

# XI. Data: FMLA Coverage, Usage, and Economic Impact

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To assist in analyzing the impacts of the FMLA, the Department presented estimates of the coverage and usage of FMLA leave in 2005 in the “FMLA Coverage and Usage Estimates” section of the Request for Information (“RFI”).<sup>23</sup> The Department requested comment on these estimates and any data that would allow the Department to better estimate the costs and benefits of the FMLA, as well as particular issues for which the Department was seeking additional information.

The Department’s estimates were based, in large part, on a report it published in January 2001, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update* and its underlying employer and employee surveys. As the Department explained in the RFI, this report is commonly referred to as “the 2000 Westat Report”—available online at [www.dol.gov/esa/whd/fmla2007report.htm](http://www.dol.gov/esa/whd/fmla2007report.htm).<sup>24</sup>

The 2000 Westat Report was a compilation, analysis, and comparison of one set of survey research with another set that was conducted in 1995. Title III of the Family and Medical Leave Act 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*

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<sup>23</sup> 2005 data was used because the 2006 annual employment figures were not available in December of 2006 when the RFI was published.

<sup>24</sup> Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and state and local governments. These surveys were commissioned by the Department of Labor in 2000 as an update to similar 1995 surveys ordered by the Commission on Family and Medical Leave, which was established by Title III of the FMLA. Many of the comments to the RFI cited the Westat Report and surveys but referred to it by a number of names including the West Report, Westat’s FMLA Report, the FMLA Report, the Department’s FMLA Report, and the 2000 FMLA Report. In order to minimize any confusion in this chapter, the report will be referred to as the “2000 Westat Report,” the employer survey will be referred to as “Westat’s employer survey,” the employee survey will be referred to as “Westat’s employee survey,” and when discussing both the employer and employee surveys they will be referred to as the “Westat surveys.”

*to Congress on Family and Medical Leave Policies*” – available online at [www.dol.gov/esa/whd/fmla2007report.htm](http://www.dol.gov/esa/whd/fmla2007report.htm).

The RFI was not meant to be a substitute for survey research about the leave needs of the work force and/or leave policies being offered by employers. Nonetheless, the Department identified a number of issues in the RFI on which it sought quantitative data that would supplement and update the data that was collected by the Westat surveys. The Department specifically asked for information and data on:

- The approach the Department used to estimate the number of eligible FMLA workers at covered establishments in 2005;
- The approach the Department used to estimate the number of FMLA leave-takers given the data limitations and methodological issues in the 2000 Westat Report, and other available data that could be used to refine its estimate;
- The approach the Department used to estimate the number of covered and eligible workers taking intermittent FMLA leave, and other available data that could be used to refine its estimate;
- The approach the Department used to estimate the number of covered and eligible workers taking unforeseen intermittent FMLA leave, other available data that could be used to refine this estimate, and information on the prevalence, durations, and causes of intermittent leave; and,
- The economic impact of intermittent FMLA leave and unforeseen intermittent leave, including any differences between large and small employers, the impact that unscheduled intermittent leave has on productivity and profits, information on the concentration of workers taking unscheduled intermittent FMLA leave in specific industries and

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employers, and information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.

The Department also asked for information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave, and the different impact the leave taken by FLSA exempt and nonexempt employees may have on the workers who are taking leave and their employers. More generally, the Department also asked for information that can be used to improve the estimates of the impact that FMLA leave has on employers and employees, and for any data that would allow the Department to better estimate the costs and benefits of the FMLA.

In response to this request, the Department received a significant amount of quantitative and qualitative data from a wide variety of sources that updates and builds upon the data collected in the Westat surveys. This includes a wide variety of national survey data from employers and employees;

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<sup>25</sup> Some of the data submitted were national surveys (*e.g.*, AARP, International Foundation of Employee Benefit Plans, Society for Human Resource Management, National Association of Manufacturers, U.S. Chamber of Commerce, WorldAtWork, and the College and University Professional Association for Human Resources). Others submitted surveys or collections of reports from their clients, customers, or members (*e.g.*, Willock Savage, Kalamazoo Human Resources Management Association, Manufacturers Alliance, Air Conference, Association of American Rail Roads, Retail Industry Leaders Association, National Federation of Independent Business, HR Policy Association, International Public Management Association for Human Resources, and American Bakers Association). Numerous other comments provided data from individual companies (*e.g.*, United Parcel Service, U.S. Postal Service, Honda, Southwest Airlines, YellowBook, Madison Gas and Electric Company, Edison Electric, Verizon, Delphi, MGM Mirage, Union Pacific, and Palmetto Health) or government and quasi-government agencies (*e.g.*, New York City, Dallas Area Rapid Transit, Fairfax County, VA, the Port Authority of Allegheny County, PA, and the City of Portland, OR). Other comments provided references to previously published studies (*e.g.*, Darby Associates, the Center for WorkLife Law, Women Employment Rights, and the Family Care Alliance). Many comments were also received from labor organizations and family advocates (*e.g.*, AFL-CIO, Communications Workers of America, National Partnership for Women and Families, Families USA, 9to5, National Association of Working Women). Finally, the Department received many comments from workers who took FMLA leave.

detailed information from specific employers, both large and small, in a wide variety of industries; and economic studies, or references to economic studies, on the costs and benefits of the FMLA.<sup>25</sup>

The Department also received comments on the estimates it presented in the RFI, many of which were consistent with the Department's estimates. Many comments stated that the Department's estimates of FMLA usage, especially of intermittent FMLA leave, appear to be low given their experience. In this chapter, the Department presents both the estimates developed for the RFI and the comments received about those estimates. Although the Department evaluates the RFI estimates based upon the comments received, no revisions to the RFI estimates have been developed at this time. Finally, this chapter offers some observations about the impacts of certain aspects of FMLA leave on certain sectors of the economy.

Care should be taken to avoid drawing improper comparisons of data submitted in response to the RFI with the data from the Westat surveys. The record presented here is different than the previous two Departmental reports because the RFI is a different information-gathering tool than the previous surveys. Given the differences in the data gathering approaches, the depth with which the RFI looked at specific regulatory issues, and, of course, the differences in the self-selection of those who took the time to submit comments to the RFI compared to voluntarily responding to previous survey questionnaires, variations in the data should be expected.

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## **A. Comments on the 2000 Westat Report and Further Data Collection**

The Department used the 2000 Westat Report as the basis for the coverage and usage estimates presented in the RFI. Although the Department did not specifically ask for comments on estimates in the 2000 Westat Report, it did note that it was "interested in refining the coverage and eligibility estimates in

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the 2000 Westat Report,” and highlighted a number of important results and caveats from the 2000 Westat Report.

The Department received a few comments alleging the RFI was critical of the 2000 Westat Report. For example, the National Partnership for Women & Families stated that “[t]he RFI takes great pains to criticize the 2000 study of FMLA[.]” Doc. 10204A, at 2. However, as the Department explained in the RFI, there were several methodological issues that Westat itself noted (particularly in Appendix C)<sup>26</sup> that may have resulted in, among other issues, the overestimation of FMLA-covered and eligible workers and an underestimation of workers not covered.<sup>27</sup> Identifying some of Westat’s own caveats and limitations was not a criticism of the 2000 Westat Report. Rather, the methodological issues of the 2000 Westat Report referred to in the RFI, some of which had to do with statistics regarding intermittent leave, were meant to fully inform the public about the limitations of the 2000 Westat Report particularly in light of how the data was being used and because the Department was interested in refining some of the estimates. It should further be noted that the Department based its best estimates on the 2000 Westat Report and believes that, despite the caveats noted, the 2000 Westat Report still provides a great deal of useful information and data on FMLA leave-takers. A number of commenters concurred, stating: “the 2000 Westat Study, even with its limitations, has been invaluable and represents the *best available source* for information on FMLA usage and coverage.” Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 2.

Other commenters, however, were more critical of the 2000 Westat Report. For example, the U.S. Chamber of Commerce noted that the questionnaire used to survey establishments “provides little insight . . . on the nuanced complexity of the law,

the vagueness that has resulted in abuse of FMLA leave, the cost associated with compliance and, more significantly, the cost associated with providing leave to employees who likely were not intended to be covered by the statute.” Doc. 10142A, at 11. Another comment noted “[t]he Department does not have an accurate measure of intermittent leave because this was not covered adequately by the Westat surveys” and that “there are a few questions in [the employer] survey that address intermittent leave, but not necessarily the FMLA definition of intermittent leave.” Randy Albelda, Heather Boushey, and Vicky Lovell, Doc. 10223A, at 2. An economic analysis of the FMLA by Criterion Economics concluded that the results of the Westat surveys “are subjective, qualitative, incomplete, and biased in the direction of understating the costs of FMLA[.]” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 23.

A number of groups favored additional data collection, beyond the RFI, but were split as to whether such additional data collection was needed to form the basis for rulemaking or would even contribute significantly beyond what is already known and available. The National Partnership for Women & Families noted that “the lack of available data on many of the issues raised in the RFI is an unfortunate reminder of DOL’s failure to conduct objective studies on the FMLA and its implementation in recent years. . . . DOL has neglected to undertake significant efforts to update this research, thus leaving an information void. While the RFI solicits data from commenters on a long list of questions, in many cases it is DOL that has been – and is – best positioned to gather the relevant data to provide answers.” Doc. 10204A, at 2. “DOL has a particularly important role in conducting and commissioning objective, scientifically sound research that can be used to inform and assess implementation of the FMLA,” and that pursuing changes to the FMLA regulations without such data is unwarranted and inappropriate. *Id.* The AFL-CIO stated “The Department should

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<sup>26</sup> See 2000 Westat Report, at C-1.

<sup>27</sup> See 2000 Westat Report, at 3-4.

not yield to anecdotal evidence with respect to the purported burden of leave on employers as a basis for tightening the eligibility rules for FMLA leave. Anecdotes can never substitute for hard data[.]” Doc. R329A at 9.

Randy Albelda, Heather Boushey, and Vicky Lovell mirrored the comments of others that recommended that “[a]dditional data collection, using nationally representative surveys, could illuminate the issues raised in the RFI” while noting that the Westat surveys “provide us with valuable information about family and medical leave-taking[.]” Doc. 10223A, at 1, 2. Criterion Economics concluded that “[t]he Department has taken the first step towards a more complete and accurate assessment by soliciting additional information through the RFI[.]” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 23. The U.S. Chamber of Commerce also recommended that a “follow-up study with employers should be conducted,” but did not believe such further study should delay regulatory action “strongly recommend[ing]” that the Department initiate a rulemaking. Doc. 10142A, at 12. Another economic analysis by Darby Associates noted that although “the data are scattered, spotty, frequently inconsistent, and largely anecdotal and episodic,” “[t]here is in the record a substantial amount of data, analysis and conjecture on which to base a description of various attributes of benefits and costs arising from over a decade of experience under the FMLA.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 7.

The Department does not dispute that the RFI was not a nationally representative FMLA survey as were the Westat surveys and the Department makes no attempt to directly compare data from such different types of information collection. The Department, nevertheless, believes that the RFI was a useful information collection method that yielded

a wide variety of objective survey data and research, as well as a considerable amount of company-specific data and information that supplements and updates our knowledge of the impacts of FMLA leave. In fact, several organizations conducted national surveys in response to the RFI.<sup>28</sup>

Finally, the Department asked a number of questions in the RFI on intermittent leave because one of the findings of the 2000 Westat Report was that “most employers report no adverse effects [from FMLA], including from intermittent leave,”<sup>29</sup> while more recent information on intermittent leave from private sector surveys and reports, recommendations to the Office of Management and Budget, and stakeholder meetings suggested that intermittent leave is a difficult issue for many employers, particularly in some industries. Moreover, there was not a lot of information on the issue in the 2000 Westat Report. As the remainder of this chapter demonstrates, the data and information obtained in response to the RFI provides considerable insight and a far more detailed picture of the workings of the FMLA, and the impact of intermittent leave, than the Westat surveys.

## B. Number of Covered and Eligible Workers

The Department presented its best coverage estimates in the RFI. These estimates were based upon updating the estimates in the 2000 Westat Report to account for differences in employment between 2000 and 2005 and “correcting” some of the methodological issues in the 2000 Westat Report. A full description of the Department’s approach was presented in the RFI and resulted in the following estimates:

### Number of Covered and Eligible Employees Under the Family and Medical Leave Act in 2005

Total U.S. Employment	141.7 million
Employees at FMLA-Covered Worksites	94.4 million
Eligible Employees at FMLA-Covered Worksites	76.1 million

Note: Employment for 2006 was not available at the time the RFI was published in December 2006.

<sup>28</sup> See also footnote 25.

<sup>29</sup> See 2000 Westat Report, Foreword by DOL at *ix*.

The Department did not receive any substantive comments on its coverage or eligibility estimates or the methodology it used to produce those estimates and concludes that these estimates are currently the best available.

