# Executive Summary

The Family and Medical Leave Act of 1993 (FMLA) opened a new era for American workers, providing employees with better opportunities to balance work and family needs. This landmark legislation provided workers with basic rights to job protection for absences due to the birth or adoption of a child or for a serious health condition of the worker or a family member.

For women dealing with difficult pregnancies or deliveries, or parents celebrating the arrival of a newborn or adopted child, the FMLA provides the opportunity to participate fully in these significant life events. For other workers—especially those who struggle with health problems or who are primary caregivers to ill family members—the FMLA has made it possible to deal with these serious challenges while holding on to jobs, health insurance, and some measure of economic security.

## Background: What the Law Covers

The Family and Medical Leave Act of 1993, Public Law 103-3, 107 Stat. 6 (29 U.S.C. §§ 2601 *et. seq*.) (the "FMLA" or the "Act") was enacted on February 5, 1993 and became effective on August 5, 1993 for most covered employers. The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. *See* 29 U.S.C. § 2612. The twelve weeks of leave may be taken in a block, or, under certain circumstances, intermittently or on a reduced leave schedule. *Id*. When taken intermittently, the Department's regulations provide that leave may be taken in the shortest increment of time the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. 29 C.F.R. § 825.203(d).

Employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. § 2614. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor ("Department") or file a private lawsuit in federal or state court. If the employer has violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See* 29 U.S.C. § 2617.

### Who the law covers

The law 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. Based on 2005 data, the latest year for which data was available the time the Request for Information was published, the Department estimates that:

- there were an estimated 94.4 million workers in establishments covered by the FMLA regulations,
- there were about 76.1 million workers in covered establishments who met the FMLA's requirements for eligibility,[1] **and**
- between 8.0 percent and 17.1 percent of covered and eligible workers (or between 6.1 million and 13.0 million workers) took FMLA leave in 2005.[2]

[1] Recent data submitted to the Department on the size and scope of the FMLA's reach support these estimates. *See* Chapter XI of this Report.

[2] Recent data submitted to the Department support this estimate as well. *See* Chapter XI of this Report.

- Nearly one-quarter of all employees who took FMLA leave took at least some of it intermittently.

Recent information submitted to the Department also suggests that FMLA awareness was higher in 2005 than in prior years. This information supports the Department's estimate of increased FMLA usage since prior studies of FMLA.

### Request for Information and Prior FMLA Reports

After nearly fourteen years of experience implementing and administering the new law, the Department's Employment Standards Administration/Wage and Hour Division undertook a review of the FMLA regulations, culminating in the publication of a Request for Information ("RFI") on December 1, 2006.[3] The RFI asked the public to assist the Department by furnishing information about their experiences with FMLA and comments on the effectiveness of the current FMLA regulations. The RFI generated a very heavy public response: More than 15,000 comments were submitted, many of which were brief emails with very personal and, in some cases, very moving 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.[4]

Twice before, the Department has published reports about the FMLA and its use. The statute established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, "A Workable Balance: Report to Congress on Family and Medical Leave Policies." In 1999, the Department contracted with Westat, Inc. to update the employee and establishment surveys conducted in 1995. The Department published that report, "Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update" in January 2001.[5]

Never before has the Department looked in such granular detail at the legal developments surrounding the FMLA and its implementing regulations, as well as the practical consequences of such in the workplace. The RFI's questions and subject areas were derived from a series of stakeholder meetings the Department conducted in 2002-2003, a number of rulings of the U.S. Supreme Court and other federal courts, the Department's own experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (OMB) as described by OMB in their three annual reports to Congress on the FMLA's costs and benefits[6].

Unlike the 2000 Westat Report, the Department's Report on the RFI Comments is not an analysis or comparison of one set of survey data with another some years later. The RFI was not meant to be a substitute for survey research about the leave needs of the workforce and leave policies offered by employers. The record presented here is different than the previous two Departmental reports because the RFI was a very different kind of information-gathering tool than the two previous surveys. Given the differences in data-gathering approaches, the depth with which the RFI looked at the regulations, and, of course, the self-selection bias by those

[3] 71 Fed. Reg. 69504.

