

# IV. Unscheduled Intermittent Leave

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The Department asked several questions in the Request for Information about the use of the FMLA for unscheduled intermittent leave.<sup>5</sup> This type of leave has long been a matter of particular concern for employers and employees alike, as shown by previous stakeholder input and public commentary presented during congressional hearings, as well as comments filed with OMB concerning the costs and benefits of regulations. The RFI sought comments on the following issues, among others:

- How the FMLA affects the ability of employers to enforce attendance policies;
- Whether unscheduled intermittent FMLA leave presents costs or benefits different from those associated with regularly scheduled leave;
- Whether the duration of FMLA leave affects the manner in which employers cover the work of employees taking leave;

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<sup>5</sup> Commenters tended to use the terms “unscheduled” and “unforeseeable” to mean essentially the same thing: arising suddenly and with little or no opportunity for advanced notice.

<sup>6</sup> Many of the same commenters who expressed concerns with unscheduled intermittent leave report little or no concerns with scheduled leave, even when taken intermittently. Sun Microsystems wrote:

When an employee notifies his/her manager that he/she is going out on a planned, intermittent leave there is usually an opportunity to: review the employee’s revised work schedule needs during this leave; identify the work load requirements during the leave; and determine the most effective way to get the work completed given the available resources. This is the optimal scenario whereby the employee and his/her manager have the opportunity to create a plan that meets both of their needs, the needs of other employees and provides a smoother transition for the employee. On the other hand, unplanned intermittent leave, which may be unavoidable with some medical conditions is a significantly greater burden on the employer and co-workers.

Doc. 10070A, at 2. See also City of Portland, Doc. 10161A, at 2 (“An employee who is absent for frequent short periods of intermittent leave presents far greater challenges, including last minute staffing adjustments, abuse of leave issues and negative impacts on employee morale.”). These differences are reflected in certain survey results from the Society for Human Resource Management, which found that “71 percent of respondents stated that they have not experienced challenges in administering FMLA leave for the birth or adoption of a child [but] 60 percent of SHRM members reported that they experienced challenges in granting leave for an employee’s chronic condition.” Society for Human Resource Management, Doc. 10154A, at 2.

- Whether and to what extent employees misuse unscheduled intermittent leave;
- How best to accommodate employers’ operational concerns and employees’ interests in legitimate unscheduled intermittent leave;
- Whether and to what extent concerns arise regarding employees not providing prompt notice when taking unscheduled intermittent leave;
- Whether and to what extent the use of unscheduled intermittent leave affects employee morale and productivity; and
- Whether the availability of intermittent leave reduces employee turnover.

Based on the number and tone of the comments the Department received, these questions, along with several related issues involving unscheduled intermittent leave, remain at the forefront of the debate regarding the FMLA and its regulations. The responses to the RFI generally fall into two categories: comments highlighting the disruption that unscheduled intermittent leave causes in the workplace, particularly when that leave is taken in a manner perceived by employers as “abusive”; and comments emphasizing the importance of this kind of leave for workers with certain types of chronic ailments. For example, according to one law firm, “[B]y far, the most problematic type of FMLA leave is unscheduled, intermittent leave due to chronic serious health conditions.” Foley & Lardner LLP, Doc. 10129A, at 3.<sup>6</sup> Many employers echoed this view, indicating that unscheduled intermittent leave due to chronic conditions results in decreased productivity, is difficult to manage, and is ripe for “misuse.” Yellow Book USA assessed the effects of unscheduled intermittent leave as follows:

The use of unscheduled, intermittent FMLA leave has a drastic negative impact on productivity and profits for employers. Larger employers, specifically, have a greater financial

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burden. Employers need to add additional staff in the Human Resources department to track the intermittent absence time used. Additionally, employers need to hire additional management staff to manage the employees on intermittent leave. Larger employers are forced to provide training to managers on a constant basis. Due to the unscheduled nature of intermittent FMLA leave, productivity is greatly impacted. The costs are many. Employers incur unexpected overtime costs, lost sales, missed deadlines, additional administrative costs and negative employee morale. From my experience, I can estimate that 30 intermittent FMLA leaves cost the company \$40,000 annually.

even more relevant today: a growing number of employees find themselves in the “sandwich generation,” faced with the dual responsibilities of caring for children and for elderly parents.

Doc. R329A, at 30. The Legal Aid Society’s Employment Law Center shared similar concerns, asking the Department to “please be mindful of the employee who, in an ideal world, would not suffer from such devastating illnesses that wreck havoc on their own lives. Employees, too, struggle with chronic and episodic illnesses. The FMLA was specifically designed to provide leave in these instances.” Doc. 10199A, at 5.

The Association of Professional Flight Attendants described chronic health conditions typically causing episodic periods of incapacity as perhaps the most important FMLA issue for its members, making the following observation:

Under [the employer’s] no-fault absenteeism policy, these shorter, but perhaps more frequent and unscheduled absences are just as likely (and indeed more likely) to result in the kind of threat to an employee’s job security that the FMLA was designed to protect against. . . . But the availability of FMLA leave for chronic conditions resulting in episodic periods of incapacitation is of critical importance to flight attendants, in large part because of the environment in which they work.

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Many workers suffer from a variety of incapacitating health conditions—*e.g.*, irritable bowel syndrome—that have required treatment over a long period of time, for ten or more years, and which result in periodic incapacitating episodes, but who are otherwise fully capable of performing even the most rigorous kind of work. It does no good to advise these employees, as [the employer] does, to apply for block

Doc. 10021A, at 4; *see also* National Association of Manufacturers, Doc. 10229A, at 9-10 (“Intermittent leave is the point in the FMLA where all the unintended harmful consequences of the law come together to cause an economic nightmare for manufacturers: unchallengeable ailments, unassailable and unannounced absences, and unending burdens with no prospect of a remedy.”).

Offering a very different perspective, many employees and/or their representatives commented that intermittent leave is expressly permitted by the FMLA and that employees who experience unscheduled absences due to chronic conditions are precisely those most in need of the FMLA’s protections. The AFL-CIO stated:

Congress explicitly provided that employees have the right to take leave “intermittently or on a reduced leave schedule when medically necessary.” . . . . The availability of intermittent leave is crucial for families who struggle to balance work and family demands and is necessary for employees who suffer from chronic health conditions or who must provide care for family members with chronic illnesses. Congress’s concern in 1995 for the difficult choices employees must make when faced with a healthcare crisis is

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leave under 825.114(a). While the employee can be expected to experience a number of incapacitating episodes over the course of the year (as in the case of migraines), it is unlikely that any one episode would last for more than three days. But employees who suffer from these recurring bouts of the same incapacitating health condition (whatever its cause) are not like employees who suffer the occasional cold or flu. The few absences experienced as a result of such common illnesses (once every two or three years) are unlikely to jeopardize an employee's job. But for the employee who suffers from a chronic recurring condition, they could experience three or four or even five unplanned absences a year, and their jobs could be jeopardized—but for the enactment of the FMLA.

Association of Professional Flight Attendants, Doc. 10056A, at 7, 9.