### C. Number of Workers with Medical Certifications for Chronic Conditions

Although the Department did not specifically ask in the RFI for comments on the number of covered and eligible workers who have medical certifications for FMLA leave, nor did it ask for this information in either the 1995 FMLA surveys or Westat surveys, it received a wide variety of information and data on this issue. Nationwide survey data and company-specific reports indicate that a significant number of workers have medical certifications on file with their employers for chronic health conditions, especially for some facilities or workgroups, and that the number is increasing. For example:

- Respondents to the National Association of Manufacturers' survey reported "that 25 percent of those eligible for FMLA leave had medical certifications *on file* for a 'chronic' illness that permitted unannounced, unscheduled intermittent leave." Doc. 10229A, at 10.
- Another comment noted that "[s]everal other [air] carriers report that 50% or more of all flight attendants and agents are certified for FMLA leave." Air Conference, Doc. 10160A, at 4.
- A survey by the U.S. Chamber of Commerce found "[l]arge companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time." Doc. 10142A, at 2.
- Verizon noted that 44 percent of the employees in its Florida Network Centers division had medical certifications and their Business Solutions Group saw a jump in

medical certifications from 28 percent in 2005 to 42 percent in 2006. Doc. 10181A, at 4.

- The Commonwealth of Pennsylvania stated that it has two 24/7 healthcare facilities where 6 percent and 10 percent of the workers have medical certifications that excuse them from working mandatory overtime. Doc. 10042A, at 3.
- The City of New York noted that 32 percent of all police communication technicians (911 call-takers) have medical certifications. Doc. 10103A, at 3.

The data received in response to the RFI suggest that a significant number of workers in certain facilities and workplaces have medical certifications on file for chronic health conditions, which due to certain regulatory provisions and interpretations can allow these workers to take unscheduled intermittent leave with little or no notice, or to be excused from certain shifts or mandatory overtime.

### D. Number of FMLA Leave-Takers

The Department presented three estimates of the number of covered and eligible workers who took FMLA leave in 2005 and asked for information and data on the approach it used to make these estimates, and for other available data that could be used to develop its estimates given the data limitations and methodological issues in the 2000 Westat Report. A full discussion of the Department's approach was presented in the RFI and resulted in the following estimates:

	Percent of Covered & Eligible Workers Taking Leave	Number of FMLA Leave-Takers
Upper-bound Estimate *	17.1%	13.0 million
Employer Survey Based Estimate **	8.0%	6.1 million
Lower-bound Estimate *	3.2%	2.4 million

\* From the Westat employee survey.

\*\* The Department used a rate of 6.5 percent of covered workers in the RFI. The rate presented here is the percentage of covered and eligible workers calculated by dividing 6.1 million by 76.1 million.

In response to this request the Department received a significant amount of data on FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. The Department also received a few comments on the data limitations with its approach and methodology for estimating FMLA leave usage.

**1. Comments on the Department’s Approach and Data on the Number of Leave-Takers**

The Department received very few comments on its approach. Most of the comments concerning the Department’s leave estimates presented FMLA usage figures *at or above* the Department’s estimates, although many of these were for individual employers or certain facilities of individual employers. For example:

- The U.S. Postal Service reported that 18.4 percent of its 620,688 employees took FMLA leave in 2006.<sup>30</sup> Doc. 10184A, at 3.
- Madison Gas and Electric Company stated, “[o]ur data shows 30% of eligible workers requested FMLA leave. Of the 30%, only 69% of the requested leaves qualified as FMLA leave. This resulted in 20% of eligible workers taking a qualified FMLA leave.” Doc. 10288A, at 4.
- Delphi reported that at one of its large manufacturing facilities in the Midwest “nearly one of every five” workers took FMLA leave in 2005. Doc. 10225A, at 1.
- UnumProvident reported that 17 percent of the employees in the FMLA program that it administers for 95 clients nationwide took FMLA in 2006. Doc. 10008A, at 1-2.

- First Premier Bank stated that “[o]n average, over 25% of our staff has been on FMLA at one point or another during the course of a year. There is almost 10% of our staff on FMLA at any given time.” Doc. 10101A, at 1.
- The University of Washington noted that “[i]n our organization of 950 employees . . . we consistently have 20% of the workforce absent from work under FMLA[.]” Doc. FL17, at 2.

The Department notes that although some employers experienced higher rates of FMLA usage than the rates published in the RFI, this does not indicate that these estimates were wrong. The Department presented three alternative estimates of *average* FMLA use *across all employers in all industries of the economy* in the RFI. Clearly some employers in some industries will experience higher rates of usage just as other employers in other industries may experience lower rates. For example, the International Foundation of Employee Benefit Plans conducted a nation-wide survey of 241 corporate benefit managers, public employers, and professional service providers and found:

Percent of Workers Using FMLA Leave	Percent of Companies
Less than 1%	9%
1% to 3%	17%
4% to 6%	22%
7% to 10%	17%
11% to 15%	11%
16% to 20%	6%
More than 20%	4%
Don’t Know	13%

Doc. 10017A, at 17.

Although it is not possible to calculate the mean of this survey, the median of those reporting a percentage is between 7 percent and 10 percent. This would appear to be consistent with the national average findings presented in the 2000 Westat Report that 6.5 percent of workers employed at facilities covered by the FMLA took FMLA leave, and reflects

<sup>30</sup> The U.S. Postal Service only reported data for those employees who are in its eRMS system.

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the comments that suggest “[w]ith the exception of Westat’s employer survey, in which double counting may have occurred, the data tends to show that FMLA usage remains low.” AFL-CIO, Doc. R329A, at 5 (footnote omitted).

Additional comments reported FMLA usage that is consistent with the range the Department estimated in the RFI. For example:

- A nationwide survey of 1,356 covered and eligible workers age 50+ by AARP found that 9 percent took leave under the FMLA. Doc. 10228B, at 5.
- The NJ Transit reported that 9 percent of its employees are covered and eligible leave-takers. Doc. FL85, at 8.
- FNG Human Resources stated that “an average of 8% of employees [are] on some manner of Family Medical Leave at all times.” Doc. FL13, at 2.
- Progressive Inc. also reported that approximately 10 percent of its workforce is on FMLA leave at any given time. Doc. FL2, at 1-2.
- The AFL-CIO stated that “our survey shows that almost 16 percent (15.99%) of respondents have taken FMLA leave. These results are well within the general range of the Westat employee-based survey[.]” Doc. R329A, at 7.

Further, comments clearly show that FMLA leave usage varies with workgroups of some employers and that using averages for FMLA usage may hide the impact it has on some employers and some facilities/workgroups within employers. For example:

- Union Pacific reported that “17% of Train and Engine Service employees use FMLA leave versus 3.5% use among all other employees (5 X more). This disproportionate rate of use is magnified when coupled with the fact that

Train and Engine Services employees make up roughly 46% of all employees company wide (25,000 of 54,000 total).” Doc. 10148A, at page 2.

- The Manufacturers Alliance reported that one “member company that is highly diversified, with eight business groups, states that the percentage of FMLA leave taken intermittently within those groups has ranged from a low of 10 percent to a high of 75 percent. Across all units, the company estimates that the percentage of intermittent leave as a percentage of all FMLA leave is in the range of 40 to 50 percent.” Doc. 10063A, at 3.

## **2. Trend in the Number of Workers Taking FMLA Leave**

A number of comments indirectly echoed Randy Albelda, Heather Boushey, and Vicky Lovell, who specifically noted that “using the 2000 share of those taking leave with 2005 employment data may also underestimate the true take-up of the FMLA.” Doc. 10223A, at 1. The Albelda letter speculated that more people may know their FMLA rights in 2005 compared to 2000, just as the 1995 FMLA surveys and Westat surveys showed an increase in the percentage of covered workers taking FMLA leave from 1995 to 2000. Madison Gas and Electric attributed its higher rate to employers’ “increased awareness and recordkeeping related to FMLA leave” and “[e]mployees have also become more aware of their rights under FMLA, which has changed the scope of leaves requested and taken.” Doc. 10288A, at 4.

A number of other commenters explicitly reported that the use of FMLA leave has increased since 2000. For example:

- The Air Conference stated that “[t]he percentage of employees using FMLA is steadily increasing” in the airline industry. Doc. 10160A, at 4.

- The Port Authority of Pittsburgh stated that “the number of employees on an approved leave at any one time has increased by five percent. In 2002 approximately 6% of the workforce was on leave at any one time. Over the years, this number has steadily increased to the current level of 11%.” Doc. FL135, at 2.
- “The Dallas Area Rapid Transit (DART) has experienced a significant increase in FMLA utilization over the past four years. Employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006.” Doc. FL41, at 2.
- The National Association of Manufacturers commented that “for one major auto parts manufacturer, applications for FMLA leave increased 150-fold in ten years,” Doc. 10229A, at 4.
- The City of New York reported that “[t]he use of FMLA leave... has increased substantially in the last five years, from 10.8 % of all medical leave in 2001... to the 2006 level of 27.0% of all medical leave.” Doc. 10103A, at 2.
- Aztec Manufacturing reported that “FMLA absences have grown 200% from 2002 to 2006.” Doc. 10081A, at 2.

Others suggested that FMLA usage remains low. The Department notes, however, that firms with higher than average FMLA usages rates probably have a greater incentive to report their higher rates than those with rates lower than the average.

Although the weight of the comments strongly suggests that the percentage of employees using FMLA leave has increased, particularly in some industries, the range of workers who took FMLA leave in 2005 (between 3.2 percent and 17.1 percent) is consistent with the data submitted in response to the RFI. Nevertheless, the Department recognizes it is possible that the number of workers who took

FMLA leave in 2005 is more likely to be between 6.1 million and 13.0 million than between 2.4 million and 6.1 million. As the next section indicates, awareness of the FMLA appears to be higher in 2005 than in 1999 when Westat conducted its surveys. So just as FMLA usage increased between the times the two surveys sponsored by the Department were conducted in the 1990s, given the comments received it is likely that FMLA usage increased between 1999 and 2005.

### 3. Awareness of FMLA Leave Usage

In the RFI, the Department also raised the issue about the difference between its lower-bound estimate based upon Westat’s employee survey and its best estimate based upon Westat’s employer survey. The Department noted: “2.4 million may be a lower-bound estimate in that it may underestimate the number of covered and eligible workers who actually took FMLA leave, because evidence exists that many workers are unaware that their leave qualified and that their employers may have designated their leave as FMLA leave.” 71 Fed. Reg. 69504, 69511 (Dec. 1, 2006).

The Department received many comments on this issue. For example, one commenter stated that “[t]he obvious reason for this [discrepancy between employer and employee survey figures] is that a significant number of employers are not properly informing employees that they are utilizing FMLA leave time when that is actually occurring.” Kennedy Reeve & Knoll, Doc. 4763A, at 13.

Others believe that there may be some confusion over FMLA leave when other types of leave are taken concurrently. The National Council of Chain Restaurants, for example, stated that the Department asked “why employee estimates regarding the use of FMLA are so much lower than employer estimates. We believe employees are much more likely to focus on whether leave is paid or unpaid, and only to count unpaid leave as FMLA leave when they answer such questions.” Doc. 10157A, at 7. The Commonwealth of Pennsylvania reported that 6 percent of its



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employees “use some type of FMLA qualifying leave *without pay* each year.” Doc. 10042A, at 2. However, this did “not include employees who use paid leave in lieu of unpaid FMLA leave.” *Id.*

Data from the Westat surveys and other surveys suggest that when many employees think of FMLA leave, they only think of unpaid leave and do not realize that FMLA leave often runs concurrently with paid leave. They do not associate taking paid sick leave and other forms of paid leave (e.g., vacation, personal) as taking FMLA leave – when at times it may be designated as such by their employer as permitted by the statute. For example, AARP’s national sample of workers 50 or more years old reported that “[d]espite high overall awareness of FMLA and the fact that the majority (58%) of survey respondents have taken at least some time off for family- or medical-related reasons within the past five years, only nine percent of respondents (or 15% of leave-takers) reported that any of the time taken was FMLA leave.” Doc. 10228B, at 4.

#### **4. Continuing Concern with Estimates of Leave Usage Over Time**

After reviewing the comments the Department continues to believe that the available data do not enable an accurate estimation of the total number of workers who took FMLA leave since 1993, and remains concerned about the possible misinterpretation of its estimates and misapplication of its methodology for estimating the number of workers who took FMLA leave in a given year. In fact, the Department received a few comments with different estimates of the number of workers who have taken FMLA leave since 1993. For example, the National Women’s Law Center noted, without citation, that “[c]lose to 80 million workers have taken FMLA leave in the last 14 years[.]” and 9to5 stated, again without citation, that “FMLA has allowed more than 50 million Americans to take job-protected leave[.]” Doc. 10272A, at 1; and Doc. 10210A, at 1, respectively.

As noted in the RFI, the Department has determined that the available data do *not* enable the accurate estimation of the total number of workers who have taken *FMLA leave* from 1993 to 2005 because “establishments may double count persons that took more than one FMLA leave” during the 18-20 month survey period that began in January 1999. Moreover, this double counting is even more likely to occur over the longer period that began in 1993 due to workers who have chronic conditions, more than one family member with a serious health condition, or multiple pregnancies or adoptions.

#### **5. Differences Between FLSA Exempt and Nonexempt Workers**

In the RFI the Department solicited the following information with respect to workers who are salaried and exempt from the Fair Labor Standards Act (“FLSA”) under 29 CFR Part 541:

- The Department requests that commenters submit information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave.
- The Department also requests information on the different impact the leave taking by FLSA exempt and nonexempt employees may have on the workers who have taken leave and their employers.