[4] All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210. Many comments are also available on www.regulations.gov. The names of individual employees have been redacted from the Report where any personal medical information was shared.

[5] *See "Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update*," Westat Inc., January 2001. *See also* the description of the 2000 Westat Report in Chapter XI of this Report. *See also* 71 Fed. Reg. 69510.

[6] The 2001 report may be found at: www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf, the 2002 report at: www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf, and the 2004 report at: www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.

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who took the time to submit comments to the RFI, differences in the outcomes should be expected. Care must be taken to avoid improper comparisons of information collected in the RFI with data from the two surveys.

**General Overview of the Report**

Commenters consistently stated that the FMLA is generally working well—at least with respect to leave related to the birth or adoption of a child or for indisputably "serious" health conditions. Responses to the RFI substantiate that many employees and employers are not having noteworthy FMLA-related problems. However, employees often expressed a desire for a greater leave entitlement, while employers voiced concern about their ability to manage business operations and attendance control issues, particularly when unscheduled, intermittent leave is needed for chronic health conditions. Indeed, the overwhelming majority of comments submitted in response to the RFI addressed three primary topics: (1) gratitude from employees who have used family and medical leave and descriptions of how it allowed them to balance their work and family care responsibilities, particularly when they had their own serious health condition or were needed to care for a family member;[7] (2) a desire for expanded benefits—*e.g.*, to provide more time off, to provide paid benefits, and to cover additional family members;[8] and (3) frustration by employers about difficulties in maintaining necessary staffing levels and controlling attendance problems in their workplaces as a result of one particular issue—unscheduled intermittent leave used by employees who have chronic health conditions.

Many employees offered powerful testimonials about the important role the FMLA has played in allowing them to continue working while addressing their own medical needs or family caregiving responsibilities. Chapter I, Employee Perspectives: Experiences in the Value of FMLA, is an important representative example of how meaningful the ability to use the Family and Medical Leave Act has been for employees. The Department could have written an entire report based simply on those comments.

But, no regulatory scheme, particularly at the outset, is perfect. In 1993, the FMLA was a brand-new employment standard and many of the concepts, particularly those that took effect in the final regulations, were borrowed from other areas of law or were completely new. Thus, it should come as no surprise that RFI commenters continued to debate some of the choices made by the Department as it sought to implement the statute in a manner consistent with Congressional intent.

As is evident from both the RFI record and from many of the legal challenges to regulatory provisions over the years, the debate continues on whether the Department successfully implemented the statutory requirements and Congressional intent, or struck the right balance in all places. That debate is reflected in Chapters II – XI. In many instances, commenters expressed the view that a certain regulation was "exactly what Congress intended," while others said of the same regulation that "it could not possibly be what Congress intended." Because of that, in order to provide context to the comments received, in many chapters legal background is provided and/or the evolution of a particular regulatory section is retraced through the rulemaking process. Indeed, many commenters did the same thing. While this is in some cases done in great detail, without that history it may be impossible to understand not just what suggestions are being offered, but why they are being offered. These historical summaries are not intended to endorse the legitimacy of any particular comment or suggestion.

As explained in the RFI, some of the issues brought to the attention of the Department in

[7] Many of these employee comments stated that there were no problems with FMLA and there should be no changes to the program.

[8] Because comments on the need for expanded benefits concern matters outside the scope of the Department's authority and the purposes of the RFI, these comments are not covered in any significant detail in this Report.

various forums over the years are beyond the statutory authority of the Department to address.[9] Nonetheless, many commenters provided suggestions for statutory changes to expand the FMLA. Among others, and in no particular order, were comments on: providing paid maternity leave, covering the care of additional family members (*e.g.*, siblings), changing the 75-mile eligibility test, reducing the coverage threshold below 50 employees, and providing coverage for part-time workers. Because these comments are beyond the Department's authority to address, we do not detail them in the chapters that follow.