As already mentioned in Chapter I, the Department received many comments to the RFI from employees discussing how they were able to take FMLA leave at crucial times in their work lives and how critically important they viewed the FMLA in providing them job security when they needed it most. At the same time, the Department received many other comments from employers discussing their perceptions that the FMLA at times creates situations where some employees can misuse the rights or privileges established under the FMLA. In this chapter, we address the various issues raised in the comments related to unscheduled intermittent leave in three parts. We begin by providing the statutory and regulatory background, addressing the concepts of chronic serious health conditions, intermittent leave, and leave that is not foreseeable. Next, we discuss comments concerning the workplace consequences of unscheduled intermittent leave, including scheduling problems where employees taking intermittent leave provide little or no notice, loss of management control resulting from perceived employee “abuse,” and the impact

on employee morale and productivity. Finally, we examine comments addressing the benefits to employees of the availability of unscheduled intermittent leave.

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## A. Background

Employers and employees made frequent reference in their comments to coverage of chronic conditions under the definition of serious health condition. Both groups recognize that chronic conditions are a primary reason for unscheduled intermittent absence under the FMLA. Three legal concepts underpin the debate regarding unscheduled intermittent leave: chronic serious health conditions, intermittent leave, and leave that is not foreseeable. Together, the interaction of these facets of the FMLA and its regulations gives rise to the issues addressed in this chapter.

### 1. Chronic Serious Health Conditions

There is no definition or specific mention of a “chronic” serious health condition in the Act. The House and Senate Committee Reports do, however, refer to conditions where “the underlying health condition or treatment for it requires that the employee be absent from work on a recurring basis . . . . [A] patient with severe arthritis may require periodic treatment such as physical therapy.” H. Rep. No. 103-8, at 40 (1991); S. Rep. No. 103-3, at 29 (1993). Because of this and other legislative history, the Department created a separate serious health condition definition (one of the six different definitions mentioned in Chapter III, which addresses serious health conditions) for “chronic” conditions. The interim 1993 regulations defined a serious health condition, in part, as a condition involving “[c]ontinuing treatment by (or under the supervision of) a health care provider for a chronic or long-term condition that is incurable or so serious that, *if not treated, would likely result in a period of incapacity of more than three calendar days.*” 29 C.F.R. § 825.114(a)(3) (1993) (emphases added).

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“Continuing treatment” was further defined as:

(1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician’s assistant under direct supervision of the health care provider.

(2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider, *or* is treated for the injury or illness by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider—for example, a course of medication or therapy—to resolve the health condition.

(3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured. Examples include persons with Alzheimer’s, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment.

*Id.* § 825.114(b)(1)-(3).

The preamble to the interim regulations explained the creation of a separate “chronic” serious health condition that does not involve incapacity per se:

Because the statute permits intermittent leave or leave on a “reduced leave schedule” in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor’s visits or therapy—*i.e.*, that the absence requiring leave need not be due

to a condition that is incapacitating at that point in time. Thus, the legislative history explains that absences to receive treatment for early stage cancer, to receive physical therapy after a hospital stay or because of severe arthritis, or for prenatal care are covered by the Act. *Therefore, the regulations provide that a serious health condition includes treatment for a serious, chronic health condition which, if left untreated, would likely result in an absence from work of more than three days, and for prenatal care.*

58 Fed. Reg. 31,794, 31,799 (June 4, 1993) (emphasis added). The preamble also explained that for certain chronic conditions, continuing treatment can include continuing supervision, but not necessarily active care, by a health care provider:

For any condition other than one that requires inpatient care, the employee or family member must be receiving continuing treatment by a health care provider. . . . In addition, there was concern about persons who have serious, chronic conditions such as Alzheimer’s or late-stage cancer, or who have suffered a severe stroke, who obviously are severely ill but may not be receiving continuing active care from a doctor. Therefore, the rule encompasses such serious conditions which are under continuing supervision by a health care provider.

Some may argue that this approach may encompass health conditions that are not really serious, while others may view the approach as excluding certain situations that were intended to require the granting of FMLA leave. However, the Department believes the regulation’s definition is most consistent with the statute and legislative history.

*Id.*

Under the final 1995 regulations, a chronic serious health condition was defined as any period of incapacity or treatment for such incapacity that:

(1) “[r]equires periodic visits for treatment by a

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health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider"; (2) "[c]ontinues over an extended period of time (including recurring episodes of a single underlying condition)"; and (3) "[m]ay cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)." 29 C.F.R. § 825.114(a)(2)(iii)(A)-(C). As restructured, the final regulation did not retain from the interim regulation the requirement that, but for treatment, more than three days of incapacity would result. Nor did it retain the requirement of "continuing supervision" by a health care provider, instead requiring only "periodic visits" to the health care provider. The final regulations also created separate categories of serious health conditions for conditions that are long-term and for which treatment is not effective, and for conditions that would likely result in a period of incapacity in excess of three days without treatment. *See id.* § 825.114(a)(2)(iv)-(v).

The Department described its treatment of chronic conditions as a reasonable approach to the unusual circumstances that surround chronic serious illnesses that often cause only episodic periods of incapacity:

The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time . . . , often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (e.g., the asthma sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised

to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration.

60 Fed. Reg. 2180, 2195 (Jan. 6, 1995).

The Department explained in the preamble to the final rule the nature of the comments received on the interim rule that had prompted restructuring the portion of the definition addressing chronic conditions. Some had contended that the duration of the absence was not always a valid indicator of serious health conditions that are very brief (e.g., a severe asthma attack that is disabling but requires fewer than three days for treatment and recovery to permit the employee's return to work), or that the duration is simply irrelevant if a condition is sufficiently severe or threatening. Additional comments contended that seriousness and duration do not necessarily correlate, particularly for people with disabilities; that a fixed time limit fails to recognize that some illnesses and conditions are episodic or acute emergencies that may require only brief but essential health care to prevent aggravation into a longer term illness or injury, and thus do not easily fit into a specified linear time requirement; and that establishing arbitrary time lines in the definition only creates ambiguity and discriminates against those conditions that do not fit the average. *See id.* at 2192.

A number of other comments stated that the interim rule definition was too restrictive and recommended that it be expanded to specifically include chronic illnesses and long-term conditions that may not require inpatient care or treatment by a health care provider. Other commenters took issue with the definition's characterization of "continuing treatment" for a chronic or long-term condition that is "incurable," contending that curability is not a proper test for either a serious health condition or continuing treatment, that curability is ambiguous and subject to change over time, and that many incurable disabilities require continuing treatment

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that has nothing to do with curing the condition (e.g., epilepsy, traumatic brain injury, and cerebral palsy, conditions for which training and therapy help restore, develop, or maintain function or prevent deterioration). *See id.* at 2193.

In response to the comments received, the Department also modified and separated the portion of the interim rule's definition pertaining to long-term conditions by deleting the reference to the condition being incurable. Instead, the Department required that the condition involve a period of incapacity that is permanent or long-term and for which treatment may not be effective, but for which the patient is under the supervision of a health care provider rather than receiving active treatment. "Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease." 29 C.F.R. § 825.114(a)(2)(iv). The Department also created a separate definition to address serious health conditions that are not ordinarily incapacitating (at least at the current state of the patient's condition), but for which multiple treatments are being given because the condition would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, and listed as examples conditions "such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), [and] kidney disease (dialysis)." *Id.* § 825.114(a)(2)(v). Multiple treatments for restorative surgery after an accident or other

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<sup>7</sup> Other comments to the RFI suggest that the Department arguably has rendered the "multiple treatments" component of the definition of serious health condition—29 C.F.R. § 825.114(a)(2)(v)—unnecessary. *See, e.g.,* Association of Corporation Counsel, Doc. FL31, at 14 ("[T]he inclusion in 29 C.F.R. § 825.114(a)[2](v) of conditions that, if left untreated, could become serious is unnecessary and should be eliminated. Any period of absence needed to receive multiple treatments for a condition that could result in a period of incapacity for more than three days would likely fall under the definition of chronic health condition in section (iii). Indeed, the illnesses listed in the regulation (cancer, arthritis, and kidney disease) would be chronic health conditions."); American Academy of Family Physicians, Doc. FL25, at 1 ("The categories of 'Serious Health Condition' are overly complicated and, in some cases, contradictory. For instance, category 6 – 'Multiple Treatments (Non-Chronic Conditions)' goes on to list as examples chronic conditions like cancer and kidney disease.").

injury were also specifically cited. The previous requirement that the condition be chronic or long-term was deleted from this section because cancer treatments, for example, might not meet that test if immediate intervention occurs.