The Department received a few comments in response to this request but they were generally vague and inconclusive. Some comments indicated that nonexempt employees tend to take more FMLA leave than exempt employees. For example, “[t]he majority of our FMLA requests are from hourly Fair Labor Standards Act-nonexempt employees.” University of Wisconsin-Milwaukee, Doc. FL120, at 1. Others indicated that FMLA usage by nonexempt workers presents more of an issue than FMLA usage by exempt workers because nonexempt workers tend to take more unscheduled intermittent leave. For example:

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As a general rule, non-exempt employees are more likely to use unscheduled intermittent leave than exempt employees. In the case of exempt employees, many tend to work more than 40 hours each week anyhow, or make up the time later, or work from home even when on a leave of absence. Exempt employees tend to use FMLA leave primarily for birth of a child, acute illnesses or surgery, or planned medical treatment (*e.g.*, chemotherapy), all of which normally result in scheduled time off and predictable time off. In most cases, these leaves are continuous leaves or intermittent leaves over a period of less than six (6) months.

Spencer Fane Britt & Browne LLP, Doc. 10133C, at 22.

However, several comments, particularly from the Society for Human Resource Management chapters, suggest that the difference between exempt and nonexempt employees is not their pattern of FMLA leave use but rather the way their employers track the use of FMLA leave. One commenter stated that “many employers do not keep track of partial day absences of exempt employees because it is virtually impossible to know if and when the time has been made up. Many exempt employees make up the time of their own volition.” Arkansas Society for Human Resource Management State Council, Doc. 5161, at 1. Another commenter noted that “[t]racking FMLA leave in such small increments is extremely burdensome – particularly with respect to exempt employees, whose time is not normally tracked.” Northern Arizona University, Doc. 10014A, at 5. One worker also agreed that employers treat exempt and nonexempt workers differently when it comes to tracking FMLA leave:

I know there is inconsistency throughout the company on the application of how FMLA is measured. For example, exempt employees are allowed to take time off and it is generally considered that if you have [worked] a minimum of 5 hours, you have [worked] a full day. If I call in late due to being ill, the

time I work is measured and if I do not make the 8 hours, I’m expected to log the difference. If another exempt calls in late because their child is sick, nothing is done. If they come in late or leave early, it is never a problem. My time is always scrutinized and questioned.

An Employee Comment, Doc. 10336A, at 9.

Although there was no consensus in the comments on whether one group is taking more FMLA leave than the other group, one commenter noted an apparent difference in the manner in which exempt and nonexempt employees are paid while on FMLA leave. For example, Madison Gas and Electric stated “[a] variance also exists between time taken by FLSA exempt and non-exempt employees. Exempt employees are typically paid for time away while non-exempt employees do not receive pay, unless they are able to substitute from a paid leave balance. This pay for leave time differences generally increases the amount of time taken by FLSA exempt employees.” Doc. 10288A, at 5.

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## **E. Number of Workers Taking Intermittent FMLA Leave**

The Department presented its estimate of the number of covered and eligible workers who took intermittent FMLA leave in 2005 and asked for information and data on the approach it used to make the estimate, and for other available data that could be used to refine its estimate. As noted in the RFI, the Department used data from Westat’s employee survey to develop an estimate of the number of workers that used intermittent FMLA leave in 2005. Specifically, Westat’s employee survey found that almost one-quarter (23.9 percent) of covered and eligible workers who took FMLA leave reported taking their leave intermittently. That is, they repeatedly took leave for a few *hours* or *days* at a time because of ongoing family or medical reasons. Therefore, based on the Westat survey data, about 1.5 million FMLA leave-takers (*i.e.*, 23.9 percent of 6.1 million FMLA leave-takers) or about 2 percent of

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the workers employed in the establishments covered by the FMLA (i.e., 1.5 million of 94.4 million) used intermittent leave in 2005.

In response to this request, the Department received a significant amount of data on intermittent FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. In fact, the Department received more data on this issue (and the unscheduled component of intermittent leave discussed in the following section) than almost any other issue in the coverage and usage section of the RFI. The Department also received a few comments on the data limitations with its approach and methodology for estimating intermittent FMLA leave usage.

### **1. Comments on the Department's Approach to Estimating Intermittent FMLA Leave Use**

As was noted in the RFI, the Westat surveys "tended to focus on the longest leaves taken for family and medical reasons rather than the leaves taken intermittently." However, the Westat surveys also asked some questions related to intermittent leave.

Randy Albelda, Heather Boushey, and Vicky Lovell submitted one of the most critical comments on the Department's approach that touched on some data limitations of Westat's employee survey while noting that "data that are available from the survey seem to suggest a wide range of possible leave-takers who might use the leave intermittently." Doc. 10223A, at 2. Specifically, the Albelda letter stated:

[The Department's] approach may substantially understate the use of intermittent leave. The Department uses data from the employee survey, which does not ask about the number of intermittent leaves, asking instead whether those who took a leave for purposes covered under FMLA leave took their leave intermittently. Some, none, or all of that leave may have been under FMLA, but there is no way

to know from the survey questions. Further, the Department applies this "guesstimate" to the total number of leave-takers, which may not be correct. As the Department points out, this assumes that all groups of workers are equally likely to take intermittent leave, which may not be true.

The Department does not have an accurate measure of intermittent leave because this was not covered adequately by the Westat surveys.... The Westat employee survey asks how many leaves employees took over the previous 16-18 month period and probes further about two of their longest leaves, but does not specifically ask about FMLA-defined intermittent leave[.]

*Id.* (emphasis added).

This criticism notwithstanding, the Albelda letter went on to identify a number of questions in the Westat employee survey that might be used to refine the Department's approach and reached nearly the same estimate as that presented by the Department in the RFI, that intermittent FMLA leave appears to be important for more than a quarter of leave-takers. Specifically, the Albelda letter noted:

The data that are available from the survey seem to suggest a wide range of possible leave-takers who might use the leave intermittently. For example, 27.7 percent said they alternated between leave and work (question A5BB), with more than half (53.3 percent) of that group indicating they did that for less than half of their leave (question A5C). So, a relatively large number indicate not taking a leave all at once, but over half did so for less than half of their leave. In another part of the survey, 7.2 percent of leave-takers said that they were not off work the entire time during their longest leave over the past 16-18 months (question A3E). Of those who took multiple leaves, 20 percent indicated they alternated between leave and work (question A8); of those, 13 percent

indicated they do so regularly (question A8A). Thus, the ability to use FMLA leave intermittently appears to be an important feature of the policy for more than a quarter of leave-takers.

*Id.*, at 2-3 (footnote omitted).

Madison Gas and Electric Company stated that “the approach used by the Department [to estimate the usage of intermittent leave] seems sound but will vary between employers. The estimated use of intermittent leave is lower than the experience of our company.” Doc. 10288A, at 4.

A number of commenters who were critical of the Department’s approach recommended that the Department collect additional information about intermittent FMLA leave, which was one of the objectives of the RFI. *See* Chapter XI, section A.

## 2. Data on the Number of Intermittent Leave-Takers

The Department received a significant amount of data on the number and percentage of workers who have taken intermittent FMLA leave that supplements and updates the results of the 2000 Westat Report. For example, a nation-wide survey of 241 corporate benefit managers, public employers, and professional service providers by the International Foundation of Employee Benefit Plans found:

Percent of FMLA Leave that is Taken Intermittently	Percent of Companies
Less than 5%	48%
5% to 15%	16%
16% to 25%	10%
26% to 55%	6%
More than 55%	5%
Don’t Know	14%

Doc. 10017A, at 20.

Although it is not possible to calculate the mean of this survey, the median of those reporting a percentage is between 5 percent and 15 percent, which is below Westat’s estimate that 23.9 percent of FMLA leave-takers took some of their leave intermittently. Other comments also reported percentages of intermittent FMLA leave lower than either Westat’s estimate or the Department’s estimate that about 2 percent of all workers employed in the establishments covered by the FMLA took intermittent FMLA leave. For example:

- According to the WorldatWork survey, 18.1 percent of FMLA leaves in 2005 were due to chronic conditions. Doc. 10201A, at 11.
- The AFL-CIO stated “in our survey just 12 percent of all respondents reported having taken intermittent leave. This finding supports that available evidence, which shows that ‘intermittent leave is used infrequently[.]’” Doc. R329A, at 7.
- One member company of the Manufacturers Alliance stated that intermittent leave “is rare and generally involves ongoing medical treatment[.]” This company “does not see a lot of intermittent leave-probably less than 10 percent of all leave taken.” Doc. 10063A, at 2.

Many comments, however, reported intermittent FMLA usage above either the Westat or the Department’s estimates. For example:

- The University of Washington reported “5% of employees are currently approved for intermittent FMLA leave.” Doc. FL17, at 2.
- Honda reported that 2,249 employees out of an employee population of 20,757 (about 11 percent) took a total of 22,250 days of intermittent FMLA leave in 2006. Doc. 10255A, at 6.
- NJ Transit reported that “fully 95 percent of [FMLA] requests were for intermittent leave.” Doc. FL85, at 5.

- Progressive Inc. reported that 75 percent of its employees' FMLA leaves are intermittent. Doc. FL2, at 2.
- The Madison Gas and Electric Company reported that "[o]ver one-third of employees within our company request intermittent leave which is higher than the estimate determined by the Department." Doc. 10288A, at 4.

*See also* Delphi Inc, Doc. 10225A, at 2; Kalamazoo Human Resource Management Association, Doc. 10035A, at 2; HR Policy Association, Doc. R367A, at 3; Southwest Airlines Co., Doc. 10183A, at 3.

Other comments show that intermittent FMLA leave usage varies by workgroup within some employers, and that using averages for intermittent FMLA usage across industries and operations within industries may hide the impact that FMLA usage has on some employers and some facilities/workgroups within employers. For example:

- Based on client comments, Spencer Fane Britt & Browne stated "[t]here are employers who report that they have as many as 40-50% or more of all their employees, and as much as 75-100% of employees within a particular work group or department, who have submitted medical certifications for and use intermittent leave for chronic conditions." Doc. 10133C, at 19.
- Southwest Airlines reported that "[i]n the workgroup with the highest percentage of FMLA use in relation to [the] number of employees, Reservations, intermittent FMLA represents 75% of the FMLA leaves over the last two years[.]" Doc. 10183A, at 3.
- The Manufacturers Alliance reported that one highly diversified member with eight business groups stated "that the percentage of FMLA leave taken intermittently within those groups has ranged from a low of 10 percent to a high of 75 percent" with a company wide

average of "40 percent to 50 percent." Doc. 10063A, at 3.

*See also* MGM Mirage, Doc. 10130A, at 4; Briggs and Stratton, Doc. FL37, at 1-2; and Association of American Railroads, Doc. 10193A, at 1.

A number of other comments reported that intermittent leave usage is increasing. In some cases the reported increases are very large. For example:

- DST Systems, Inc. stated that "[t]he burden of intermittent leave is steadily growing. The number of intermittent leaves at our company has grown almost 300% in one year, from 71 in 2005 to 221 in 2006." Doc. 10222A, at 2.
- Verizon provided the example of its Customer Financial Services Mass Market group where "the use of intermittent leave has increased from 22% of eligible employees in 2004 to 30% in 2005 and 37% in 2006." Doc. 10181A, at 4.
- National Association of Manufacturers reported that "[f]or one major auto parts manufacturer... 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." Doc. 10229A, at 4.

The fact that some employers have higher rates of intermittent FMLA leave use than the averages estimated by the Department is not surprising, especially in view of the self-selection of those who took the time to submit comments to the RFI. Moreover, it is noteworthy that the preponderance of companies responding to the survey conducted by the International Foundation of Employee Benefit Plans reported that less than 25 percent of FMLA leaves were taken intermittently.

On the whole, the data presented above appear to be consistent with the ratios used by the Department to develop the estimates presented in the RFI, i.e., that about one quarter of FMLA leaves are taken intermittently. However, the Department believes that its estimate that about 1.5 million workers

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took intermittent FMLA leave in 2005 may be too low because the estimate of 1.5 million workers taking intermittent FMLA leave was based upon the estimate of 6.1 million workers taking FMLA leave and for the reasons discussed above (e.g., increased employee awareness), the 6.1 million estimate may be low. Moreover, the comments also suggest that more workers appear to be taking intermittent FMLA for chronic serious health conditions.

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## **F. Number of Workers Taking Unforeseen or Unscheduled Intermittent FMLA Leave**

The Department presented its estimate of the number of covered and eligible workers who took unscheduled intermittent FMLA leave in 2005 and asked for information and data on the approach it used to make the estimate, and for other available data that could be used to refine its estimate.<sup>31</sup> The Department also requested comment on the prevalence, durations, and causes of intermittent leave.

As noted in the RFI, the Department used the responses to Question A8a in Westat’s employee survey as a rough “proxy” for the percentage of the employees who took unscheduled intermittent FMLA by assuming that the portion of the intermittent FMLA leave-takers who took unscheduled leave were the 45.4 percent that answered “As Needed” to Question A8a. Thus the Department estimated that about 700,000 workers (i.e., 45.4 percent of 1.5 million) took unscheduled intermittent FMLA leave in 2005.

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<sup>31</sup> Commenters used the terms “unscheduled” and “unforeseen” interchangeably.