Finally, this Report is not a catalogue of every comment received or every suggestion made about every part of the regulations. Nor is it a catalogue of every organization or group that submitted comments. We do believe that the comments selected for discussion are representative and the chapters that follow accurately reflect the record according to the most important subject matters presented—many of which, but not all, follow and detail the subjects and questions asked in the RFI. The chapters are designed to explain the questions asked in the RFI, provide background on the law where needed, and detail the feedback about the FMLA and the Department's implementation of it as raised in comments from employees and employers.

Given the detailed presentations in many of the responses to the RFI, and when the comments are read and studied in the aggregate, certain observations about the record stand out. Those observations follow in this Executive Summary or are found in Chapter XI: "Data: FMLA Coverage, Usage, and Economic Impact". We believe the observations included in this Report are evident from a plain reading of the thousands of comments received from both employers and employees.

[9] *See* 71 Fed. Reg. 69504.

**The Department's Observations Regarding the Comments**

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

At the same time, a central defining theme in the comments involves an area that may not have been fully anticipated: the prevalence with which unscheduled intermittent FMLA leave would be taken in certain workplaces or work settings by individuals who have chronic health conditions. This is the single most serious area of friction between employers and employees seeking to use FMLA leave. The Department is cognizant that certain of its regulatory decisions and interpretations may have contributed to this situation.

Certain types of industries and worksites and their workers appear to be more impacted by unscheduled intermittent FMLA leave-taking than others and there is considerable tension between employers and employees over the use of this leave. The Department heard, in particular, from employers, and from the representatives of employees who work with them, whose business operations have a highly time-sensitive component, *e.g.*, delivery, transportation, transit, telecommunications, health care, assembly-line manufacturing, and public safety sectors.

While many employer comments used the words "abuse" and "misuse" to describe employee use of unscheduled intermittent leave, the Department cannot assess from the record how much leave taking

is actual "abuse" and how much is legitimate. In some cases, the use of unscheduled intermittent leave appears to be causing a backlash by employers who are looking for every means possible (e.g., repeatedly asking for more information in the medical certifications, especially in cases of chronic conditions) to reduce absenteeism.

Another area that generated significant comments is the current medical certification process. The Department recognizes that communication about medical conditions is essential to the smooth functioning of the FMLA in workplaces. However, none of the parties involved with the medical certification process—employers, employees, and health care providers—are happy with the current system. Employees are concerned about the time and cost of visits to health care providers to obtain medical certifications and the potential for invasion of their privacy. Employers, especially when it comes to intermittent leave use, seek predictability in attendance and are frustrated with medical certifications that do not provide meaningful guidance. Health care providers complain they cannot predict how many times a flare-up of a particular condition will occur.

Despite much work by the Department, it also appears that many employees still do not fully understand their rights under the law, or the procedures they must follow when seeking FMLA leave. For example, many employees are misinformed about the fact that paid leave can be substituted for, and run concurrently with, an employee's FMLA leave. Even among employees who possess a general awareness of the law, many do not know how the FMLA applies to their individual circumstances. In turn, this failure in understanding may be contributing to some of the problems identified with the medical certification process, and with employers' ability to properly designate and administer FMLA leave. It is clear the Department has more work to do to further educate employees and employers regarding their rights and responsibilities under the law.

## Summary of Chapters I - XI

### Employee Perspective: Experiences in the Value of the FMLA (Chapter I)

Chapter I provides a representative sampling of comments received by the Department regarding the "value" FMLA provides to employees. In general, employees commented they were very happy to have the protections afforded by the FMLA. Many commented that the Act prevented job loss, allowed them to spend time with sick or injured family members, and, upon returning to work, encouraged a greater sense of loyalty to their employer. Some pointed out that their employers went above and beyond what is required by the law. Many employers also submitted comments that outlined advantages to complying with the FMLA and offering benefits beyond what the law requires.

