.

Direct Contact between Employer and Employee's Health Care Provider: Section 827.307(a)

Under the current regulations, if an employer needs clarification about a medical certification form, an employer may contact the health care provider of the employee. However, currently the employer may do so only under certain conditions:

- 1) The employer must obtain the employee's permission, AND
- 2) The contact must be made by a health care provider representing the employer.

The proposed regulations would change this practice to allow the employer to directly contact the employee's health care provider for clarification of matters on the certificate once the employee has given her permission. Also, if an employer wants to authenticate a medical certification, under the current regulations the employer must follow the same two step process used for clarification. Under the Department's new proposal, an employer will be allowed to contact an employee's health care provider directly for authentication of the certification, without obtaining the employee's authorization. AAUW strongly opposes both of these changes.

AAUW is very concerned that this change will encroach upon employees' medical privacy rights. There is nothing in the Department's proposed regulation regarding which staff member the employer may have make the inquiry, and there is nothing to stop the employee's supervisor or even a coworker from being the employer's representative in contacting the health care provider. Aside from the whole issue of

whether just any employee has the expertise to ask the appropriate medical questions, once the employer's representative is in contact with the health care provider a whole other can of worms is opened – because there is little to stop the employer from asking the health care provider for more details about the employee's health. There are many serious health conditions that unfortunately still carry strong social stigmas—a worker with any of these runs the risk of having her supervisors or coworkers know about her condition, and potentially even share this information with colleagues. AAUW believes this new provision could clearly have a chilling effect on workers interest and ability to access FMLA leave.

To compound the problem, the proposed regulations also allow that if a worker (or the worker's family member for whom the worker is providing care) refuses to give permission to the employer to contact the health care provider, FMLA leave can be denied. Thus, the consent from the employee or the family member is essentially being coerced by the employer – giving up this privacy is being made a condition of taking FMLA leave.

If the Department does implement this change, at the very least they must include provisions that require employers to use someone out of the employee's supervision chain for the medical inquires; this would give workers some small privacy protection. Additionally, the Department should allow, as it did in the 1995 preamble, that if an employee does not give the employer permission to contact the employees' health care provider rather than denying the FMLA leave, the employer must then use the second opinion system.⁹ Lastly, if the Department moves forward with this change, the provisions regarding the protection of FMLA leave-related medical documents and information must be strengthened.

Medical Certification Requirements: Section 825.306(a)(1)

The new regulations propose that the medical certification be changed to include additional information regarding the employee's serious health condition, including symptoms, hospitalization, prescription of medication, and diagnosis. AAUW objects to this new provision. The objective of the medical certification is to supply the employer with the information needed to determine if the serious health condition at hand meets the definitions stipulated for FMLA leave. Given those definitions, there is no need in many cases for the health care provider to include symptoms and a diagnosis. AAUW believes that the existing medical certification regulations appropriately balance a worker's interest in a manageable process that does not impose unreasonable burdens with the employer's interest in accurate certification of the worker's medical condition. Additionally, the current regulations also recognize that an employer's judgment regarding an employee's health condition should not be substituted for the professional medical opinion of the employee's health care provider.

Fitness for Duty: Section 825.310

Under the current regulations, workers whose employers require some type of fitness for duty certification need only provide a simple statement from their health care provider to meet this requirement. The Department is proposing changes to require

health care provider certification that the employee is able to return to work; this could include analyzing job functions to determine if the employee can perform them. Under the proposed rules, privacy issues again arise, because employers may be able to contact the employee's health care providers directly -- after obtaining the employee's consent -- in the same manner as the proposal for medical certification. AAUW objects to these changes, because there is no Departmental data showing problems with the current standard. Further, this new standard would add to the burden on employees and health care providers by increasing the requirements for fitness for duty certification.

On a related issue, under current regulations, employees who use intermittent leave are not required to produce fitness for duty certificates upon returning to work. The Department proposes rule changes that would allow employers to require these certificates every 30 days in which leave is used when there are "reasonable safety concerns." AAUW also objects to this change. The Department does not define what "reasonable safety concerns" are and whether those concerns must be related to the safety issues of the job or the safety issues posed by the serious health condition -- or both. Also, it is unclear who determines the existence of these "reasonable safety concerns" and how employees might challenge this assertion.

AAUW opposes any changes to the certification requirements that would create not only unnecessary barriers but also impose unnecessary costs to workers who need to take FMLA leave.

Conclusion

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

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

AAUW will continue to oppose all efforts to weaken FMLA protections, which would limit women's equal opportunity in the workplace. AAUW will also work to advance policies that will improve workplaces for employees with family responsibilities of all

kinds. Such protections and improvements are critical to women's employment opportunities and economic security.

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

Sincerely,



Lisa M. Maatz
Director, Public Policy and Government Relations

¹ AAUW has signed on to separate comments regarding proposed regulations for the expansion of the FMLA for military family members.

² 2007 – 09 AAUW Public Policy Program (approved July 2007).

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

⁴ National Partnership for Women and Families. All statistics were compiled from the U.S. Department of Labor report, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update*. <http://www.nationalpartnership.org/portals/p3/library/FamilyMedicalLeave/THE FMLAWhatWhoHow.pdf>. Accessed January 5, 2007.

⁵ U.S. Department of Labor, Bureau of Labor Statistics. *The 2000 THE FMLA Survey Report*. Table A2-6.12 and A2-6.19. <http://www.dol.gov/esa/whd/the FMLA/the FMLA/APPX-A-2-TABLES.htm> Accessed January 12, 2007.

⁶ Regulatory Preamble, 60 Fed. Reg. at 2195 (emphasis added).

⁷ U.S. Department of Labor, Bureau of Labor Statistics. *The 2000 THE FMLA Survey Report*. Table A1-2.17. <http://www.dol.gov/esa/whd/the FMLA/the FMLA/APPX-A-1-TABLES.htm> Accessed January 12, 2007.

⁸ 29 U.S.C. § 2612(d)(2)(A)&(B) “[e]xcept that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.”

⁹ 60 Fed. Reg. 2224 “[i]f the employee refuses to give permission [for the employer to contact that employee’s health care provider] the employer may then require certification from a second health care provider.”