<sup>32</sup> For example, Randy Albelda, Heather Boushey, and Vicky Lovell noted that data from the Westat employee survey found that for the 27.7 percent who said they alternated between leave and work (question A5BB), more than half (53.3 percent) of that group indicated they did that for less than half of their leave (question A5C). Doc. 10223A, at 2-3. This implies that nearly one-half (46.7 percent) used more than half of their leave intermittently. Given the comments that were received, certainly a significant amount of this intermittent leave was unscheduled. *Id.*

In response to this request, the Department received a significant amount of data on the use of unscheduled intermittent FMLA leave from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. The Department also received a few comments on the data limitations with its approach and methodology for estimating intermittent FMLA leave usage.

Although the Department did not receive significant comments on its method for estimating the number of workers who took unscheduled intermittent FMLA leave in 2005 (about 12 percent of workers taking FMLA leave), the Department acknowledges that the uncertainty regarding this estimate is larger than that of the estimate of intermittent FMLA leave because data on taking leave *as needed* was used as a proxy for unscheduled intermittent leave. Moreover, it is important to note that many of the estimated 700,000 workers may take a number of unscheduled intermittent leaves depending on their chronic health condition.<sup>32</sup>

The Department did receive a significant amount of data on the number and percentage of workers who have taken unscheduled intermittent FMLA leave. Many commenters also used terms such as “certified for intermittent leave” or “leave taken intermittently for chronic conditions” to describe their data. For example:

- The National Association of Manufacturers said that “respondents to the NAM’s survey... reported that 25 percent of those eligible for FMLA leave had medical certifications 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 8 times the national average!” Doc. 10229A, at 10.

- Southwest Airlines noted that “[m]ost of the intermittent leave at Southwest is also taken on an unscheduled basis, without advance notice by employees, particularly during the last five years.” Doc. 10183A, at 1.
- New York City said that “[t]he use of FMLA leave, particularly unscheduled intermittent leave, by PCTs [police communication technicians] has increased substantially in the last five years, from 10.8% of all medical leave in 2001, to a high of 39.6% of all medical leave in 2003, to the 2006 level of 27.0% of all medical leave.” Doc. 10103A, at 2.

Other comments show that unscheduled intermittent FMLA leave usage varies with workgroups of some employers; these comments suggest that using averages for FMLA usage may hide the impact it has on some employers and some facilities/workgroups within employers. For example:

- The National Association of Manufacturers said that “[f]or one major manufacturer, a staggering 60 percent of all FMLA leave taken in the last nine months was for a period of one day or less. Nearly all of this leave was unscheduled, nearly all of it unannounced.” Doc. 10229A, at 10.
- The University of Wisconsin-Milwaukee stated “[i]n one department alone, of 135 hourly blue-collar employees, 37 took FMLA during 2006, or roughly 27.4 percent. Of the 37 who used FMLA during 2006, 24 were on intermittent, unscheduled FMLA, or roughly 65 percent of those who used FMLA were on intermittent unscheduled FMLA.” Doc. 10098B, at 3.
- The U.S. Chamber of Commerce provided several examples of workplaces where the

large numbers of active FMLA certifications permit a significant portion of the workforce to take unscheduled FMLA leave. “Large companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time. Some employers reported extraordinary levels of active FMLA cases . . . . One employer reported certain facilities with 30 percent of the workforce classified as FMLA active. Another employer reported a call center where 50 percent of the workforce was classified as FMLA active.” Doc.10142A, at 2 n. 2.

After reviewing the comments, it appears that the Department’s unscheduled intermittent FMLA leave estimates presented in the RFI—that about 700,000 workers took unscheduled intermittent FMLA leave—may be too low for at least a couple of reasons. First, as noted in the previous section, the Department’s estimate of the number of workers who took intermittent leave in 2005 appears to be low. Second, the comments also suggest that a significant percentage of FMLA covered and eligible workers have medical certifications on file for chronic conditions that enable them to take unscheduled intermittent leave with little or no notice.<sup>33</sup> Thus, it is likely that a significant portion of the estimated 6.1 million workers who took FMLA leave in 2005 (perhaps several million) took some form of intermittent leave and that many of the workers who took intermittent leave took at least some of it without prior notification.

Finally, it is clear from the record and the comments received that if another nationwide survey of both employers and employees on the use and impact of FMLA is conducted in the future, it should do more than simply update the Westat surveys. The Westat surveys were not designed to inquire specifically about many of the issues currently being raised (e.g., the use of unscheduled intermittent FMLA leave); the definition of “intermittent

<sup>33</sup> See Chapter IV.

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leave” used by Westat did not match the statutory definition; and the Westat surveys did not collect data on medical certifications for chronic health conditions.

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## G. The Economic Impact of FMLA Leave

Previous congressional testimony, the 2000 Westat Report, other surveys, and stakeholder meetings suggest that the FMLA has significant benefits and costs. Further, most surveys of workers and employers show that, while the FMLA has been generally effective in carrying out the congressional intent of the Act, some aspects of the statute and regulations have created challenges for both workers and employers. As was stated in the RFI:

[T]he Department has not received complaints about the use of family leave – *i.e.*, leave for the birth or adoption of a child. Nor do employers for the most part report problems with the use of scheduled intermittent leave as contemplated by the statute, such as when an employee requests leave for medical appointments or medical treatment like chemotherapy. Rather, employers report job disruptions and adverse effects on the workforce when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer.

The Department received additional support for this understanding in response to the RFI from both worker and employer groups. For example, the AFL-CIO noted that “[c]oupled with smaller, more recent studies, the 2000 Westat Report shows that the FMLA, as implemented by the regulations, has worked as Congress intended.” Doc. R329A, at 1. Further, the National Association of Manufacturers stated that “the FMLA has achieved its principle goal: leave to care for oneself or one’s family during health problems . . . . 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.” Doc. 10229, at 3.

Given this assessment, the Department presented Westat’s estimates of the impact that the FMLA had on productivity and profitability (*see* 71 Fed. Reg. at 69513, Table 4), and asked a variety of questions intended to update and supplement data in the 2000 Westat Report on the economic impact of the FMLA. Specifically, the Department asked for:

- Data that would allow the Department to better estimate the costs and benefits of the FMLA.
- How does the availability of FMLA leave affect employee morale and productivity?
- Is there any evidence that FMLA leave increases employee retention, thereby, reducing employee turnover and the associated costs?
- Alternative information related to the different economic impacts that intermittent leave has on large employers compared to smaller employers.
- Alternative information regarding any economic impact that recurring unforeseen, unscheduled, intermittent FMLA leave may have on covered employers, and on productivity and profits.
- Information on the concentration of workers taking unscheduled, intermittent FMLA leave in specific industries and employers.
- Information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.
- Does scheduled FMLA leave present different problems or benefits from unscheduled FMLA leave? Does intermittent leave present different problems or benefits from leave taken for one continuous block of time? Does



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the length of leave taken present different problems or benefits?

- How do employers cover the work of employees taking FMLA leave? Does the length of leave impact this coverage? Does the fact that the leave is scheduled or unscheduled impact this coverage? Does the amount of notice given by the leave-taking employee impact this coverage? Does the fact that the leave is intermittent impact this coverage?
- Is there any evidence of employers closing or relocating facilities as a result of employee leave patterns (either scheduled or unscheduled)?

The Department received many comments on some of these questions (e.g., the impact of the FMLA on employees' morale, productivity and profits) and very few, if any, comments on others (e.g., the closing of plants due to the FMLA). Since the responses to many of the questions overlap, the Department decided to organize the findings presented below by topic rather than according to each question asked.

### 1. Comments on the Department's Approach on the Economic Impacts of the FMLA

It was not the Department's intention in the RFI to focus on just the impact that the FMLA regulations have on productivity and profitability. Rather, the intention was to supplement existing data and information on the wide variety of economic impacts that the FMLA is likely to have on both workers and employers, including productivity and profitability. Despite this, the Department received some criticism that it did not discuss nor

solicit sufficient information to assess the overall financial impact of the FMLA on the economy. For example, some Members of Congress noted that there may be "unintended consequences that not only have an adverse effect on employers, they are equally harmful to employees[.]" Letter from 2 Republican Members of Congress, Doc. FL112, at 1. A more specific critique was submitted by Criterion Economics, which stated:

[N]either the Westat survey nor the RFI itself provide an appropriate economic framework for assessing the costs of the FMLA. Both the Survey and the RFI focus on the effects of FMLA on the "profitability" and "productivity" of firms. . . . [T]he costs of FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices.

National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 2.

Darby Associates took another approach and used a standard economic welfare framework to assess the size, nature, and distribution of the Act's benefits and costs and among individuals, and concluded their analysis with a deadweight economic loss estimate. They also noted that many FMLA benefits and costs are difficult to measure. See National Coalition to Protect Family Leave, Doc. 10172A, Attachment.

Finally, the Office of Advocacy at the Small Business Administration (SBA) also noted that in 1995 the Department published a final rule that "improperly compared the number of covered small entities to the total number of small businesses, rather than calculating the number of small businesses *that are covered* by a rule that will suffer a significant economic impact."<sup>34</sup> Doc. 10332A, at 4. The SBA Office of Advocacy recommended a Section 610 review that includes an evaluation of the "degree to which the technology, economic conditions, or other factors have changed . . . the area affected by the rule." Doc. 10332A, at 3.

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<sup>34</sup> It should also be noted that the Regulatory Impact Analysis that accompanied the Department's 1995 final FMLA rule was based on 1987 and 1993 General Accountability Office (GAO) reports that did not include the net cost associated with replacing workers or maintaining output while workers are on unpaid leave. Nor did it include the costs associated with intermittent or unforeseen intermittent leave for the GAO reports focused on "extended" leave for birth or adoption of a child, a seriously ill child, a seriously ill parent, a seriously ill spouse, and temporary medical leave.

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## 2. Overall Impacts of the FMLA

Although the intent of the RFI was not to provide a basis for estimating the entire impact of the FMLA on the economy, the Department did receive some comments about the overall impacts of the FMLA. These comments were generally divided into the costs and benefits resulting from the current implementation of the statute. The Department did not receive a single submission that attempted a comprehensive and detailed cost-benefit analysis.

## 3. Overall Benefits of the FMLA

The Department received many comments discussing the benefits to workers and employers of the FMLA in general as well as specific benefits that result from decreased costs to employers and the economy. These benefits include: the retention of 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.<sup>35</sup>

Often these benefits are immeasurable and priceless. *See also* Chapter I. One worker perhaps said it best: “Last year, my husband was diagnosed with Hodgkin’s Lymphoma. . . . It was during this time that my husband needed me most. Had I not had the opportunity afforded to me by the FMLA, I don’t know what we would have done. I needed to be there to help him eat, take care of him when he was sick, consult with doctors and nurses, but most of all for mental and emotional support. He still says how important it was that I was with him at all times during this terrible experience. . . . FMLA allowed me to help my husband and not have to worry about job security.” An Employee Comment, Doc. 4755,

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<sup>35</sup> Presenteeism is where employees report to work when they are ill and perform below the employer’s expectations because they are not well.

<sup>36</sup> The Center for WorkLife Law’s reference for these estimates was Jodi Levin-Epstein, *Presenteeism and Paid Sick Days*, Center for Law and Social Policy (February 28, 2005), *citing* W. Stewart, D. Matousek, & C. Verdon, *The American Productivity Audit and the Campaign for Work and Health*, The Center for Work and Health, Advance PCS (2003).

at 1. Clearly, “there is no denying the importance of fundamental benefits conferred by the Act on individuals.” National Coalition to Protect Family Leave, Doc. 10172A, Darby Associates, Attachment at 2.

Although none of the commenters developed an overall estimate of the benefits of the FMLA, the comments generally characterized the major benefits to employers as reducing the cost of presenteeism and employee turnover. Additionally, there was a significant amount of anecdotal evidence presented on the benefits to the employees taking FMLA leave and their families.

For example, one commenter noted that “[t]he Department should remember that there would be many hidden costs associated [with] weakening this law. Sick employees will report to work thereby infecting co-workers and further damaging productivity. People will not be able to provide adequate care for sick children and elderly parents. Nobody knows what such neglect might cost our economy.” An Employee Comment, Doc. 5438, at 1.

## 4. Reduced Presenteeism Costs

According to the Center for Worklife Law, “The cost of lost productivity due to presenteeism is significantly greater than the cost of lost productivity due to absenteeism. The total annual cost of lost productivity is \$250 billion. Presenteeism accounts for \$180 billion or 72% of that total. The availability of intermittent FMLA leave incentivizes employees to stay home when they are seriously ill and reduces lost productivity expenses incurred by employers.”<sup>36</sup> Doc. 10121A, at 5. “Sick men and women do not add in a positive way to their working environment. What does happen is the population of the surrounding offices are exposed to increased risk of illnesses causing flu, colds and other seasonal illnesses to move more quickly and with a greater toll on our population in general.” An Employee Comment, Doc. 4710, at 1.

The estimates submitted for the record, such as the one cited above, already include a reduction

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in presenteeism due to the use of the FMLA as the studies were conducted well after the FMLA was enacted in 1993. Although many commenters cited the overall costs of presenteeism and asserted that FMLA has some positive impact on limiting those costs, no one attempted to quantify the marginal effect or economic impact that enactment of the FMLA had on the issue. However, the lack of a quantitative estimate does not mean that the FMLA does not have an impact on presenteeism. Clearly, the FMLA has allowed workers to take leave and not work when they are suffering from a serious health condition that is contagious. On the other hand, it is also evident that workers with contagious illnesses still come to work for a variety of reasons.