The value of the FMLA was particularly noted by employees caring for both children and parents with serious health conditions; this observation was supported by employer comments, many of whom noted that they increasingly receive FMLA leave requests from employees with elder care responsibilities. Many employees commented that the FMLA would be more useful if it provided paid leave, if more time off was available, and if the program covered more types of family members, such as siblings, grandparents, etc.

### Ragsdale Decision/Penalties (Chapter II)

This chapter discusses the impact of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* on the FMLA implementing regulations. *Ragsdale* invalidated the "categorical penalty" in section 825.700(a) of the regulations, which provides that if an employer does not designate an employee's leave as FMLA leave, it may not count that leave against an employee's leave entitlement. Other courts have struck down similar "categorical penalty" rules in sections 825.110(d) (relating to deeming an employee eligible for leave) and 825.208(c) (relating to designation of paid leave). Since *Ragsdale,* many

courts have applied equitable estoppel[10] principles when employers either fail to communicate required information or communicate incorrect information.

Employers commented that all categorical penalties should be removed from the regulations and that employers should be permitted to designate leave as FMLA leave retroactively. Some employers suggested that any penalty should be tailored to the specific harm suffered by the employee or suggested situations in which no penalty would be appropriate. Employees supported the current notice and designation requirements in the Department's regulations, with many noting that they suffer hardships when they do not know promptly whether the employer believes they are entitled to FMLA-protected leave. Some employee commenters suggested that employers be required to provide annual notices to employees regarding their FMLA eligibility status and periodic reports regarding any FMLA leave used. Employers expressed concerns that without some clarification they are unsure of their liabilities for failure to follow the notification requirements. Both groups expressed a need for the Department to clarify the impact of *Ragsdale* on the notification requirements in the current regulations.

**Serious Health Condition (Chapter III)**

The Department received many comments on the regulatory definition of serious health condition relating to a period of incapacity of more than three consecutive calendar days and treatment two or more times by a health care provider (sometimes called the "objective test") contained at 29 C.F.R. § 825.114(a)(2)(i) and its interaction with 29 C.F.R. § 825.114(c) (which provides examples of conditions that ordinarily are not covered). Chapter III summarizes these comments. Many of these comments echoed (or had their origins in) earlier comments to the record the Department received in 1993 when promulgating its current regulations.

The Department received many comments from employees and employee groups who believe that the objective test is a good, clear test that is serving its intended purpose, consistent with the legislative history, while a common theme from many employers was that the regulatory definition of serious health condition is vague and/or confusing. Moreover, comments from employer groups complained that there is no real requirement that a health condition be "serious" in the regulatory definition of serious health condition.

Many employee representatives felt section 825.114(c) imposes no independent limitation on the definition of serious health condition and therefore need not be changed. Other commenters took the very opposite tack—that the objective test extinguished Congress' intent to exclude minor illnesses and that the Department should breathe life into subsection (c) by making it more of a *per se* rule, as it was initially interpreted by Wage and Hour Opinion Letter FMLA-57 (Apr. 7, 1995).

Some employers offered to give meaning to subsection (c) by changing the period of incapacity in the objective test from "calendar" days to "business" days. Still other commenters suggested that the Department maintain the substantive language of both regulatory sections but explicitly adopt a recent court interpretation of the regulations that the "treatment two or more times by a health care provider" in section 825.114(a)(2)(i)(A) must occur during the period of "more than three days" incapacity. Some commenters suggested reconciling the two regulatory provisions by simply tightening the requirements for qualifying for a serious health condition under the objective test (*e.g.*, increasing the number of days of incapacity required).

[10] "Equitable estoppel" is a legal bar that prevents one person from taking advantage of a second person where the second party is injured by reasonably relying on the misrepresentations (or silence when there is a duty to speak) of the first person.

**Unscheduled Intermittent Leave (Chapter IV)**

Chapter IV of the Report discusses the use of unscheduled intermittent leave under FMLA. Based on the comments received, unscheduled intermittent FMLA leave is crucial to employees with chronic serious health conditions resulting in sudden, unpredictable flare-ups. Conversely, it is precisely the use of unscheduled (or unforeseeable) intermittent leave for chronic conditions that presents the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. With respect to employer comments, no other FMLA issue even comes close.