Comments received from employers in response to the RFI emphasize how commonplace chronic conditions have become under the FMLA and how difficult it is for employers to determine or to monitor "incapacity" when self-treatment is involved. *See* United States Postal Service, Doc. 10184A, at 4, 8-9 (Out of "1,077,571 instances where FMLA leave was requested and approved" resulting in over 2 million hours of protected FMLA leave taken, "leave taken intermittently for chronic conditions accounts for the largest category of FMLA conditions and constitutes almost 38% of all FMLA cases for 2006."); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 15 ("Of the six situations that fall within the current definition of 'serious health condition,' the 'chronic' conditions create the most problems for employers[.] The Act was never intended to cover sporadic absences from work on a permanent basis for the entire work life of an employee."); Brian T. Farrington, Esq., Doc. 5196, at 1 ("The most troublesome part of the current regulations is the definition of a 'chronic' health condition. Under the current regulation, the only right the employer has to challenge or question an employee claiming a chronic health condition under 29 CFR 825.114(a)(2)(iii) is to go through the process described in 825.307(a). Once the existence of the condition has been established, the employee can then take off any time, with little or no notice, claiming a manifestation of the chronic condition, and the employer is powerless either to verify or control that absence.").

## 2. Intermittent Leave

The second legal concept central to understanding the present debate regarding unscheduled intermittent leave is the increment in which employees may use leave. The Act provides for the taking of leave in small blocks, or intermittently, in certain situations:

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IN GENERAL.—Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

29 U.S.C. § 2612(b)(1). Although the Act specifies that an employee’s FMLA leave entitlement shall not be reduced “beyond the amount of leave actually taken,” it does not specify what increment can be used to measure that amount. As set forth in the final regulations: “There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer’s payroll system uses to account for absences or use of leave, provided it is one hour or less.” 29 C.F.R. § 825.203(d).

Comments submitted before the final regulations proposed a variety of changes to the rule, but none was accepted. Many comments from employers “urged that the taking of intermittent leave in increments of one hour or less was too burdensome” and attempted to limit the blocks of leave available to minimum amounts such as “half-days (four hours) or full days[.]” 60 Fed. Reg. at 2201. Still other commenters suggested “that the amount of intermittent leave available be limited to four weeks of the 12 week total available in any 12 months.” *Id.* at 2202. The Department rejected any minimum limitations on intermittent leave beyond

the units of time captured by an employer’s payroll system because “it seemed appropriate to relate the increments of leave to the employer’s own recordkeeping system in accounting for other forms of leave or absences.” *Id.* The Department explained this position on the basis that the statute makes no provision for limiting the increment of leave and that “otherwise employees could be required to take leave in amounts greater than necessary, thereby eroding the 12-week leave entitlement unnecessarily.” *Id.* Moreover,

[p]ermitting an employer to impose a four-hour minimum absence requirement would unnecessarily and impermissibly erode an employee’s FMLA leave entitlement for reasons not contemplated under FMLA . . . . An employee may only take FMLA leave for reasons that qualify under the Act, and may not be charged more leave than is necessary to address the need for FMLA leave. Time that an employee is directed by the employer to be absent (and not requested or required by the employee) in excess of what the employee requires for an FMLA purpose would not qualify as FMLA leave and, therefore, may not be charged against the employee’s FMLA leave entitlement.

*Id.* at 2236.

In rejecting a four-hour minimum for intermittent leave in the preamble to the interim regulations, the Department suggested that such a limitation was unnecessary. The Department stated: “There are other protections for employers in the statute; for example, if leave is foreseeable, an employee is required to try to schedule the leave so as not to unduly disrupt the employer’s operation[.]” 58 Fed. Reg. at 31,801. The Department further predicted that incidents of unscheduled intermittent leave would be unusual: “[I]t is considered unlikely that an employee would have several short instances of intermittent leave on an emergency basis which qualify as serious health conditions.” *Id.* (emphasis

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added). Thus, the Department did not envision how commonplace unscheduled intermittent leave would become, at least as is now reflected in many of the comments submitted in response to the RFI. For example, the United States Postal Service reported to the Department that, out of 179,370 FMLA certifications and 2 million days of FMLA protected leave in 2006, almost 38% of all leaves were chronic and intermittent, and “76.8% of all FMLA leave hours associated with a chronic condition were unscheduled.” Doc. 10184A, at 9.

### 3. Leave That Is Not “Foreseeable”

The third facet of the FMLA that contributes to the issues concerning unscheduled intermittent leave is the concept of leave that is not “foreseeable.” The Act expressly provides that an employee must give 30 days notice if the need for FMLA leave is foreseeable. If 30 days’ notice is not possible, the employee must give “such notice as is practicable.” 29 U.S.C. § 2612(e)(2)(B) (emphasis added).

The Department’s regulations on foreseeable leave mirror this language:

An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

29 C.F.R. § 825.302(a). The regulations then define “as soon as practicable” to mean “as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.” *Id.* § 825.302(b). In the case of “foreseeable leave where it is not possible to give as much as 30 days notice, ‘as soon as practicable’ ordinarily would mean at least

verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.” *Id.* The regulations on unscheduled leave similarly require that “an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case.” *Id.* § 825.303(a). As with foreseeable leave where 30 days notice is not possible, “it is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.” *Id.*

Some courts have found the Department’s regulations difficult to interpret:

Except for the 30-day notice provision, [the regulations] do not clearly explain when leave is viewed as “foreseeable” or “unforeseeable.” For example, if an employee learns of the need for leave only a day before the workday begins is the need for leave viewed as “foreseeable” or “unforeseeable”? What about a half-day? Or just two hours?

*Spraggins v. Knauf Fiber Glass*, 401 F. Supp. 2d 1235, 1239 (M.D. Ala. 2005); *see also Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir. 2003) (“The regulations do not so explicitly discuss employer notice procedures in the context of an employee’s unforeseeable need for leave, noting only that when an employee requires emergency medical leave, an employer cannot require advance written notice pursuant to its internal rules and procedures.”).

In a January 15, 1999 opinion letter deriving from the regulatory language discussed above, the Department rejected an employer’s attendance policy that “assess[ed] points against an employee who fails to report within one hour after the start of the employee’s shift that the employee is taking FMLA intermittent leave, *unless the employee is unable to report the absence due to circumstances beyond the employee’s control.*” Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999) (emphasis added). The

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Department deemed this policy non-compliant, stating:

The company's attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails to provide such "timely" notice of the need for FMLA intermittent leave. Clearly, this policy is contrary to FMLA's notification procedures which provide that an employer may not impose stricter notification requirements than those required under the Act (§ 825.302(g)) and that FMLA leave cannot be denied or delayed if the employee provides timely notice (under FMLA), but did not follow the company's internal procedures for requesting leave.