### **5. Increased Employee Retention and Lower Turnover Costs**

The Department received many comments emphasizing the positive impact the FMLA has on employee morale and how it increases worker retention and lowers turnover costs. By reducing employee turnover, some commenters argued that the FMLA reduces employer costs.

For example, the Human Rights Campaign noted that “[t]he 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or neutral effect on employee morale. The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive.” Doc. 10179A, at 2. The Center for Law and Social Policy cited “[t]he 1995 Commission on Leave report [that] found that 10.9 percent of leave-takers who are not covered by FMLA fail to return to the same employer after taking leave, compared to only 1.9 percent of workers who are covered.” Doc. 10053A, at 2. Finally, Local 2026 of the American Federation of Teachers concluded,

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<sup>37</sup> The Center for WorkLife Law reference for this estimate was “The MetLife Caregiving Cost Study: Productivity Losses to U.S. Business,” MetLife Mature Market Institute and National Alliance for Caregiving, at 12 (July 2006).

“[t]he law promotes workforce stability by helping employees retain their jobs when an emergency strikes. We believe the FMLA is essential to greater employee retention and to reducing employee turnover, and it is crucial to preserve FMLA’s protections in their entirety.” Doc. 10242A, at 8.

A survey of AARP members suggests that the FMLA also increases the supply of labor. When FMLA leave-takers in its survey “were asked to speculate about the steps that they would have taken if they had not received FMLA leave, approximately one in ten (11%) indicated that they would have had to quit their job or would have lost their job[.]” Doc. 10228B, at 4.

Notably, the Center for WorkLife Law tried to quantify some parameters of the impact the FMLA has on worker retention. “Employers also profit from the availability of intermittent leave. . . . [T]he total estimated annual replacement cost to employers associated with caregiver attrition is \$6,585,310,888. Without FMLA leave, attrition among employed caregivers would increase even more sharply.”<sup>37</sup> Doc. 10121A, at 5.

However, other commenters noted that while some uses of FMLA leave (e.g., for a medical emergency, the birth of a child, to receive medical treatment or therapy) are good for employee morale, the repeated use of unscheduled FMLA leave by some employees can actually have the opposite effect. *See* Chapter IV, for a more complete discussion.

### **6. Other Benefits**

A number of workers also submitted comments that either explicitly or implicitly identified other important benefits of the FMLA, such as having more productive employees at work, lower long-run health care costs, retaining valuable human capital, and lower public assistance costs. For example,

- “Because of the Act our team is still complete and productive . . . the Family and Medical Leave Act not only *keeps productive teams together* in the long run, but it *fosters loyalty* to

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the corporation not only for those who take part in family leave, but for those who respect the support of their colleagues. It is a small investment by the corporation for a long term benefit.” An Employee Comment, Doc. 4858, at 1-2 (emphasis added).

- “Having a parent available to care for a sick child has proven benefits in shortened recovery times and better health and school outcomes.” 9to5, National Association of Working Women, Doc. 10210A, at 1 (emphasis added).
- “Because of being able to take time off for treatment and retain my job, *my company was able to retain valuable expertise.*” An Employee Comment, Doc. 234, at 1 (emphasis added).
- “If it were not for FMLA, my family and I would be living in a box under a bridge somewhere . . . if it were not for my employer being understanding and supporting FMLA, [I would] be *another statistic of the unemployed in the United States.*” An Employee Comment, Doc. 5006, at 1 (emphasis added).

Clearly the FMLA has resulted in significant benefits for employers, their employees and the public. Employers benefit from reduced turnover and decreased presenteeism. Workers benefit from being able to take leave to care for themselves and family members with serious health conditions without fear of losing their jobs. Society benefits from the increased supply of trained workers and the reduced need for public assistance. The fact that these benefits have not been quantified or expressed in monetary terms by any of the commenters should not be taken as an indication that these benefits are not substantial.

## 7. Overall FMLA Compliance Costs

Some commenters cited a 1995 Department

of Labor cost estimate<sup>38</sup> and a 2004 study by the Employment Policy Foundation that estimated the cost of the FMLA. For example, the SBA Office of Advocacy stated: “In 1995, DOL estimated that the cost to all business from the FMLA [was] \$675 million annually, but only computed the costs of maintaining group health insurance during periods of permitted absences. In contrast, a study by the Employment Policy Foundation (EPF) estimates that the direct costs [of] FMLA leave to employers was \$21 billion in 2004 in terms of lost productivity from absenteeism, continued health benefits, and net labor replacement costs.”<sup>39</sup> Doc. 10332A, at 3-4. The EPF estimates were based upon the direct compliance costs of the firms responding to a membership survey.

The Department received one economic study from Darby Associates that assessed the impact of the FMLA on the economy “based on a review of data and analysis available after a decade of experience under the Act.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 1. “The paper concludes that much of the cost of implementation of the Act is effectively a ‘dead weight’ economic loss that reflects economic waste and confers very limited benefit on all but a few stakeholders. These deadweight losses are estimated to be in excess of \$30 billion annually[.]” *Id.* Darby Associates developed their estimate by adding \$11 billion in indirect costs from a 2001 National Association of Manufacturers survey to the \$21 billion direct costs estimate by EPF.

Darby Associates also identified a number of FMLA-related costs that they did not attempt to separately estimate: these include the loss of productivity, increased administrative and personnel costs, overtime pay, decreases in quality and safety, and costs imposed on customers and other employees. National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 15. Darby Associates went on to note that “[m]any of the costs of leave, especially intermittent leave, are experienced in ways that defy measurement – lost opportunities by employers as well as impacts on

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<sup>38</sup> 60 Fed. Reg. 2180 (Jan. 6, 1995).

<sup>39</sup> See also footnote 34.

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other employees in the workplace, including stress, inconvenience, loss of morale and workplace effectiveness.” *Id.*, Doc. 10172A, Attachment at 13-14.

A primary finding of Criterion Economics’ analysis is that “the costs of FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 2; *see also*, Doc. 10172A, Darby Associates, Attachment at 13-14.

### **8. Summary of the Overall Benefits and Costs of the FMLA**

The available evidence appears to support the conclusion that both the costs and benefits of the FMLA are large and difficult to quantify.

The overall weight of the comments is that the FMLA has had immeasurable benefits for millions of workers *and* has imposed significant costs on the economy. The records shows it has likely increased the supply of labor and reduced employer costs by enabling employees to remain in the work force in the face of serious health conditions, but its costs are borne by individuals as consumers, workers, and economic stakeholders.

As explained in earlier chapters, numerous comments that the Department received in response to the RFI confirm that the greatest challenge for employers associated with the FMLA, and its most significant economic impacts, stem primarily from the unscheduled intermittent leave portion of the FMLA.<sup>40</sup>

Finally, the Department believes that it would be difficult, with any precision, to differentiate the impact that the FMLA has had on the supply of labor, wages and prices from other changes that have occurred over the last 14 years. Similarly, it is not possible, with any precision, to estimate what the labor turnover rates or the cost of presenteeism would be without the FMLA.

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<sup>40</sup> *See also* Chapter IV.

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## **H. Comments on the 2000 Westat Report’s Findings on the Impact Intermittent FMLA Leave has on Productivity and Profitability**

The Department received many comments quoting sections of the 2000 Westat Report that suggest intermittent FMLA leave generally is not a problem for employers. For example, Local 2026 of the American Federation of Teachers stated, “[t]he 2000 Westat Study found that 81% of covered establishments reported that intermittent leave had no impact on business productivity, and 94% reported that intermittent leave had no impact on business profitability.” Doc. 10242A, at 6. Similarly, the Women’s City Club of New York stated, “[r]esearch shows that the FMLA has been beneficial to business. A United States Department of Labor employer [survey], released in 2000, found that 9 in 10 covered employers report that the FMLA has a positive or neutral effect on productivity and growth.” Doc. 10003A, at 2.

Similarly, a 2007 Society for Human Resource Management survey found that 71 percent of respondents reported no noticeable effect on productivity. *See* Doc. 10154A, Attachment at 4. However, in the Department’s view, the fact that many employers responding to a survey did not experience problems does not mean that the FMLA does not have a significant impact on the productivity and profits of a number of other employers in certain industries and sectors of the economy. As was noted by Criterion Economics, “[c]ritical aggregate statistics in the Westat Survey are constructed by averaging across all industries. Reliance on simple averages disguises the fact that certain sectors incur disproportionately high costs as a result of FMLA compliance, and hence leads to estimates that are biased downward.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 19.

In other words, just as certain employers reported higher FMLA leave use in response to the

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RFI than the average estimated by the Department, some employers are likely to incur higher costs than the “average” firm responding to Westat’s employer survey. If these high costs are clustered in specific industries or types of work, then the FMLA could impose significant costs for those clusters of employers while the average number of employers may have reported relatively lower costs.<sup>41</sup>

Other comments cited the 2004 study by the Employment Policy Foundation (EPF)<sup>42</sup> referenced in the RFI as evidence that there are significant costs incurred by some firms in some industries. For example, The Equal Employment Advisory Council stated:

While the 2000 Westat Report . . . suggests little, if any, burden associated with administering FMLA leave, we believe the Report does not accurately reflect the level of difficulty some employers have experienced in attempting to comply with the current FMLA regulations. Many EEAC members participated in a separate survey of 431 large corporations conducted by the Employment Policy Foundation in 2002. Of the 94 companies that responded, the vast majority reported that intermittent leave has been a problem to administer (87.2%). . . . Most of the respondents who were able to quantify the cost of complying with the regulatory FMLA recordkeeping and notification requirements reported a moderate to significant cost burden, with annual estimated costs *per employer*

ranging from \$213,188 to \$1.3 million, *excluding* employer costs for complying with other existing federal recordkeeping and reporting requirements.

Doc. 10107A, at 2-3.

Moreover, as was noted in the RFI, Westat found that establishments with more than 250 employees experienced greater negative impacts on productivity and profits than smaller establishments covered by the Act. Criterion Economics presented an analysis stating that “[i]n reporting its results, the Westat survey weights the results by the number of establishments, a weighting scheme that biases the overall results in favor of responses provided by small establishments, as there are far more small firms than large firms in the United States. . . . weighting the Westat survey results by employment has a large effect on the reported impact.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 14-15.

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## I. Impact of Unscheduled Intermittent FMLA Leave

As discussed in Chapter IV, the Department received a variety of comments regarding the impact of unscheduled intermittent FMLA leave. At the same time, notice issues notwithstanding, comments from employees demonstrate that it is the unpredictable nature of certain serious health conditions that makes the use of intermittent leave invaluable.

Representative of many employer comments, the National Business Group on Health described the impact of unscheduled FMLA leave this way:

Unscheduled leave presents different problems than scheduled FMLA leave because of the lack of advance notification and unpredictability of the employee’s time away from work. Furthermore, it creates significant problems if the employer cannot obtain adequate staffing. Additionally, the need for overtime or temporary

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<sup>41</sup> Similarly, epidemiologists might find a problem due to the cluster of an illness in a specific locality or demographic group, even if the average incidence in the general population is low. Therefore, it is not sufficient to only examine the average impact on employers. It is also necessary to examine the impact on employers experiencing problems to determine if there is some pattern involved.

<sup>42</sup> Janemarie Mulvey, *The Cost and Characteristics of Family and Medical Leave*, Employment Policy Foundation Issue Backgrounder (Apr. 19, 2005). *But see* Institute for Women’s Policy Research, *Assessing the Family and Medical Leave Act: An Analysis of an Employment Policy Foundation Paper on Costs* (June 29, 2005).

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personnel increases operating costs. With unscheduled leave, employers cannot give advance notice of the need for overtime to those employees who must fill in for the employees on FMLA leave, negatively affecting employee morale. Scheduled FMLA leave, on the other hand, gives the employer a better opportunity to plan, though it still raises operating costs. It allows an employer time to obtain coverage during an employee's absence from the employer's own staff pool and to administer the FMLA leave in a timely manner. Also, the other employees who fill in for colleagues on FMLA can better plan their overtime.

Doc. 10268A, at 2; *see also* South Central Human Resource Management Association, Doc. 10136A, at 7.

However, the Women's Employment Rights Clinic at Golden Gate University School of Law provided this view of the benefits to workers of intermittent FMLA leave:

Intermittent and reduced schedule leaves are central to employees' ability to balance work and family. . . . the opportunity to take leave in limited increments is extremely important to workers. In the case of one's own medical needs, intermittent and reduced schedule leave allow employees to continue working while undergoing medical treatments that require only partial absence from work. This not only gives the employee the opportunity to continue earning wages, but also to continue as an active participant in the workforce . . . For those who need only partial leave for care of a family member, such flexible leave arrangements give the worker the opportunity to maintain much needed earning capacity during periods of increased medical and caretaking expenses.

Doc. 10197A, at 6.

Keeping workers with chronic conditions employed not only benefits the workers themselves but also benefits society in the form of reduced public assistance payments. For example, one worker stated:

Without [the FMLA], I would have surely missed mortgage payments, car payments and my paycheck would definitely not been enough to provide groceries for the family. The end result would be a damaged credit history in which my family and I would suffer paying higher costs of insurance and other means of credit suffering for years and years, causing unresolved debt hanging over our heads. Not to say the least, without this protection, I probably would have lost my job and all its benefits due to the missed time at work.