The Act itself does not provide a definition of "chronic" serious health conditions. During the 1993-1995 notice-and-comment rulemaking phase, the Department filled in this gap, as the regulatory definition of "serious health condition" evolved in response to public comments urging that this definition specifically cover chronic conditions.

Regarding intermittent leave, the Act provides for the taking of leave in small blocks, or intermittently, but does not specify the minimum increment. 29 U.S.C. § 2612(b)(1). In its regulations, the Department rejected any minimum limitations on intermittent leave, citing the statute, and stating a concern that such limits would cause employees to take leave in greater amounts than necessary, and thus erode a worker's 12-week leave entitlement. 60 Fed. Reg. 2236. The Department also predicted initially that incidents of unscheduled intermittent leave would be unusual. 58 Fed. Reg. 31801.

The Act sets out a clear, 30-day notice requirement for leave that is foreseeable, but for leave foreseeable less than 30 days in advance, the Act has a less clear, "as soon as practicable" notice requirement. 29 U.S.C. § 2612(e)(2)(B). The Department, through its interpretive actions, has defined "as soon as practicable" to mean two working days after the need for leave becomes known.[11]

Fourteen years later, the comments indicate that unscheduled intermittent FMLA leave for chronic conditions has become commonplace and it is difficult for employers to determine or monitor employees' incapacity when the chronic condition does not involve any active, direct treatment or care by a health care provider (*i.e.*, self-treatment by employees with chronic conditions such as asthma, diabetes, migraine headaches, and chronic back pain).

Employers expressed frustration about what they perceive to be employees' ability to avoid promptly alerting their employers of their need to take unscheduled leave in situations when it is clearly practicable for them to do so. A common example cited by employers involves ignoring mandatory shift call-in procedures even when the employee is fully able to comply, and then later reporting the absence as FMLA-qualifying after-the-fact. Thus, some employers allege, employees may use FMLA: (1) as a pretext for tardiness or to leave work early for reasons unrelated to a serious health condition, (2) to obtain a preferred shift instead of the one assigned by the employer, or (3) to convert a full-time position to a permanent part-time one. These employers believe the Department's regulatory interpretations have exacerbated this situation.

Other commenters said that when an employer is unable to verify that an employee's unscheduled absence is in fact caused by a chronic serious health condition, and the employer cannot seek additional medical verification of the need for the absence, the employer cannot distinguish between employees who legitimately need FMLA leave and employees who misuse the protections of FMLA to excuse an otherwise unexcused absence from work.

[11] *See* Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999).

## Notice: Employee Rights and Responsibilities (Chapter V)

Chapter V of the Report summarizes comments received regarding the FMLA rights and responsibilities of employees. The comments to the RFI indicate that many employees are not knowledgeable about their rights and responsibilities under the FMLA. Even among employees who possess a general awareness of the law, many do not know how the FMLA applies to their individual circumstances. This reported lack of employee awareness may contribute to frustrations voiced by the employer community concerning employee notice of the need for FMLA leave. Employers and their representatives commented on employees not providing notice of the need for leave in a timely fashion and receiving notice without sufficient information to make a determination as to whether or not the leave is FMLA-qualifying.

## The Medical Certification and Verification Process (Chapter VI)

The Department received significant comments regarding the FMLA medical certification process. These comments are discussed in Chapter VI. Generally speaking, all parties involved in the certification process—employees, employers and health care providers—believed the current process needs to be improved.

Many employers commented that they are frustrated with certifications that do not provide meaningful guidance regarding the employee's expected use of intermittent leave. They also noted that the current regulatory framework provides them with limited options for verifying that employees are using FMLA leave for legitimate reasons. Employers also stated they want to be able to talk directly with the employee's health care provider (without using a health care provider of their own) and feel that greater communication would allow decisions regarding FMLA coverage to be made more quickly.