*Id.* The letter went on to provide guidance regarding how the notice provision works:

For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (*as would be required under the FMLA's two-day notification rule*), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance control policy.

*Id.* (emphasis added).

As a result of this letter, an employee must now be allowed two full days to report an unscheduled absence regardless of the facts and circumstances of the employee's individual case.<sup>8</sup> What began as an

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<sup>8</sup> As one commenter stated, "Not only are employers' routine call-in procedures subordinated to the FMLA rule allowing notice 'within one or two working days of learning of the need for leave' (29 C.F.R. § 825.303(a)), another provision of the FMLA regulations, 29 C.F.R. § 825.208(e)(1), expands the time period to allow an employee to notify the employer that his or her absence was FMLA-protected up to two days after returning to work, even if the employee could have followed normal call-in procedures or provided notice earlier. This is another procedure that makes no sense in the context of intermittent leave for a chronic condition." National Association of Manufacturers, Doc. 10229A, at 12.

illustrative outer limit of one or two working days notice by the employee to the employer of the need for leave has in effect evolved into the rule that an employee with a chronic condition can miss work without notifying the employer in advance of the need for leave and, in fact, notify the employer of this event two days later. "[The regulatory notice provisions have] been applied by the Department . . . to protect employees who provide notice within two days, even if notice could have been provided sooner under the particular facts and circumstances." National Coalition to Protect Family Leave, Doc. 10172A, at 27.

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## B. Workplace Consequences of Unscheduled Intermittent Leave

The comments received in response to the RFI reflect the tension and complexity surrounding the workplace issues related to unscheduled intermittent leave: tension because these issues ultimately require striking the appropriate balance between an employee's ability to take job-protected leave due to unforeseen circumstances and an employer's ability to schedule its work; complexity because reaching that balance also involves considering, at a minimum, the FMLA's notice provisions, the definition of "chronic" serious health condition, the minimum permissible leave increments, and the interaction between the FMLA and an employer's own attendance-related policies.

The Society for Human Resource Management commented on the effect of unscheduled intermittent leave on employers:

Intermittent leave initially was intended to permit scheduled leave for planned medical treatments or physical therapy. Since the FMLA's enactment, however, regulatory interpretations of a "serious health condition" have brought many chronic conditions under that umbrella, thus enabling some employees to expand FMLA protections to the point of abuse.

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... For instance, if an employee is approved for intermittent FMLA leave related to a chronic episodic condition for which there is no date certain when leave will be needed (arthritis and allergies), the employee may take unscheduled leave whenever s/he likes without further medical substantiation that the condition actually incapacitated the employee on each leave date. Under this frequent scenario, the employer has no ability to require confirmation that the employee was actually ill each time leave is taken. Conversely, if an employee attempts to take sick leave for a non-FMLA qualifying condition, the employer can require medical substantiation for each absence and can discipline the employee if medical or other substantiation for each absence is not provided, specifically based on employer policies.

*Reg'l Hosp., Inc.*, 946 F. Supp. 988, 998 (1996) (“It is plaintiff’s failure to adhere to the FMLA procedures for informing his employer of intermittent leave that is ultimately fatal to his claim.”). An employer may deduct points under an attendance control policy from an employee who could have given advance notice and failed to comply with FMLA regulations. Dep’t of Labor Op. Ltr. FMLA-101 (Jan. 15, 1999).

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There is no empirical evidence of widespread abuse of intermittent leave, and the current regulations provide employers with procedures to ensure that only eligible employees take intermittent leave, that the leave taken is medically necessary, and that leave is scheduled at convenient times and as far in advance as possible.

Doc. 10154A, at 8.

In contrast, the comments submitted to the RFI on behalf of employee representatives suggested a markedly different view. For example, the AFL-CIO stated:

[T]he regulations currently permit employers to discipline employees, even when they are eligible for leave, if they fail to follow the rules. Employees are required to make reasonable efforts to schedule intermittent leave so as not to “disrupt unduly the operations of the employer.” 29 U.S.C. § 2612(e)(2)(a); 29 C.F.R. § 825.117. Employees must also give advance notice of thirty days before taking leave, or at least give notice as soon as practicable. 29 U.S.C. § 2612(e)(2)(b) (2002); 29 C.F.R. § 825.302 (a)-(b). If an employee could have given proper notice but did not, the employer may delay the commencement of leave for thirty days until after notice. *See Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 971 (7th Cir. 2000) (employer entitled to delay leave 30 days where employee did not give notice of intent to take paternity leave until day after child’s birth). *See also Kaylor v. Fannin*

Doc. R329A, at 33.

The comments in response to the RFI focused on the following workplace consequences of unscheduled intermittent leave: (1) scheduling problems caused by employee absences with little or no notice, (2) loss of management control, and (3) impact on employee morale and productivity. We address these issues in turn.

#### **1. Scheduling Problems Where Employees Taking Intermittent Leave Provide Little or No Notice**

A number of comments identify the root of the problems with unscheduled intermittent leave as the Department’s interpretation of the notice requirement, particularly the amount of notice an employee must give to his or her employer when the employee seeks FMLA protection for unscheduled leave. *See, e.g., Southwest Airlines Co.*, Doc. 10183A, at 6-7; *College and University Professional Association for Human Resources*, Doc. 10238A, at 7-8.

As mentioned above, Wage and Hour Opinion Letter FMLA-101 interpreting the regulations at 29 C.F.R. §§ 825.302 and -.303 has given rise to an understanding in the regulated community that

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employers (1) are prevented from disciplining any employee for failing to comply with a policy that requires advance notice of the need for leave and (2) are required to treat leave as FMLA-protected as long as the employee provides the employer with “notice” within two days after the absence. As explained by the National Coalition to Protect Family Leave:

The phrase “as much notice as is practicable” is not well-defined. The current phrase puts employers in the difficult position of having to approve leaves where questionable notice has been given. The current regulatory definition—within one or two business days—has been applied by the Department to both foreseeable and unforeseeable leaves, and to protect employees who provide notice within two days, even if notice could have been provided sooner under the particular facts and circumstances. *See* Opinion Letter No. 101 (FMLA) (1/15/99) (proposed attendance policy, which would require employees taking intermittent FMLA leave to report absence within one hour after start of employee’s shift unless employee was unable to do so because of circumstances beyond employee’s control, violated FMLA because employees have two days to notify employer that absence is for FMLA-covered reason).

National Coalition to Protect Family Leave, Doc. 10172A, at 27. *See also* Temple University, Doc. 10084A, at 6.

Employer commenters to the RFI were nearly unanimous in their understanding that the FMLA permits an employee to wait until two days after an absence to advise his or her employer of the need for FMLA leave. This understanding, according to the commenters, combines with other issues—*e.g.*, the definition of serious health condition, the minimum period for intermittent leave, and the inability to request additional medical information—to create a situation where employers lose much of their ability to manage their business:

The DOL regulations at 29 C.F.R. Part 825.203 require employers to permit employees to take leave in the “shortest period of time the employer’s payroll system uses to account for absences of leave, provided it is one hour or less.” Many employers have payroll systems capable of accounting in increments as small as six minutes. Tracking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked. In addition, CUPA-HR members have had difficulties scheduling around intermittent leave because it is hard to find a replacement worker for small increments of time and the regulations do not require employees to provide any advance notice of the need for leave. The DOL Opinion Letter FMLA-101 (January 15, 1999) exacerbates this problem by stating that an employer must accept notice of need for leave up to two days *following* the absence. These problems are evidenced by the overwhelming majority of respondents to our membership survey that reported problems with FMLA administration. More than 80 percent of respondents reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences.