An Employee Comment, Doc. 2666, at 1. Another worker stated:

My experience with the Act has been extensive as I used both intermittent and continuous leaves to care for my elderly mother . . . Without this important benefit . . . [o]ur only alternative was to deplete Mother's assets and apply for Medicaid which would put the financial responsibility of her care on the Federal Government. With this Act we feel we were able to accomplish our goals and avoid shifting the burden of care to the government.

An Employee Comment, Doc. 4720, at 1.

On the other hand, as explained in Chapter IV, many comments indicate that unscheduled intermittent FMLA leave is difficult for employers because employee absences can be unpredictable and occur with little or no notice. However, it is precisely the unpredictable nature of many serious health conditions that makes the ability to take unscheduled intermittent FMLA leave so important for employees.<sup>43</sup>

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<sup>43</sup> See Joan C. Williams, *One Sick Child Away From Being Fired: When "Opting Out" Is Not an Option*, University of California, Hastings College of the Law, 2006, at 31.

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## J. Impact of Unscheduled Intermittent FMLA Leave on Productivity and Profitability

Although employer comments suggest that unscheduled intermittent leave is a problem, others pointed to data from the national surveys that suggest intermittent FMLA leave is not a significant problem. Two types of data were submitted as evidence that employers are overstating the impact of intermittent FMLA leave: data on productivity and profits, and data on the use of intermittent FMLA leave.

For example, the AFL-CIO stated:

[A]lthough intermittent leave has now become a focal point of employer complaints about the FMLA, in our survey just 12 percent of all respondents reported having taken intermittent leave. This finding supports that available evidence, which shows that ‘intermittent leave is used infrequently and has imposed minimal burdens on employers.’ Anne Wells, Note, *Paid Family Leave: Striking a Balance Between the Need of Employees and Employers*, 77 S. CAL. L. REV. 1067, 1081 & nn.94-98 (2004). In fact, Westat found that ‘[a]bout a fourth of leave-takers (27.8%) had at least one intermittent leave during the [2000] survey reference period.’ 2000 Westat Report at 2-18.

Doc. R329A, at 7-8.

As was noted previously, the use of averages tends to minimize the impact on some employers. The fact that relatively small *averages* of workers in the Westat employer survey and the AFL-CIO survey used intermittent FMLA leave may obscure the fact that some employers in some industries or workgroups are experiencing disruptive rates of unscheduled intermittent leave use.

Moreover, some commenters indicated that the use of unscheduled intermittent FMLA leave by a few workers can significantly disrupt the operations of their employers depending on their positions, duties, and the type of work being performed. As one HR manager stated, the regulatory “definition of ‘key employee’ . . . has to do with income level. The reality is our transit drivers are key employees because without them, the bus does not run. So I think I would change the definition of what is ‘key’. A policeman is key. A fireman is key. A transit driver is key.” Doc. 2627A, at 3. “[M]any positions only have one person or one person per shift in a job class. When this person is absent for any reason, specific duties do not get carried out for the company.” Infinity Molding & Assembly, Doc. 5192A, at 1.

Some commenters asserted that the problems being cited by the employers result more from management practices than the FMLA. For example:

- Cummins Inc. noted, “[i]t has been our experience that facilities that maintain stringent attendance management policies often experience the highest number of FMLA intermittent leave requests.” Doc. 10340A, at 2.
- Madison Gas and Electric Company stated “[t]he belief that unscheduled, intermittent FMLA is increased due to poor management and labor-relations issues is valid. Employees may concentrate on chronic health issues more heavily if their work situation is not fulfilling or becomes difficult. It is very interesting when reviewing FMLA leave data to see an employee with a certain condition taking large amounts of intermittent, unscheduled FMLA leave and another with the same condition taking very little time.” Doc. 10288A, at 5.

As mentioned in Chapter IV, other comments indicate that certain provisions in collective bargaining agreements (CBAs), in conjunction with the FMLA, may provide an opportunity for



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employees to work particular times or shifts, and avoid others. These include: (1) provisions that provide that bargaining unit workers can receive premium pay (e.g., for working a holiday or a particular shift) without having to complete a 40 hour work week; and, (2) provisions that workers have to be paid a full day of pay regardless of the actual amount of time they are at work. For example:

- “Common practice is to take FMLA thru the week but work on the weekends at 1.5 to 2.0 [times] the salary.” A Human Resource Manager Comment, Doc. 4917, at 1.
- “We even had one individual during our busy period of time (where overtime was abundant) come in four hours before the start of their shift (2 hours at double time and 2 hours at time and one half) and then at the start of their regular shift go home [on] FMLA. In that way she would earn seven (7) hours of pay and leave while not working the shift (2<sup>nd</sup> shift) that she hated.” Roger Bong, Doc. 6A, at 4.
- “Take, for example, a Yardmaster who frequently calls in at the start of his or her shift stating [that] he or she will be using . . . intermittent FMLA leave. . . . Under the Yardmaster collective bargaining agreement, Yardmasters cannot work part of a shift and if a replacement is called, the replacement must be paid for the entire shift regardless of how long he or she is needed. Thus, the absent employee may say he or she only needs two hours of FMLA leave and is charged accordingly but ends up with eight hours off from work because the replacement works the entire shift. . . . Another similar scenario is presented when an employee’s health care provider indicates he or she cannot work more than four hours per day, for example, due to exhaustion . . . Again, a replacement must be called and paid for the entire shift

under the labor contract.” Union Pacific Railroad, Doc. 10148A, at 8.

- “Due to the ‘no penalty’ clause in FMLA, absent employees acquire ‘super seniority’ in many cases. For example: Our labor agreement allows us to deny holiday pay under certain conditions. Although the entire workforce is covered under the labor agreement, FMLA privileges afford special treatment to employees absent for FMLA reasons.” Interbake Foods, Doc. 10012A, at 2.
- “In the railroad industry, workers from the railroad’s pool or extra board are called in roughly two or three hours before they are needed (as prescribed in the pertinent labor agreement). Unfortunately, a railroad worker so inclined can use the existing regulatory scheme to repeatedly use very small increments of FMLA leave to avoid unwanted assignments - disrupting railroad operations and unfairly impacting his or her co-workers. For example, a worker could call in to the railroad at 1:00 a.m. and take FMLA leave (e.g., for a chronic migraine), thereby preventing the railroad from assigning him or her to a 3:00 a.m. train run (or whatever assignment that worker may find unpleasant). That same worker can then call back a short period later (as soon as the worker feels that he or she has safely avoided that assignment), knowing that he or she would be assigned a later train run - thus obtaining a more favored assignment[.]” Association of American Railroads, Doc. 10193A, at 6.

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## K. Specific Industries Report Difficulties with Unscheduled FMLA Leave

Some industries, and operations within industries, may have more problems with employees' use of unscheduled FMLA leave than others.

"[E]conomic theory and empirical research indicate that the costs of absenteeism vary depend[ing] on the characteristics of firm production functions." National Coalition to Protect Family Leave, Doc. 10172A, Criterion Economics, Attachment at 18. "A regulation that reduces labor productivity, for example, will have a larger impact on economic welfare in industries where production requires 'fixed proportions' of capital and labor (e.g., air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor." *Id.*, at 6. Further, "[i]n some industries, employee absenteeism will have a relatively small effect on firms' overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment." *Id.*, at 8.

The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models. For example, the United States Postal Service reported "[i]n a time-sensitive environment . . . unscheduled leave presents significant operational challenges." Doc. 10184A, at 9. The United Parcel Service stated "employers typically can arrange coverage for an employee who might require intermittent leave to take his mother to regularly scheduled . . . treatments. However, it is a huge burden for management to cover for an employee who is certified for intermittent leave for chronic . . . [conditions] and who calls in with no advance notice . . . especially in time-sensitive / service-related industries." Doc. 10276A, at 5.

In many situations, the absence of just a few

employees can have a significant impact. For example, "[w]ith respect to unscheduled intermittent leaves, some employers find they have to over staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers are required to work employees overtime to cover the absent employee's work. Both of these options result in additional costs[.]" Spencer Fane Britt & Browne LLP, Doc. 10133C, at 19.

The Department also received many comments discussing the benefits that FMLA leave has for workers in these industries, and some of the issues employees face trying to take FMLA leave in these industries. *See* Chapter XI.H.3; *see also* Chapter I. As noted earlier, often these benefits are immeasurable and priceless. Although they will not be repeated here, they should be taken into account.

Comments received in response to the RFI suggest at least four types of business operations appear to have particular difficulty with unscheduled intermittent FMLA leave: 1) assembly line manufacturing; 2) operations with peak demand; 3) transportation operations; 4) and operations involving public health and safety.

### 1. Assembly Line Manufacturing

One commenter explained, if a single worker is missing or has to leave, the line may have to be shut down until a replacement arrives.

My company is a manufacturing facility . . . Unfortunately, the production process is often slowed down or brought to a halt when an employee is out on FMLA. Not all of our product lines have employees cross-trained to work there. Intermittent FMLA affects the employee's productivity if they are not able to work a full day to produce the product needed to meet the customer demands. Employees often do "double duty" to cover a team member who

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is out on FMLA, which in turn causes stress and feelings of resentment.

Cooper Bussmann, Doc. 247, at 1.

The National Association of Manufacturers summarized the problem for U.S. manufacturers in this way. “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[.]” Doc. 10229A, at 3.

Some comments said that problems such as those reported above are merely scheduling issues and are not really problems with the FMLA, and that employers should expect some workers to be absent each day and should hire, staff, and schedule accordingly. For example, the Center for WorkLife Law stated that “[e]mployers should not rely on co-workers to cover for absent employees as a matter of course. Rather, co-workers should be used to pick up the slack when no other option is available. Most employees will need to take FMLA leave at some point during their career, and good management practices dictate that employers recognize this eventuality and plan for it.” Doc. 10121A, at 7.

Employer commenters had a different view.

Given the need for US manufacturers to control costs and compete in a global market, we do not have the luxury of having a ‘pool’ of surplus employees to cover for unplanned absences. Six to seven years ago we were able to have a few employees in a floater pool for flexibility, but [with] the utilization of lean manufacturing techniques [that enables] us to compete with foreign competition, we no longer have those ‘extra’ employees. I know most, if not all, of the manufacturing people that I interact with in our State no longer have this luxury.

Ed Carpenter, Human Resources Manager, Tecumseh Power Company, Doc. R123, at 1.

Companies with production lines have no useful work for an employee who reports to work a few hours late. For example, a manufacturing facility begins its production line at the start of the shift. Within the first hour or two of the shift, the company needs to fill *all job positions* so that the production line can begin operations. An employee with a chronic condition . . . has an episode that causes him to take 2-4 hours of unscheduled FMLA leave . . . By the time the employee reports to work . . . all jobs on the production line have already been filled and there is no work for the employee. If the employee is permitted to ‘bump’ the person assigned to do his tasks, then the employer is still left with another employee with nothing to do.

Clark Hill Inc., Doc. 10151A, at 2.

Honda’s comments indicate that employers could incur substantial costs even when there are floaters available to keep the line moving.

[B]ecause all work stations must be covered in assembly-line manufacturing, employers must have extra workers to cover possible unscheduled, intermittent leave . . . Such absences increase the costs of manufacturing by increasing the number of extra employees who have no regular work but are ‘floaters’ to cover for unscheduled absences . . . Furthermore, because those ‘floaters’ or ‘fill-in’ workers are not as experienced or knowledgeable, they may not be able to keep up with the normal pace . . . Because they move from department to department depending upon the need, they cannot be expected to have proficiency of an associate regularly assigned to that process. Therefore, production units may be lost, and, to make up for the lost units, the whole department or shift may have to work overtime. The employees in attendance are inconvenienced, and the employer

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has incurred increased costs for the same number of units.

Doc. 10255A, at 4-5.

## 2. Operations with Peak Demand

Commenters noted that in contrast to assembly line manufacturing, some operations primarily experience problems with unscheduled intermittent FMLA leave during their periods of peak demand. At other times, such leave can be more easily accommodated. Two examples are electric utilities during power outages, and call centers.

Although power interruptions are, in many cases, unavoidable, Exelon's customers expect the restoration of power as quickly and safely as possible. Indeed, in some cases, a customer's safety and wellbeing are dependent upon the prompt restoration of service . . . . The nature of Exelon's business requires employees to work overtime, particularly employees who are responsible for restoring electrical service to customers or who are responsible for responding to customer inquiries regarding electrical service. When employees with these duties are unable to work overtime [because of FMLA medical certifications], their co-workers have to pick up the burden . . . . Simply put, when a customer is without power in the middle of the night, Exelon does not have the option of deciding to restore the customer's power the next morning, when the employee needing FMLA leave from overtime is able to come to work.

Exelon, Doc. 10146A, at 1 and 3.

Our company has several divisions, with the one being impacted the most by FMLA our call center. The call center is staffed by call volume and based on the expected minutes of an employee's time on the phone during a shift. Intermittent FMLA in this division causes problems with phone coverage. This frequently means that we . . . have to offer overtime to employees who will cover someone's shift (whenever enough notice is given), resulting in increased wage expenses.

Another scenario is that our service level agreements with our customers suffer the consequences of our center being understaffed. This has a more long-term effect that may result in our customers not renewing contracts with our call center.