Employees commented that employers are not using the existing FMLA procedures appropriately to challenge medical certifications and are instead simply refusing to accept certifications without seeking clarification or a second opinion. Some employees also claimed that their use of unscheduled intermittent leave for chronic conditions seems to be causing a backlash among some employers who refuse FMLA coverage for any absences that exceed what is on the medical certification. Employees also expressed concern that increased communication between the employer and their health care providers could lead to an erosion of their right to medical confidentiality.

Finally, although the certification requirement calls for an estimate of the expected use of intermittent leave, health care providers commented that often there is no way they can furnish a reliable estimate of the frequency or severity of the flare ups and thus are unable to provide all the information required in the certification. Based on the comments received, employers, employees and health care providers almost universally believe the Department's model certification form WH-380 could be improved.

## Interplay between the FMLA and the Americans with Disabilities Act (Chapter VII)

A number of commenters discussed the relationship between the FMLA and the Americans with Disabilities Act ("ADA").[12] Although the ADA also may provide employees with job-protected medical leave, the legislative history of the FMLA indicates that Congress intended for "the leave provisions of the [FMLA to be] . . . wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]."[13] Nonetheless, the Department borrowed several important concepts from the ADA when finalizing the FMLA regulations. The practical realities of the workplace also mean

[12] 42 U.S.C. §§ 12101-12117, 12201-12213.

[13] S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993).

that employee requests for medical leave often are covered by both statutes, thus requiring employers to consider carefully the rights and responsibilities imposed by each statute. Chapter VII summarizes the comments received by the Department regarding the interplay between FMLA and ADA.

Almost uniformly, employers and their representatives urged the Department to consider implementing more consistent procedures for handling and approving medical leave requests under the FMLA and ADA. These commenters argued that, in many instances—but particularly with respect to obtaining medical information—the ADA and its implementing regulations provided a "much better model" and struck a more appropriate balance between an employee's right to take reasonable leave for medical reasons and the legitimate interests of employers. Many of these commenters cited their own experience in administering the ADA as support for the idea that additional limits imposed by the FMLA were unnecessary, particularly because both statutes require employers to review similar types of medical information and make determinations about an employee's ability to work based on that information. These commenters also noted that, in many instances, the same human resources person reviews an employee's absences under both statutes, thus further blurring the line between what an employer could permissibly do under each statute.

Other commenters, including unions and other employee groups, argued that the differences between the two statutory schemes were a direct result of the distinctively different purposes of each law. These commenters noted that the ADA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to *work*, while the FMLA's purpose is to provide reasonable *leave from work* for eligible employees. These commenters generally opposed implementing procedures they viewed as placing additional limits on the availability of FMLA leave, or increasing requirements under the FMLA medical certification process.

### Transfer to an Alternative Position (Chapter VIII)

The RFI did not specifically ask any questions about an employer's ability to transfer an employee to an "alternative position" but the Department received many comments on this topic. These comments are discussed in Chapter VIII of the Report. Under the FMLA, an employer may transfer an employee to an "alternative position" with equivalent pay and benefits when the employee needs to take intermittent or reduced schedule leave "that is foreseeable based on planned medical treatment[.]" 29 U.S.C. § 2612(b)(2). Section 825.204 of the regulations explains more fully when an employer may transfer an employee to an alternative position in order to accommodate foreseeable intermittent leave or a reduced leave schedule.

A significant number of employer commenters questioned why the regulations only permit an employer to transfer an employee when the employee's need for leave is *foreseeable* based on planned medical treatment as opposed to a chronic need for *unforeseeable (unscheduled)* leave. Many commenters saw no practical basis for differentiating between foreseeable and unforeseeable need for leave in this context. In fact, many employers reported that the underlying rationale for the transfer provision—to provide "greater staffing flexibility" while maintaining the employee's same pay and benefits—is best served where the employee's need for leave is *unforeseeable*.