College and University Professional Association for Human Resources, Doc. 10238A, at 7-8.

Throughout the comments, employers explained why they believe the “two day rule” is impractical and tantamount to eliminating the ability of employers to adequately staff their shifts and/or discipline employees for violating standard workplace rules. The “two day rule” is thus described as unworkable:

[T]he DOL’s informal practice of allowing employees to give their employers notice of FMLA leave up to two business days after the fact facilitates abuse. . . . [T]his “two-day”

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practice of the DOL is also an arbitrary, unreasonable standard[.] . . . . The DOL's two-day notice practice is not a promulgated regulation or rule, and indeed the DOL's practice conflicts with the FMLA and DOL's own regulations[.] . . . . The DOL's informal two-day notice practice improperly allows an employee to remain silent and provide no notice to his/her employer for up to two full business days, even when the employee has the knowledge and means to give timely notice to their employer. As such, the DOL's informal two-day notice practice is an arbitrary standard that fails to recognize an employer's legitimate operational need for timely notice and that contradicts with an employee's statutory duty to provide such notice as is practicable.

Southwest Airlines Co., Doc. 10183A, at 6-8.

Employers also identified as an area of concern the closely related issue of their inability to enforce routine call-in procedures. Section 825.302(d) of the regulations, which addresses the issue of advanced notice in the context of foreseeable leave, provides:

An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

29 C.F.R. § 825.302(d).

A comment from Wolf, Block, Schorr and Solis-Cohen identified what it believes to be the problems associated with section 825.302(d):

Another area of FMLA abuse involves the DOL regulations' limits on an employer's ability to require employees to comply with their customary call-out

procedures. This is of particular concern for employees taking intermittent leave.

. . . .

[Section 825.302(d)] has been interpreted by the DOL to limit an employer's ability to impose a call-in procedure (e.g. requiring employees to call in and report their absence within 1 hour of their start time) on employees who are absent from work for an FMLA related reason where the call-in procedure is more onerous [than] the verbal and written notice procedures set forth in 29 C.F.R. § 825.303. The inability of an employer to insist that employees on FMLA leave comply with a call-in procedure, such as in the previous example, invites abuse from employees who are medically approved for intermittent FMLA leave and, subsequently, give their employer little or no notice leading up to their sporadic absences.

Wolf, Block, Schorr and Solis-Cohen, Doc. 10093A, at 2.

Employers asserted that the call-in procedures, which are enforced routinely outside the FMLA context, are often critical to an employer's ability to ensure appropriate staffing levels. The Ohio Department of Administrative Services commented that:

Many state agencies have a call-in procedure that requires employees to personally call within a certain period of time prior to the shift if they will be unexpectedly absent that day. For agencies that employ this procedure, the advanced "call-in" serves as a crucial element of their attendance program, and enables the agency to adjust schedules and personnel to cover the absent worker's duties and responsibilities. This procedure is especially critical in institutional agencies that provide direct care and supervision of inmates or patients.

Doc. 10205A, at 3.

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Employer commenters, however, were clear in their belief that the Department's interpretations have severely limited those employers who need to know in advance of any absence and have opened the door for misuse of FMLA leave:

[T]he current FMLA regulations reduce the effectiveness of [call-in procedures], as agencies are prohibited under the regulations from requiring advance notice of the employee's need for FMLA leave. Once an employee receives a certification for an ongoing chronic condition, leave can be taken on numerous occasions intermittently for the same condition and without advance notice. . . . This restriction leads to a greater potential for abuse, as employees may be tempted to use their certifications to justify tardiness. Current FMLA regulations require an employee to give notice of the need for FMLA leave "as soon as is practicable," which usually means within a day or two of learning of the need for leave.

*Id.* See also National Association of Manufacturers, Doc. 10229A, at 4, 12 ("65 percent of the requests received for intermittent leave were made either on

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<sup>9</sup> Cases addressing employer policies have involved three types of employer policies. The first group involves employer policies requiring the employee to report an absence within a specific time frame (frequently one hour prior to the start of the employee's shift). These types of employer policies present the clearest potential for conflict with the FMLA notice regulations. Compare *Spraggins v. Knauf Fiber Glass GmbH, Inc.*, 401 F. Supp. 2d 1235 (M.D. Ala. 2005) (holding that employer could enforce rule requiring employees to call in one hour prior to their shift unless it was impracticable for them to do so), with *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192 (S.D. Cal. 1998) (holding that employer's policy requiring employees to call 30 minutes prior to the start of their shift, regardless of circumstances, conflicts with FMLA notice provision). The second group involves employer policies requiring employees to call a specific office or individual to report an absence. See *infra* (discussion of *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2004), and *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004)). The final group of cases involves employer policies applied during the course of an employee's FMLA leave. See, e.g., *Callison v. City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005) (upholding application of employer policy requiring employees on paid sick leave to call in when leaving home); *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2002) (upholding application of three-day no-call/no-show rule); *Gilliam v. UPS*, 233 F.3d 969 (7th Cir. 2000) (upholding application of three-day no-call rule).

the day of the leave, *after* the leave was taken, or *without any notice*. . . . [E]mployees with unscheduled intermittent leave routinely ignore mandatory shift call-in procedures (even if they are fully able to comply), wait two working days, as permitted by 29 C.F.R. § 825.303(a), and then report their absence as FMLA-qualifying").

Wage and Hour Opinion Letter FMLA-101, discussed above, allows employers to discipline employees for failure to follow employer notice policies only where those policies are less stringent than the FMLA's notice requirements.

The employer, however, could impose a penalty, *i.e.*, assign points under its customary attendance control policy, in a situation where the employee was in the position of providing advance notice, absent extenuating circumstances, of the need for FMLA leave and failed to provide the notice in accordance with FMLA's requirements and the company's notification policy, if less stringent than FMLA's. Under this circumstance, the provisions of § 825.302(d) would not apply because of the employee's failure to provide timely notice based upon FMLA's requirements (§§ 825.302(a) and (b)).

Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999).

This issue of an employer's ability to enforce its own notice policies for employees taking leave has been litigated in the federal courts with varying results.<sup>9</sup> Two appellate courts have addressed whether the application of employer policies requiring employees to notify a specific individual or office when requesting a leave of absence violates the FMLA and have reached differing results. In *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2003), the U.S. Court of Appeals for the Sixth Circuit addressed an employer policy requiring an employee to formally request a leave of absence from a specified department within three workdays of the first day missed. The employee called daily to report his absences to the employer's security office, but

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failed to comply with the requirement to notify the correct department of his need for a leave of absence in a timely manner. The Sixth Circuit concluded that the employer's policy did not comply with the FMLA, holding that "employers cannot deny FMLA relief for failure to comply with their internal notice requirements" as long as the employee gives timely notice pursuant to the FMLA. *Id.* at 723. In denying the employer's ability to enforce its workplace rule, the court determined that "[i]n permitting employers to develop notice procedures, the Department of Labor did not intend to allow employers in effect to undermine the minimum labor standard for leave." *Id.* at 722.