Leslile Masaitis, Doc. 224, at 1.

Moreover, it is impossible to calculate or repair the loss of goodwill that results from frustrated customers who are kept waiting for [call center] service and from disappointed customers whose needs remain unmet because of the absences. In one office, in one month alone in 2006, intermittent FMLA absence resulted in over 8,900 unanswered calls.

Verizon, Doc. 10181A, at 4.

## 3. Transportation Operations

The Department received a number of comments indicating there are unique FMLA issues for the transportation industry. Typically, the plane, bus, or train cannot leave until the crew is present. Many commenters pointed out that any delay in staff can result in a delay that inconveniences many passengers and customers. Moreover, if the individual taking FMLA leave arrives after the departure, there may be no work for that individual for several hours.

Our customers depend on us to get them to work, school or medical appointments on time. When drivers are late to work . . . their route must quickly be given to another driver, and the bus must get out on the road. This can mean that a busload of people is late. . . . Employers in time-sensitive industries such as public transportation whose existence depends on being able to make pull-out (getting the buses out on the road, particularly at peak ridership times); arriving at destinations on time; meeting up with other buses on schedule, etc., are really in a bind when an employee can circumvent rules by calling in to the dispatcher and simply saying "I'm running late because of FMLA."

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Metro Regional Transit Authority, Akron, Ohio, Doc. 10118A, at 1.

Unforeseen, intermittent FMLA leave is not only having a negative impact upon our operations, but also upon our customers, the general public. When bus operators report off work, in many instances, at the last possible moment, a bus may be late or not show at all. Additionally, extra operators must be scheduled to work in anticipation of coworkers calling off work. These costs are critical to nonprofit organizations that rely, to some degree, upon government funding. The current provisions for intermittent leave present a significant burden to schedule-driven operations.

The Port Authority of Allegheny County, PA, Doc. FL135, at 2.

Three workgroups represent 82% of all FMLA leave at Southwest and each of them has operational job responsibilities: Ramp, Operations and Provisioning Agents; Reservations Sales Agents; and Flight Attendants . . . When these employees take FMLA, it directly impacts Southwest's ability to operate our published flight schedule, much less on time and with efficiency. When these employees are absent, flights do not take off without another employee taking their place . . . the replacement staffing costs alone represent approximately \$20 million annually . . . Southwest estimates that it must employ and pay as many as 200 additional Reserve Flight Attendants each month to cover intermittent FMLA.

Southwest Airlines Co., Doc. 10183A, at 3, 5.

An office worker who shows up one hour late for work may find some extra paperwork on his desk which he can handle during the day without affecting others. A flight attendant who reports at 10 a.m. for a 9 a.m. departure has almost certainly created significant operational problems. He has either (a) forced 100-400 passengers to wait and miss later connections, or (b) caused the airline to reposition another flight

attendant onto the aircraft because, by federal regulation, an aircraft cannot board passengers or take off without a minimum number of flight attendants. The ripple effects of such delays also can affect an infinite number of passengers, as well as numerous coworkers . . . in cases where airline employees work on planes that have left the airport, it is physically impossible for an employee to report to work on a plane that has taken off.

Air Conference, Doc. 10160A, at 4, 11.

There are 55 employees in our workforce. . . . Three are [on] FMLA [leave]. . . . Buses don't leave the garage without drivers. Buses are not properly maintained without enough mechanics. Therefore we have to hire more people to get the job done while we wait to see if the four that are off will ever come back. If they do, we have to lay off the people that we hired and trained to do the job.

The Transit Authority, Huntington, WV, Doc. FL3, at 1.

#### **4. Operations Involving Public Health and Safety**

The RFI record indicates that unscheduled intermittent leave can have an adverse impact on operations involving public safety. There are numerous examples in the record describing the impact of such leave on police, fire, correctional and health operations.

##### **a. Hospitals, Clinics and Long-Term Care Facilities**

Unscheduled leaves of absence, whether covered by the FMLA or not, naturally present staffing and operational difficulties, particularly for hospitals and other health care facilities that must provide treatment and services for patients' medical needs . . . for many years, the health care industry has been confronted with a serious nursing shortage. Therefore, hospitals and other health care facilities must supplement their regular nursing staffs through the use of nurse agencies in order to satisfy

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patient:nurse ratios in order to provide optimal patient care and treatment. It can be very difficult, however, to have an agency nurse assigned to a facility in a timely manner when a nurse experiences an unforeseeable absence, particularly in situations requiring nurses with specific expertise in a clinical area. In addition, when non-licensed (i.e., non-nursing) clinical staff experience unforeseeable absences, nurses and other staff members are often required to cover their duties, as it can be equally difficult to schedule a replacement employee in a timely manner to meet patient needs. Clearly, these situations impose significant stress on a workforce responsible for delivering optimal patient care.

Medstar Health, Doc. 10144A, at 11-12.

The Commonwealth of Pennsylvania expressed concern about the use of unscheduled intermittent FMLA leave making it difficult for hospitals to maintain necessary staffing levels. “Some of our 24/7 direct care operations also experience difficulty in meeting federally mandated staffing standards of the Commission of Accreditation of Healthcare Organizations because of the intermittent use of FMLA.” Doc. 10042A, at 3. Allina Hospitals and Clinics expressed concern about the impact of unscheduled FMLA leave on patient care. “The great majority of Allina’s employees work at hospitals and clinics and are involved in direct patient care . . . These provisions make it very difficult to ensure that hospitals and clinics will be adequately staffed . . . . Yet, Allina has had to allow emergency room staff, surgical support staff, nurses, physicians and ambulance drivers to take this extensive, unplanned leave . . . regardless of the impact on patient care.” Doc. 641, at 1.

- The concern about patient care was also mentioned in the comments by Hinshaw and Culbertson. “[W]e have conducted a formal survey of our clients with respect to the questions raised in the Federal Register . . . The general concern with unscheduled leave .

. . . and intermittent leave . . . [is] patient safety (at healthcare entities) can become a problem when staffing is low or when temporary employees are used[.]” Doc. 10075A, at 1, 3.

- Long term care (LTC) “employers distribute work among its staff or hire agency staff to care for patients. Full time employees may be offered incentives beyond overtime pay, or staff may be brought in from affiliated employment sites, which means that travel costs must be covered. LTC employees provide direct care to frail, elderly and disabled individuals who are in need of clinically complex, special care. Therefore, when employees take FMLA leave, adequate numbers of trained replacement staff are especially important. Notably, some states have specific minimum requirements for nurse to patient staff ratios in LTC facilities in order for Medicare/Medicaid beneficiaries to reside in these facilities. On the federal level, facilities must have ‘sufficient staff’ to provide nursing care to residents. Therefore, having adequate staff on hand not only is necessary to promote good patient care, but it is a state and federal mandate.” American Health Care Association, Doc. 10321, at 1.

**b. Other 24/7 Operations**

Franklin County Human Resources cited correctional institutions and nursing homes. “Unscheduled leave is where the hardship lies in continuing normal operations. This is critical for a 24-hour operation. This is more difficult in our more service-based departments that include a Jail and Nursing Home. In these operations, we must have a proper number of nurses and corrections officers . . . [and] unscheduled absences . . . places demands on other employees they were not prepared for.” Doc. FL59, at 5.

- The Indiana State Personnel Department

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cited correctional institutions and mental health facilities. “Operations of 24/7 facilities housing correctional offenders or persons with mental illnesses are adversely impacted by unscheduled intermittent FMLA leave due to legal requirements for specific staff/resident ratios and related safety issues.” Doc. 10244A, at 3.

c. *Emergency 911 Operations and Public Safety*

The situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators, or other employees requiring face-to-face relief, because if the person’s shift is not able to be covered by a colleague who in some instances is required to work overtime, then the public may receive a slow response to an emergency call. Moreover, on certain holidays, during public events or declared emergencies . . . the NYPD must be able to double the size of its staff. Yet, the inordinate number of employees who call in sick for allegedly FMLA qualifying reasons on holidays . . . and during public emergencies . . . places the NYPD in a precarious situation of trying to balance between an individual employee’s rights and public safety concerns. Moreover, when more than 20% of the employees on a shift call in claiming the need for an FMLA-related reason on the same day – which happens frequently on holidays such as New Year’s Eve – the employer, in this case, the NYPD, may be left short-staffed and unable to provide the necessary safety-sensitive services to the public.

New York City, Doc. 10103A, at 5.

- New York City provided many other examples of “public safety sensitive positions” including police officers, firefighters, sheriffs and sanitation workers. *Id.*, at 2 n.1.

- A manager of a 911 center also expressed similar concerns. “The work in the 9-1-1 Center is very specialized and requires hundreds of hours of training. I cannot hire ‘temps’ from an office service to replace absent employees. The majority of absences require that I hire overtime, and often, that overtime is forced on employees. Currently, five of the seven employees assigned to day shift are on FMLA. Three other employees in the division (of 27 employees) are also on FMLA and another three have recently submitted FMLA paperwork for approval. With one exception, these medical conditions have not required hospitalization. Instead, these employees are given free license to call in sick on a day-to-day basis. And they do. Frequently. The remaining employees are working an enormous amount of short notice overtime and are denied their own personal and family time in order to cover these absences. The number of overtime hours being worked leads to overtired people making critical life and death decisions in an emergency driven environment.” Doc. 5193, at 1.
- The Fairfax County Public Schools provided the example of school bus drivers. “[T]he essence of a school bus driver’s job is to deliver children to school on time and safely. A few bus drivers have used chronic conditions such as CFS, depression, or sleep problems as an excuse not to report on time and not to call in when they will be late. They claim that their ‘condition’ precludes them from providing notice or from being on time. These behaviors mean that children are often left waiting on street corners in all weather for some other bus driver.” Doc. 10134A, at 2.

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## L. The Impact of FMLA Leave Use in the Workplace

The 2000 Westat Report found that during a worker's FMLA leave, employers most frequently assign their work temporarily to other employees.

### Most Frequently Used Method to Cover Work When an Employee Takes Leave for a Week or Longer

Temporarily Assign Work to Other Employees	74.5%
Hire Outside Temporary Replacement Workers	18.0%
Put Work on Hold Until Employee Returns	2.4%
Some Other Method	4.3%

Source: 2000 Westat Report, Table A2-6.5.

These results are consistent with the Society for Human Resource Management's more recent findings:

Employer approaches to covering work when an employee is on unscheduled intermittent leave vary based upon such factors as the nature and size of the employer's business, the employee's position, the number of individuals available to provide coverage in the employee's department, and business needs in that department. Employers may cover the leave-taker's work with: (i) hiring a temporary worker; (ii) asking current employees to work overtime; (iii) spreading the work among current employees; or (iv) rearranging other employees' schedules to provide coverage. Sometimes, however, employers are unable to cover the work, particularly in situations involving unscheduled intermittent leaves. These situations can and do result in missed deadlines, lost production, and other business losses.

Doc. 10154A, at 7.

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<sup>44</sup> See 2000 Westat Report, Table 4.22 at 4-19.

<sup>45</sup> See *id.* at Table 4.20 at 4-18, and Table 4.23 at 4-20. It should be noted that 17.4 percent of workers felt co-workers taking leave had a positive impact and 67.4 percent felt it had no impact on them. Moreover, 63.9 percent did not feel that providing 12 weeks of unpaid leave was an unfair burden to co-workers.

The 2003 Society for Human Resource Management survey found that assigning some work temporarily to other employees and hiring temporary outside replacements were the two most common methods used to cover the work of an employee absent on FMLA leave, with average ratings of 4.42 and 2.86 out of a possible 5, respectively. *Id.*, at 13.

Westat's employee survey also found that 32.1 percent of employees worked more hours than usual, and 22.9 percent worked a shift not normally worked when co-workers took leave.<sup>44</sup> Moreover, 36.1 percent of workers felt that providing 12 weeks of unpaid leave for family and medical reasons was an unfair burden to employees' co-workers, and 15.1 percent of employees felt that their co-workers taking leave had a negative impact on them.<sup>45</sup>

The comments submitted for the RFI supplement this record by providing greater details and insights on this issue. For example, Darby Associates commented that "[a]n important cost dimension is reflected in the burdens imposed upon fellow employees. These are not trivial . . . The record indicates that fellow employees who 'fill in' for unscheduled leave-takers are often obliged to miss professional appointments and family engagements. Employees also cite added workplace stress, resentment and uncertainty. There are considerable costs to employees that must work overtime or more intensely to cover for another employee 'out' on FMLA leave. This is especially true for unscheduled intermittent leave . . . employees are very unhappy when they believe that a fellow employee is gaming the system and forcing them to work extra when the person is abusing FMLA laws." Doc. 10172A, Attachment at 26.

The record indicates if the morale of workers covering for the absent workers on FMLA leave begins to suffer, these workers may in turn seek and need their own FMLA certifications, causing an even larger impact on productivity and attendance. For example:

- Workers "also report that employees on



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unforeseen, intermittent leave indicate that they can and will misuse the system when they want to. As a result, more and more employees are applying for unforeseen, intermittent leave so they can take time off of work whenever they choose.” YellowBook, Doc. 10021A, at 1.