### Substitution of Paid Leave (Chapter IX)

Chapter IX of the Report summarizes comments regarding the substitution of paid leave for unpaid FMLA leave. Under the statute, employees may substitute accrued paid leave for FMLA leave under certain circumstances. If employees forego the option to substitute paid leave, employers may then require

such substitution.[14] The legislative history indicates that Congress had two purposes in providing for the substitution of accrued paid leave for unpaid FMLA leave. First, Congress sought to clarify that where employers provided paid leave for FMLA-covered reasons, they were only required to provide a total of 12 weeks of FMLA-protected leave including the period of paid leave (i.e., employees could not stack 12 weeks of unpaid FMLA leave on top of any accrued paid leave provided by the employer). The second purpose of substitution of paid leave was to mitigate the financial impact of income loss to the employee due to family or medical leave.

A major concern of the employer commenters was that when employees substitute paid vacation or personal leave for unpaid FMLA leave, they are able to circumvent certain aspects of employers' existing paid leave policies, such as notification requirements, minimum increments of leave, seniority, or time of year restrictions. These commenters stated that employees substituting such paid leave for unpaid FMLA leave are, therefore, treated more favorably than those employees who use their accrued leave for other reasons. Employee commenters noted that the ability to substitute paid leave is a critical factor in their ability to utilize their FMLA entitlements, because many employees simply cannot afford to take unpaid leave.

The comments also identified a number of other issues affected by substitution of paid leave. For example, employers questioned the wisdom of the regulation forbidding substitution if employees are receiving payments from a benefit plan such as workers' compensation or short-term disability plans. On the other hand, employees commented that they are improperly required by employers to substitute paid leave, despite contrary language in existing collective bargaining agreements providing employees with the right to decide when to use their leave.

[14] 29 U.S.C. § 2612(d).

**Joint Employment (Chapter X)**

Chapter X of the Report discusses comments regarding employer coverage under FMLA in cases in which a company utilizes the services of a Professional Employer Organization (PEO). Unlike a staffing or placement agency, PEOs generally are service providers that handle payroll and other human resource work for the employer and which, under the current regulations, may qualify in some circumstances as a primary employer in a joint employment arrangement.

The comments indicated that PEOs generally are not responsible for employment decisions like hiring, firing, supervision, etc. All of the comments in this area supported the view that the primary "employer" in these cases should be the client company that actually hires and uses the employees who are provided benefit services by the PEO. Thus, according to these comments, the client company, and not the PEO, should be responsible for the placement of employees returning from FMLA leave.

**Data: FMLA Coverage, Usage, and Economic Impact (Chapter XI)**

The Department received a significant number of comments on the usage and impact of the FMLA, including a variety of national surveys and numerous data on FMLA leave from individual companies or government and quasi-government agencies. This information, when supplemented by the data from the 2000 Westat Report (and despite its limitations), provides considerable insight and a far more detailed picture of the workings of the FMLA, and the impact of intermittent leave, in particular. Chapter XI of this Report provides a full discussion of the data received.

Several themes arose out of the data comments submitted in response to the RFI:

- The benefits of FMLA leave include retaining valuable human capital; having more productive employees at work; lower long-run health care costs; lower turnover costs; lower presenteeism costs; and lower public assistance costs.

- There are unquantifiable impacts on both sides. On the benefit side, the value of FMLA leave is often immeasurable. On the cost side, there can be a negative impact on customers and the public when workers do not show up for their shifts on time.
- A significant number of workers, especially for some facilities or workgroups, have medical certifications on file for chronic health conditions, and the number is increasing.
- Unscheduled intermittent FMLA leave causes staffing problems for employers requiring them to overstaff some positions and use mandatory overtime to cover other positions. Both of these increase costs and prices.
- The lack of employee notification can cause some positions to go temporarily understaffed resulting in service or production delays. This not only increases costs in the short run but also may potentially impact future business.
- Unscheduled intermittent FMLA leave can adversely impact the workplace in a variety of ways, including missed holidays and time-off for other employees, lower morale, and added stress that can result in health problems.

Further, it appears that the Department's intermittent FMLA leave estimates presented in the RFI—that about 1.5 million workers took intermittent FMLA leave in 2005, and that about 700,000 of these workers took unscheduled intermittent FMLA leave—may be too low.