In *Bones v. Honeywell Int'l., Inc.*, 366 F.3d 869 (10th Cir. 2004), the Tenth Circuit took a different approach, allowing an employer to enforce its own internal requirements governing whom an employee must contact regarding her absence. In *Bones*, the employee was terminated because she failed to report to work or to call her supervisor for three days. On the second day of her absence, she requested a leave of absence from the employer's medical department; the employer's policy, however, expressly stated that employees were required to follow the call-in procedure and that contacting the medical department was not sufficient. *Id.* at 875. The court did not directly address whether the employee had provided sufficient notice under the FMLA, finding that the issue had been waived. *Id.* at 877. The court went on to note, however, that "Bones was terminated because she did not comply with Honeywell's absence policy; she would have been terminated for doing so irrespective of whether or not these absences were related to a requested medical leave." *Id.* at 878.

## 2. Loss of Management Control

Employers commented frequently regarding what they see as the difficulty in maintaining control over the workplace when, in the employers' view at least, employees "abuse" unscheduled intermittent leave in order to achieve some privilege or advantage

to which they are not entitled. *See, e.g.*, National Association of Manufacturers, Doc. 10229A, at 4 ("As currently interpreted by DOL, the FMLA has become the single largest source of uncontrolled absences and, thus, the single largest source of all the costs those absences create: missed deadlines, late shipments, lost business, temporary help, and over-worked staff."). The commenters assert that because employers' ability to use call-in procedures and other attendance control mechanisms is severely limited where the FMLA is involved, and because the FMLA allows few options for determining whether a specific instance of leave use is appropriate, situations arise where certain employees do as they wish, ignoring the employers' rules, schedules, and staffing decisions. As described by one attorney:

In my practice, by far the biggest problem we face with the FMLA is intermittent leave. . . . These employees typically use their intermittent leave in small increments day-to-day. Especially when based on the need to care for others or highly subjective factors, this leave is neither scheduled in advance nor susceptible of being scheduled. The end result is employees who, under the auspices of FMLA, we must . . . allow to come and go as they please without any regard for our business needs. From both a legal and practical point of view, the employer is at the mercy of the employee. As a practical matter, there is no effective or legally "safe" way for an employer to regulate or verify the legitimacy [of] an employee's use of intermittent leave.

Peter Wright, Esq., Doc. 4760, at 1.

One employer made the following observation:

The most difficult and burdensome part of the FMLA is the intermittent FMLA. Many employees will request FMLA as soon as they are placed in the discipline system for attendance. Health care providers will complete the forms for some for any reason the employee requests. The provider does this in such

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a vague manner i.e. “chronic condition, unknown or lifetime length, unknown frequency that may prevent them from coming to work, may cause them to be late leave early or not be able to attend without notice.” This gives the employee the right to come and go as they please without giving the company the right to question or discipline.

FNG Human Resources, Doc. FL13, at 2.

Although not strictly limited to unscheduled intermittent leave use, a number of comments noted that employers cannot enforce their attendance policies—particularly “no fault” attendance policies—against employees on FMLA leave, which results in inconsistent treatment of those absent for non-FMLA-qualifying reasons. The Society for Human Resource Management summarized the issue:

Moreover, some employers’ sick or personal leave policies penalize repeated absences, even illness-related absences, which do not qualify for FMLA protection. (These are commonly called “no-fault” policies.) For a non-FMLA qualifying condition, the employer can discipline and even terminate an employee who is repeatedly absent. This follows from the principle that regular attendance is generally required of every job and is essential to productive and smooth operations. With an FMLA-qualifying condition, however, the employer may not discipline the employee for any absences, no matter how frequent, unless and until the employee’s leave entitlement is exhausted.

Society for Human Resource Management, Doc. 10154A, at 8.

The Edison Electric Institute was able to quantify the effect this position (and other FMLA-related positions) has had on its attendance:

In the year 1987 our sick leave usage averaged 89.2 hours per employee. In 1990 we implemented a No-Fault Modified Attendance Policy (point

system) to control employee attendance. After the policy was in place for three years the sick leave usage dropped 70% (from 89.2 hours to 27.2 hours). However, since FMLA went into effect in 1993, sick leave usage has steadily increased each year. At the end of 2006 the average hours used per employee escalated to 78.2. This is a 188% increase over a thirteen year period. . . . We attribute most of this increase to the FMLA. Under the existing regulations 29 C.F.R. 825.220(c) employers cannot use the taking of FMLA leave as a factor in employment actions, i.e., No-Fault Attendance policies.

Edison Electric Institute, Doc. 10010A, at 1.

The types of scenarios identified by employers as subject to “abuse” through the improper use of unscheduled intermittent leave include, among other things: (1) employees using leave to cover for simple tardiness or a desire to leave work early, and (2) employees seeking to alter their work schedule through securing a different shift.

a. *Arriving Late/Departing Early*

Many employer commenters suggested that employees use unscheduled intermittent leave as a pretext to cover for their tardiness or to leave work early for reasons unrelated to a serious health condition. *See* Southwest Airlines Co., Doc. 10183A, at 4; Air Conference, Doc. 10160A, at 11 (“Under the current regulations, an employee could be tardy by nearly two hours every scheduled workday for an entire year and never exceed his allotment . . . . [S]ome employees use this loophole to leave work early every day to be at home when their healthy children arrive home from school.”); “[M]any employees use intermittent leave to cover for tardiness, creating a scheduling and attendance reliability issue for airlines.”); Cummins Inc., Doc. 10340A, at 2 (“Our payroll system allows for increments as few as three minutes, and one facility had over 200 incidents of three minute FMLA uses in 2005. We strongly suspect that our incidents of three minute FMLA leave are used to excuse tardiness

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rather than true FMLA leave.”); DST Systems, Doc. 10222A, at 1 (“Increasing increment allowed may reduce inappropriate use of the FMLA which can be misused for late arrivals/tardiness instead of a legitimate FMLA reasons.”); Methodist Hospital, Thomas Jefferson University Hospital, Doc. FL76, at 1 (“Having a major medical problem like surgery and receiving block time off without repercussion is not the issue. Intermittent leave on the other hand has created a hiding place for Employees who have absence issues. . . . Facilities are not looking to punish cancer patients who need chemotherapy on a weekly basis; we do need to question Employees that have intermittent problems on snow days when they call in for ‘intermittent leave’ and hospitals have to struggle in providing last minute staffing.”).

**b. *Obtaining a Preferred Shift***

A number of commenters stated that some employees misuse the FMLA rules to secure for themselves a preferred schedule in the form of a shift different from the one legitimately assigned by the employer. *See, e.g.,* Southwest Airlines Co., Doc. 10183A, at 2, 4 (“Far too many employees misuse unscheduled, intermittent FMLA leaves to set their preferred rather than assigned work schedules; to work shifts paying overtime but no show regular pay shifts; to get excused absences that would otherwise violate attendance rules; . . . FMLA usage plummets on December 25 Christmas Day each year when triple overtime is paid[.] . . . FMLA usage is near its peak the day before Christmas and jumps the day after, but somehow nearly all those employees who have been out on FMLA feel better on Christmas day and are able to come to work.”); Roger Bong, Doc. 6A, at 4 (“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.”); Air Conference,

Doc. 10160A, at 4. (“[E]very airline has numerous examples of workers who bid a full-time, 40-hour week schedule, entitling them to maintain all corresponding full-time benefits, but who then cut short most work days with intermittent leave. In other instances, reservation agents have been known to miss their regular shift – forcing the carrier to call-in another worker with overtime pay – and then report into work later that day for an overtime shift that pays a higher premium.”).