- “Productivity and services inevitably declined and morale suffered. Some of the overworked employees developed their own serious health conditions.” City of Portland, Doc. 10161A, at 2.
- “In larger companies, once employees understand that FMLA will allow the use of time off of work, without penalty and providing job protected leave, they have become savvy with the use of FMLA to their benefit and they do not hesitate to let their co-workers know how it works.” First Premier Bank, Doc. 10101A, at 4.
- “We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida . . . Once one employee ‘gets away with it’, all employees are lined up at their doctors office to acquire intermittent FMLA leave.” Akers Packaging Service, Doc. 5121, at 1.

The issue of leave “contagion” as a behavior pattern is discussed in research cited in the RFI by Harold Gardner, et al., titled *Workers’ Compensation and Family and Medical Leave Act Claim Contagion*. It notes:

Economists and psychologists have been interested in why groups tend to engage in repeated behavioral patterns . . . The social barrier theory suggests

that future claims will increase as prior claims break social barriers to claim filing. An example of a social barrier effect is a driver who wants to speed but does not because he fears the consequences of being caught or the increased probability of an accident. These concerns create a psychological barrier that he may not be able to cross even though there may be no police presence. If several speeding motorists pass the driver, he now finds it more psychologically acceptable to speed. ‘Contagion’ occurs when an individual observes others taking an action that has not been possible for him to take because of a psychological barrier, and seeing others break the barrier itself increases his own ability to break it as well . . . an alternative economic view is claimant learning by proxy . . . A workers’ compensation claim by one member of a workgroup makes others more aware of its provisions for medical payments, disability pay, and rehabilitation services. A worker gains claimant capital through another workers’ claims, by proxy. In other words, workers learn about the benefits of workers’ compensation claims when their co-workers make workers’ compensation claims, and this information lowers future barriers of filing claims.

71 Fed. Reg. 69504, 69514 (Dec. 1, 2006).

According to CCH’s 2006 *Unscheduled Absence Survey*, “the rate of unscheduled absenteeism climbed to its highest level since 1999, costing some large employers an estimated \$850,000 per year in direct payroll costs, and even more when lost productivity, morale and temporary labor costs are considered.” CCH estimates that 18 percent of unscheduled absences are due to personal needs, 12 percent due to stress, and 11 percent due to an entitlement mentality.<sup>46</sup>

As discussed in Chapter IV, several commenters noted the misuse of intermittent FMLA leave for the purpose of avoiding mandatory overtime, and argued that this can have an adverse impact

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<sup>46</sup>CCH, 2006 *CCH Unscheduled Absence Survey*, available online at: [www.cch.com/press/news/2006/20061026h.asp](http://www.cch.com/press/news/2006/20061026h.asp).

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on their co-workers who are forced to cover for absent workers. However, some academic research postulates the negative attendance effects on those who are working to cover the absence of a person on FMLA leave may be related to new serious health conditions that arise—not additional misuse:

The loss of firm-specific human capital of the initial claimant places an increased burden on the workers in the group who remain because they must “pick up the slack.” The remaining workers may also be diverted from their assigned work if they have to train the replacement worker in those skills he needs to function as part of the group . . . The increased burden creates a higher stress environment. The stress felt by these workers may spread to other workers . . . Job-related stress has been found to be positively correlated with increased levels of coronary disease and mental illnesses . . . Stress can exacerbate preexisting conditions or cause new medical condition because of greater physiological pressure on the body created by psychological factors. Workers must exert more physical and mental effort to pick up the slack with the departure of the original claimant’s firm-specific human capital. The higher stress environment will lead to more illnesses and therefore more claims being filed under . . . FMLA . . . Stressed workers are more likely to be absent, as they leave the work environment temporarily to cope with the stress.

Harold Gardner, et al., *Workers’ Compensation and Family and Medical Leave Act Claim Contagion*, *Journal of Risk and Uncertainty*, Volume 20, Jan. 2000.<sup>47</sup>

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<sup>47</sup> See also National Institute for Occupational Safety and Health, *STRESS...At Work*, NIOSH Publication No. 99-101, available online at: [www.cdc.gov/niosh/stresswk.html](http://www.cdc.gov/niosh/stresswk.html).

<sup>48</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (discusses the concept of reasonableness).

<sup>49</sup> For more information on risk management matrices see, for example, Corinne Alexander and Maria I. Marshall, *The Risk Matrix: Illustrating the Importance of Risk Management Strategies*, *Journal of Extension*, April 2006, Volume 44 Number 2, Article Number 2TOT1, available online at: [www.joe.org/joe/2006april/tt1.shtml](http://www.joe.org/joe/2006april/tt1.shtml).

Thus, based on the record, although some amount of contagion (i.e., the use of FMLA leave increases as more and more workers in a facility begin to take it) appears to be taking place, the causes of the increase are not certain. In addition to alleged misuse, the increase in the use of unscheduled intermittent FMLA leave seen in the data submitted by some employers could be due to other factors, such as workers suffering from the adverse health effects associated with the stress of staffing shorthanded operations.

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## M. Risk Management Analysis of Unscheduled Intermittent Leave

The techniques of risk management analysis and the concept of reasonableness can be used to explain how unscheduled intermittent FMLA leave can have different impacts on different employers, and account for such divergent comments about the economic impact and cost and benefits of the FMLA that the Department received in response to the RFI.<sup>48</sup>

Figure 1, below, presents a standard risk management analysis matrix to illustrate how risk management principles apply to the issue of unscheduled intermittent FMLA leave.<sup>49</sup> It consists of four combinations of the probability (or rate) that unscheduled intermittent leave will occur, and consequences (is the cost high or low) associated with such leave for employers. In Block I, the probability that, or rate at which, unscheduled intermittent leave occurs is low, and the cost of such leave for employers is low. In Block II, the probability that, or rate at which, unscheduled intermittent leave occurs is higher, but the cost of such leave for employers remains low. In Block III, the probability that, or rate at which, unscheduled intermittent leave occurs is relatively low, but the cost of such leave for employers is high. Finally, in Block IV the probability that, or rate at which, unscheduled intermittent leave occurs is high, and the cost of such leave for employers is high.

Figure 1  
Risk Management Matrix

<b>Probability</b>	High	<b>II</b>	<b>IV</b>
	Low	<b>I</b>	<b>III</b>
		Low	High

**Costs**

Based upon the available evidence, the Department believes that most FMLA covered establishments are in Block I with respect to the use of unscheduled intermittent FMLA leave. The data indicate that only a small portion of the workforce covered by the FMLA takes any form of FMLA leave, and even a smaller portion takes unscheduled intermittent FMLA leave. If an absence occurs, the reasonable employer will 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. These establishments probably constitute most of the 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.<sup>50</sup>

For the establishments in Block II where the probability (or rate) of unscheduled intermittent leave is relatively high, but the overall cost to these establishments remains low because of the low cost associated with each absence, the reasonable employer may take steps to manage the leave (e.g., talk to the workers, get the workers to call in before taking leave), but will most likely continue to resolve these low cost events on a case-by-case basis. It is likely that these establishments also report that intermittent FMLA leave does not adversely impact either productivity or profits.

On the other hand, most of the establishments in the time-sensitive industries discussed above (*see* Chapter XI, section K.) are probably in Block III. Although only a small portion of their workforce may take unscheduled intermittent FMLA leave, or is certified for a chronic condition, the cost of an absence by a worker is relatively high (e.g., the assembly line can not run as fast or it may

<sup>50</sup> See 2000 Westat Report, at 6-12.

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take longer for the power to be restored). For the establishments in Block III, the overall cost is low if unscheduled intermittent leave does not occur, but high if it does. Here the reasonable employer is likely to take steps to reduce both the probability and the consequences associated with an absence. This may include more rigorous absence control systems and policies to discourage absences, overstaffing (e.g., the use of floaters or on-call workers), and the use of mandatory overtime to ensure that the time-sensitive operations are adequately staffed when some workers are unexpectedly absent. These establishments clearly incur some additional costs to mitigate the impact that unscheduled intermittent FMLA leave has on their operations, and likely report a small negative impact (4.2 to 5.4 percent of establishments) on either productivity or profits if an absence occurs.<sup>51</sup>

To the extent the Department received comments about how family-friendly policies and flexible schedules are good for business (e.g., improve morale, employee retention, productivity, etc.), these comments are most likely from employers in Blocks I and II (pertaining to the majority of employees covered by the FMLA). However, reasonable employers in Block IV, who face the high probability of high cost absences associated with FMLA leave (e.g., a few workers taking leave that results in an assembly line being shut down for a shift), are not likely to be persuaded by comments that reflect a lower risk experience.

For those establishments and workgroups in Block IV 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 previously employed to reduce the risk and costs associated with unscheduled intermittent FMLA leave appears to work very well. Traditionally, employers have provided monetary incentives for workers to report (such as perfect attendance awards) and disincentives for workers not to report (such as an attendance point system).<sup>52</sup>

These establishments, whose risk management systems (e.g., absence control policies, overstaffing, mandatory overtime) appear to be overwhelmed (e.g., Southwest Research Institute, Doc. 10077A), 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).<sup>53</sup> In addition, many of their traditional methods to encourage or control absenteeism (e.g., perfect attendance awards or no fault attendance policies) are not permitted for FMLA protected leave. A reasonable employer in this situation may seek changes to the regulations or the statute,<sup>54</sup> may try to make it difficult for their workers to take unscheduled intermittent FMLA leave by repeatedly questioning the medical certifications or asking for recertifications (see Chapter VI.B.1.c, and comments from: the Association of Professional Flight Attendants, Doc.10056A; the International Association of Machinists and Aerospace Workers, Doc. 10269A; and the Communication Workers of America, Doc. R346A), and whenever possible, may require employees to use paid leave to cover their absences (see the joint comment on behalf of the International Association of Machinists and Aerospace Workers, the Transportation Communications International Union, the Transport Workers Union, and the United Transportation Union, Doc. 10235A; and the joint comment from the American Train Dispatchers Association, the Brotherhood of Locomotive Engineers and Trainmen, the Brotherhood of Railroad Signalmen, the International Brotherhood of Electrical Workers, the National Conference of Fireman and Oilers, and the Sheet Metal Workers International Association, Doc. 10163A.).

As the risk analysis indicates, FMLA-related tension between employers and employees is at its highest for those entities in Block IV. More specifically, the comments confirm this tension arises, for the most part, due to unscheduled intermittent leave.

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<sup>51</sup> See 2000 Westat Report, Table A2-6.13, at A-2-59. Some of these establishments may also report that intermittent FMLA leave has no impact on either productivity or profits if such leave does not occur very frequently.

<sup>52</sup> The Department received many comments about the use of, or inability to use, perfect attendance awards due to certain regulatory provisions and interpretations. The Department interpreted the regulatory provisions on perfect attendance bonuses (section 825.220(c)) in Wage and Hour Opinion Letter FMLA-2 (Aug. 16, 1993):

With regard to attendance incentive plans rewarding perfect attendance, an employee may not be disqualified nor may any award be reduced for having taken unpaid FMLA leave. In a case where the bonus is expressed as an amount per hour worked, the employee on unpaid FMLA leave would receive a lesser amount than an employee who had not been on FMLA leave, as the employee on FMLA Leave is not entitled to accrue benefits during FMLA leave. *See* § 825.220(c).

The Department has restated its position in several opinion letters since then. *See, e.g.*, Wage and Hour Opinion Letter FMLA-31 (March 21, 1994), and Wage Hour Opinion Letter FMLA-110 (Sept. 11, 2000).

Several commenters suggested that no “problem” exists with respect to perfect attendance bonuses, and that employers ought simply to provide bonuses other than “perfect attendance” bonuses. *See* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 2; International Association of Machinists and Aerospace Workers, Doc. 10269A, at 3; SEIU Local 668, Pennsylvania Social Services Union, Doc. FL105, at 3; Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4; American Association of University Professors, Doc. R31A, at 3; and National Partnership for Women & Families, Doc. 10204A, at 10-11.

Several commenters, on the other hand, objected to prohibiting FMLA-protected leave from counting against an employee for the purposes of a perfect attendance bonus. *See* The Southern Company, Doc. 10293A, at 12; Taft, Stettinius & Hollister LLP, Doc. FL107, at 5; National Public Employer Labor Relations Association, Doc. R358A, at 3-4; Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 3-4; G.S.W. Manufacturing, Inc., Doc FL288, at 2; Fisher & Phillips LLP, Doc. 10262A, at 7-8; Edison Electric Institute, Doc. 10128A, at 4; and Carol Hauser, Senior Director of Human Resources, Miami University, Doc. 10032A, at 9.

<sup>53</sup> *See* 2000 Westat Report, Table A2-6.13, at A-2-59.

<sup>54</sup> A similar analysis can be used to show why workers wanted Congress to pass the FMLA. Before the FMLA, a serious health condition could have been a catastrophic high cost event due to the potential loss of employment and health insurance. When women entered the workforce in greater numbers in the 1970’s and 1980’s, fewer families had an adult available to care for family members with serious health conditions, and the probability of families experiencing such a catastrophic event rose. Workers reacted reasonably by trying to limit this risk through the passage of legislation such as the FMLA.

The tension can be traced to two competing needs that are true at the same time: 1) employers’ need for predictable attendance, particularly in certain industries; and 2) employees’ need for unscheduled intermittent leave for their own or a family member’s serious, chronic health conditions that flare up unpredictably and require absence from work. In some cases it appears these competing needs have resulted in employers and employees adopting a more adversarial approach in their FMLA interactions.