While the percentage of FMLA covered and eligible workers who take FMLA leave may appear to be low relative to the total workforce and the percentage who take unscheduled intermittent leave may appear to be even smaller, the record shows that these workers can have a significant impact on the operations of their employers and their workplaces for a variety of reasons. First, as a number of commenters pointed out, these workers can repeatedly take unscheduled intermittent leave, over nine hours per week, and still not exhaust their allocation of FMLA leave for the year (generally, 12 weeks x 40 hours/week = 480 hours). Second, the record reveals that workplaces with time-sensitive operations, such as assembly-line manufacturing, transportation, transit, and public health and safety occupations can be disproportionably impacted by just a few employees who repeatedly take unscheduled intermittent leave. Third, the comments indicate that if the morale or health of workers covering for the absent employees on FMLA leave begins to suffer, either because they believe the absent workers are misusing unscheduled intermittent leave or from the stress caused by an increased workload, these workers may in turn seek and need their own FMLA certifications causing a ripple effect in attendance and productivity.

Finally, the data indicate that if unscheduled intermittent FMLA leave is taken, most employers will be able to resolve these infrequent low cost events on a case-by-case basis by using the existing workforce (or possibly bringing in temporary help) to cover for the absent worker, and likely will view unscheduled intermittent FMLA leave as an expected cost of business. On the other hand, for those establishments and workgroups with a high probability (rate) of unscheduled intermittent leave and where the cost of such leave is high, the comments suggest that none of the measures that are typically used to reduce the risk and costs associated with unscheduled intermittent FMLA leave appear to work very well. These establishments, whose risk management systems (*e.g.*, absence control policies, overstaffing, mandatory overtime) appear to be overwhelmed, are likely the employers reporting that intermittent FMLA leave has a moderate to large negative impact on their productivity and profits (1.8 to 12.7 percent of establishments

according to the 2000 Westat Report). In addition, many of the traditional methods used to encourage good attendance or control absenteeism (*e.g.*, perfect attendance awards or no fault attendance polices) may not be used if they interfere with FMLA protected leave. These employers may try to make it more difficult for their workers to take unscheduled intermittent FMLA leave by repeatedly questioning the medical certifications or asking for recertifications—creating tension in the workplace.

## Conclusion

In those sections of the FMLA dealing with leave for the birth of a child, for the adoption of a child, and associated with health conditions that require blocks of leave and are undeniably "serious" (*e.g.*, cancer, Alzheimer's, heart attack), the law appears to be working as anticipated and intended, and working very successfully. When addressing these areas, there is near unanimity in the comments—FMLA leave is a valuable benefit to the employee, improves employee morale, improves the lives of America's families, and, as a result, benefits employers. These aspects of the FMLA are fully supported by workers and their employers.

But to the extent that the use of FMLA leave has continued to increase in unanticipated ways, primarily in the area of intermittent leave taken as self-treatment for chronic serious health conditions, the Department has heard significant concerns. These unanticipated facets of the FMLA are the source of considerable friction in the following areas:

- How serious is "serious"?
- What does "intermittent" leave mean and how long should it go on?
- What are the rules surrounding unforeseeable leave?
- How much information can an employer require before approving leave?
- What are an employee's responsibilities under the Act?
- What workplace rules may an employer actually enforce?
- How has other legislation, including the ADA and HIPAA, affected the FMLA?

Absent the protections of the FMLA, many workers with chronic conditions might not otherwise be permitted to be absent from their jobs. This is unquestionably a valuable right. But it is precisely the use of FMLA leave by a subset of these workers—those seeking unscheduled intermittent leave for a chronic condition—that appears to present the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. As was clear from the record, these comments are not inconsistent with each other. These things are true at the same time.

The success of the FMLA depends on smooth communication among all parties. To the extent that employees and employers become more adversarial in their dealings with each other over the use of FMLA leave, it may become harder for workers to take leave when they need it most.

The Department hopes that this Report will further the discussion of these important issues and is grateful to all who participated in this information-gathering process.