A number of commenters expressed concern that compliance with the FMLA’s intermittent leave provisions—particularly when taken for a chronic condition—often converted a full-time position into a permanent, part-time position:

DOL takes the view that an employee is entitled to an FMLA reduced schedule due to a serious health condition regardless of the fact that the condition is permanent and it is unlikely that the employee will return to full-time employment. (DOL Opinion Letter-97, July 10, 1998) If an employee has a reduced schedule with one full day off per week due to FMLA, this arrangement can go on indefinitely. This results, in effect, in the creation of a new part-time position. . . . [An employee can refuse] reasonable accommodation under the American[s] with Disabilities Act (ADA) but instead chose to continue with . . . reduced schedule under FMLA. . . . The regulations should not permit this.

Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A at 3. *See also* Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 4 (“The issue here is that some intermittent FMLA leaves almost default into light duty assignments because supervisors must reassign work that the frequently-absent employee is responsible for to ensure that deadlines are met and services are provided to customers.”); Madison Gas and Electric Company, Doc. 10288A at 2 (“Offering an employee the

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possibility of 12 weeks of intermittent, unscheduled absences makes the employer vulnerable to the discretion of the employee. An employee taking advantage of this provision can essentially work part-time, but reap the benefits of a full-time employee.”); Air Conference, Doc. 10160A at 11 (“Some employees use this regulation to effectively convert a fulltime position to part-time when part-time work is not otherwise available or to receive a shift which they do not have the seniority to hold under a collectively-bargained seniority system.”).<sup>10</sup>

Comments from the University of Minnesota noted similar problems:

Dealing with such situations is extremely difficult. Supervisors do not know if the employee will come in to work on any given day. They do not know if the employee will work an entire shift. Employees will simply notify their supervisors, in many cases after the fact, that they have experienced symptoms and cannot come in to work, or must leave work early. A comment by a supervisor regarding a performance issue may result in the employee excusing himself/herself for the rest of the day. Without proper notice, a supervisor cannot make plans for a replacement. . . . Nonetheless, the current statutory and regulatory provisions provide employers with few options.

University of Minnesota, Doc. 4777A, at 2.

### **3. Impact on Employee Morale and Productivity**

A very large number of comments addressed the effect that the FMLA (and unforeseeable intermittent leave in particular) has had on employee morale.

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<sup>10</sup> Several comments, in making this point, noted that it is possible for a “full-time” employee to use FMLA leave intermittently under these circumstances and not exhaust his or her yearly leave entitlement. For example, 12 weeks times 40 hours per week = 480 hours of intermittent FMLA leave entitlement per year, divided by 52 weeks = 9.2 hours of intermittent FMLA leave per week, divided by 5 days per week = 1.8 hours per day.

The Department received comments emphasizing the positive aspects of the FMLA on employee morale and retention, as well as the negative impact on employee morale and productivity.

#### **a. Viewpoint: the FMLA Improves Employee Morale and Retention**

Most of the comments addressing the FMLA’s positive impact on employee morale focus on the FMLA generally. Several of the commenters who described the FMLA’s positive impact on morale relied on the 2000 Westat Report. *See, e.g.*, Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A at 8 (“The 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.”); The Human Rights Campaign, Doc. 10179A, at 2 (same); 9to5, National Association of Working Women, Doc. 10210A, at 2 (“And more than 4 in 5 employees who have taken on added duties when a co-worker has taken FMLA leave say that the impact on them was neutral or positive.”).

According to the Women’s Employment Rights Clinic:

Studies clearly suggest that workplace flexibility, such as leaves for family obligations, increases employee retention. . . . [O]ther findings “strongly suggest that employers who provide greater opportunities for flexible work arrangements, have supervisors who are more responsive to the personal and family needs of employees, and create a workplace culture that is more supportive of the worklife needs of employees have employees who are more satisfied with their jobs, more committed to their employers, and more likely to plan to stay with their current employers. Interestingly, none of these work-life supports necessarily impose

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direct costs upon employers, in contrast with conventional benefits.”

Doc. 10197A, at 7-8 (citation omitted). *See also* Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 8 (“The 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.”).

A number of commenters focused on the benefits directly enjoyed by the employer:

Based on recent research, it is clear that the FMLA contributes to a more stable economy and workforce by helping employers retain their employees and reduce turnover. In the 2000 Westat study, 98 percent of employees taking FMLA leave returned to work after taking that leave. And of the employers who experienced cost savings due to the FMLA, more than three-quarters attributed their savings to decreased turnover. The Employment Policy Foundation reports that the average cost of employee turnover is 25 percent of an employee’s total compensation. Not only does the FMLA support families, it also supports businesses. The FMLA has reduced these costs by creating an effective mechanism for employees to retain their jobs.

Families USA, Doc. 10327A, at 6 (footnotes omitted). *See also* The Human Rights Campaign, Doc. 10179A, at 2 (“Many companies and states know from experience that providing a safety net for all families is a good business decision.”); 9to5, National Association of Working Women, Doc. 10210A, at 2 (“The Family Medical Leave Act is a win-win for employees and employers.”).

Several comments from employees opined that the causes of decreased employee morale are not so much the result of the FMLA, but rather the employer’s failure to manage effectively:

The primary method for covering for employees on FMLA leave is to assign their work to co-workers. Reportedly, this method of getting the work done has a negative affect on the morale of the employees who pick up the slack for their absent co-workers. Employers 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.

Center for WorkLife Law, Doc 10121A, at 7.

**b. *Viewpoint: Unforeseeable Intermittent Leave Negatively Affects Employee Morale and Productivity***

In contrast to the comments emphasizing the morale-related benefits of the FMLA generally, several employers commented that when co-workers perceive employees to be “abusing” the FMLA, morale and productivity suffer. As described by the Pennsylvania Turnpike Commission:

FMLA leave when abused / misused affects morale negatively. We have received phone calls from both employees and managers who are frustrated that an employee(s) at their work location call off for FMLA so they can be off for holidays and weekends. These call-offs may interfere with another employee’s vacation request, requiring them to come to work while another employee uses their FMLA. We have heard these type of holiday / vacation FMLA requests called “get-out-of-jail-free” cards because there is no recourse that we have as an employer to enforce these types of abuses / misuses of leave. Employees will request a vacation day, and if that request is denied, they often call in sick for FMLA that day. Some employees have even bragged to others how easy it is to get the extra

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time off and how they use this time for vacation or other non-FMLA reasons.

Doc. 10092A, at 8. *See also* Dover Downs Hotel & Casino, Doc. 10278A, at 2 (“Here is an example of what occurs on a REGULAR basis. An employee requests a vacation at the last minute as she received an unexpected invitation for a week at the beach. The manager denies the request, citing the numerous others who were granted vacation for the week in question. The manager simply cannot afford to allow one more person to take that week off as it would incur overtime for others to cover for this one. This employee chooses to head to the beach anyway and calls the manager, citing only those magic words ‘FMLA’. In this true scenario, we were inconvenienced – as were the employees who had to work overtime to pick up extra hours to cover for this employee.”).

This sentiment is echoed in the comments of the National Coalition to Protect Family Leave:

The Coalition believes that the availability of FMLA leave can increase morale in the workplace, if the leave is used in accordance with the spirit and intent of the Act. Employees who take FMLA leave are generally satisfied, for not only are the employees able to retain their benefits, but they also have job security. However, FMLA can also lead to low morale and decreased productivity in the workplace. When employees take unscheduled intermittent leave and even scheduled leave in large blocks of time, the morale and productivity may decline for the remaining employees. The employees who report to work must cover for their colleagues who take FMLA leave, often resulting in overtime. Both employers and employees have expressed concerns regarding the abuse of FMLA leave and, thus, the employees who report to work are the ones who suffer.

Doc. 10172A, at 51. *See also* Bendix Commercial Vehicle Systems, Doc. 10079A, at 4, 11 (“[FMLA leave] has a positive impact when it is believed to be

used appropriately, however, when it is believed to be being abused, it has a very negative [effect]. It can build animosity towards coworkers for not pulling their weight, towards the employer because we are allowing the employee to abuse the FMLA and won’t do anything about it.”; “This means that coworkers have to be asked to do more to cover for the person who took the intermittent FMLA. This can create morale issues – employee not pulling their own weight.”).

Some employers report that employees themselves also identify morale issues associated with their co-workers’ use of FMLA:

There is a menacing, intangible cost to abuse of intermittent FMLA: it wears out fellow employees who must cover shifts and trips for those abusing FMLA. It dampens workplace morale and teamwork . . . . In 2006, Southwest employees . . . were asked what one thing they would change . . . . In response, employees provided hundreds of unsolicited comments about FMLA abuse and its negative [effect] on morale.

Southwest Airlines Co., Doc. 10183A, at 6.

Morale – Employees that are not utilizing the unforeseen, intermittent leave report feeling cheated. They come to work on time and work 40 hours each week. When they need time off, they utilize their vacation time. They also report that employees on unforeseen, intermittent leave indicate that they can and will abuse 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.

Yellow Book USA, Doc 10021A, at 1. *See also* An Employee Comment, Doc. 136, at 1 (“We have a serious problem with this where I work. There are several people who do take advantage of the system to the point where it is a problem for the other workers. There is no way for them to stop or control this either as they call in for 2 days then are back before required to bring in a doctor’s excuse.”).

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Other commenters addressed the perception of “abuse” of the FMLA by leave-takers or the overall “costs” of the FMLA. A postal employee commented “it seems to me many employees abuse the system. . . . I don’t think the employees lie about illnesses, but they milk the system to stay home as much as possible.” An Employee Comment, Doc. 188, at 1. An employee at a unionized factory commented that he had witnessed “a lot of abuse” of FMLA which created morale issues as well as additional costs to the company. An Employee Comment, Doc. 195, at 1. However, an employee in the transportation industry noted, “I do see people occasionally abuse sick leave but those people would abuse it regardless of FMLA.” An Employee Comment, Doc. 4684, at 1.

Several commenters contended that misuse of intermittent leave has a negative effect on employee retention and turnover. For example:

[I]t is common that morale problems begin to appear among the employees (collectively and individually) who are left to deal with an “intermittent” abuser in their production area and have to continually pick up the slack; however, while this last group may perhaps receive some benefit via overtime as a result, the more common result is diminishing morale which often results in increased turnover.

Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 8.

Additional comments in response to the RFI described the impact of unforeseeable intermittent leave on employee morale:

[T]he availability of FMLA improves the morale of the employees that use it, while negatively affecting the employees who do not. Everyone knows the day may come when we all may need to use it; however, the fact that every individual has the ability to be certified and then be able

to miss up to twelve weeks in a twelve-month period is very disheartening. There are individuals who will exhaust the twelve weeks and then miraculously can come to work everyday thereafter and once eligible, complete a new certification and start the [vicious] cycle all over again. We have no evidence that it improves employee retention, however, employees that already have attendance problems find themselves with a serious health condition and are then able to continue to miss work but are able to be excused instead.

AM General LLC, Doc. 10073A, at 2-3. *See also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 19-20.

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### **C. The Importance of Unscheduled Intermittent Leave to Employees**

Many commenters addressed the need for unscheduled intermittent leave. For example, one commenter described her personal experiences with her daughter’s chronic, serious health condition:

My daughter had a major asthma attack which caused a bronchial infection, swelling and bacteria in her throat. . . . [N]one of my daughter’s doctors have told her how many times she needed to see them. I’m quite sure if they knew the answer, it would have been written . . . . No one is capable of predicting an asthma attack or the severity of the attack; I just would like the assurance of knowing that if or when the situation should arise, I have the time off required to handle her needs without the threat of being . . . terminated.

An Employee Comment, Doc. 4395, at 1. Another commenter described her experience:

In 2003, my mother was diagnosed with end stage renal failure and had to immediately begin receiving dialysis treatments three times a week. Since then, I have been working a reduced work schedule which allows me to be able to help my mom with transportation to/from

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her treatments, doctor appointments, errands, etc. . . I was so thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me. By me working only 32 hrs a week, instead of the normal 40 hr workweek, I have been able to act [as] an advocate/liaison for my mom with all of her doctors, specialists and treatments that she's had to endure. Most importantly, it has allowed for my mom to feel independent with my help. I know that if the FMLA act [wasn't] around, I would be losing a lot of time and money with my employer and my mom would probably be a burden to the society and maybe even be living in a rest home somewhere. . . . My mom will need dialysis treatments indefinitely but I end up taking leave without pay for most of the year[.]

An Employee Comment, Doc. 4773, at 1.

The AFL-CIO comments also included statements from individual employees detailing the importance of intermittent FMLA leave to affected workers:

Many of the responses to Working America's 2007 online survey on FMLA stressed the importance of intermittent leave. A Human Services Supervisor in Easton, Pennsylvania, relied on intermittent leave to care for his terminally ill father:

By using the intermittent leave provisions of FMLA, I was able to help care for my Dad in the final stages of his terminal cancer, in his own home. I was grateful that he was able to spend his last days in the comfort of his house, as he desired, while I was able to maintain my employment status, which I desperately needed for my own family. Weakening this law, will only lead to the further breakdown of already stressed family support systems.

A payroll and benefits administrator in Euclid, Ohio also cares for a sick parent:

My mother suffered a severe stroke 4 years ago. I use FMLA time to care for her at home and keep her out of a nursing home. I have two siblings who help with her care, so I only have to take intermittent leave. It's hard enough to care for a disabled parent without having to worry about losing your job. . . . It would break my heart and my mother's if I had to put her in a nursing home. The government should be finding ways to make it easier to take this leave, not make it harder.

American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 30-31 (citation omitted).

The Center for WorkLife Law expressed its belief in the importance of unforeseeable intermittent leave for chronic conditions to working Americans:

Recent studies show that 65 percent of families with children are headed by two working parents or a single parent. One in four employed men and women has elder care responsibilities and one in 10 employees is a member of the "sandwich generation" with both child care and elder care responsibilities. For those working caregivers with a seriously ill child or family member, medical emergencies are a way of life. Intermittent FMLA leave allows these employees to be available to their families when they are needed most without the stress of losing their jobs. We cannot emphasize strongly enough that the availability of intermittent FMLA leave is *critical* for eligible employees caring for an ill child, spouse or parent with a serious chronic illness.

Doc. 10121A, at 5 (emphasis in original) (footnotes omitted).