

# CRS Report for Congress

## The Family and Medical Leave Act: Recent Legislative and Regulatory Activity

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## Summary

Time off to care for one's own health problems or those of family members is not a job-protected entitlement. Thus, employees sometimes have jeopardized their continued employment to be away from the workplace to address health-related matters. With passage of the Family and Medical Leave Act of 1993 (FMLA, P.L. 103-3), Congress mandated that private employers with at least 50 employees and public employers of any size provide *job-protected unpaid* leave for 12 workweeks in a 12-month period to employees who meet the length-of-service and hours-of-work eligibility requirement in order to care for their own, a child's, spouse's, or parent's serious health condition; to care for a newborn, newly adopted, or newly placed foster child; and upon the birth or placement of an adopted or foster child.

Suggestions regularly have been made to change the FMLA and its regulations to make them more employee-friendly or more employer-friendly. The former proposals include lowering the firm-size threshold, expanding the reasons for leave-taking and adding groups of care recipients (e.g., H.R. 1369, H.R. 2392, H.R. 2792, and H.R. 2808). The employer community primarily has focused on two issues: the use of intermittent leave, particularly when not scheduled in advance, and the definition of a serious health condition.

Military operations involving members of the National Guard and Reserves recently have prompted congressional interest in modifying the FMLA. In May 2007, the House included in the FY2008 Department of Defense authorization bill (H.R. 1585, Section 675) an amendment that makes eligible for 12 workweeks of FMLA leave spouses, children, or parents of persons on or notified of an impending call to active duty in the Armed Forces in support of a contingency operation. The leave programs in H.R. 1585, as passed by the Senate in October 2007, do not amend the FMLA. The conference report includes Section 675 and substitutes S. 1975 for the language contained in the Senate-passed version of H.R. 1585. S. 1975/H.R. 3481 is one of several bills to amend the FMLA introduced in response to a recommendation of the Dole-Shalala Commission. The bill entitles relatives already covered under the FMLA and next of kin caring for injured servicemembers to 26 workweeks of FMLA leave. The President vetoed the Defense authorization bill in December 2007. After the President vetoed H.R. 976 (the Children's Health Insurance Reauthorization Act), Congress passed a revised version (H.R. 3963); both versions of the legislation incorporated S. 1975/H.R. 3481. The President also vetoed H.R. 3963.

DOL has included revision of FMLA regulations in its semiannual regulatory agenda since 2003. In the *Federal Register* of June 28, 2007 (pp. 35550-35638), DOL summarized the issues raised by commentators about its request for information on the need for possible changes to the act. Proposed regulations were *not* issued.

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# The Family and Medical Leave Act: Recent Legislative and Regulatory Activity

## Introduction

Congress passed the Family and Medical Leave Act of 1993 (FMLA) as a means of helping individuals more easily balance their family and work obligations. Over the past few decades, married mothers with young children increasingly have strived to fulfill both workplace and child-rearing obligations. With the enactment of welfare reform legislation, greater numbers of single parents also have had to meet the challenge of caring for their children while holding down jobs. Further, the aging of the population and lengthening life spans have made it more likely that workers will assume caregiving duties for elderly relatives, friends, and neighbors.

Time off to care for one's own health problems or those of family members is *not* a job-protected entitlement. That is to say, employees sometimes have jeopardized their continued employment to take time away from work to deal with health-related matters. In the latter half of the 1990s, according to the latest data available from the U.S. Bureau of Labor Statistics, state and local governments voluntarily provided paid sick leave to 51% of their employees.<sup>1</sup> In 2006, firms in the private sector voluntarily provided paid sick leave to 57% of their employees, and paid family leave to 8% of their employees.<sup>2</sup> With passage of P.L. 103-3, Congress mandated that some of those employers who did not provide employees with paid sick or family leave offer them *job-protected unpaid leave* to attend to their own serious medical problems as well as those of certain family members; to care for a newborn, newly adopted, or newly placed foster child; and upon the birth or placement of an adopted or foster child.

*The FMLA prescribes a minimum benefit.* Employees in jurisdictions that have enacted more comprehensive family and medical leave statutes (e.g., provide leave for reasons beyond those in P.L. 103-3) and those who work for employers that offer more expansive family and medical leave (e.g., provide a longer period of absence) are entitled to the more generous benefits.

This report begins with a brief overview of the major features of the FMLA and its regulations (at 29 C.F.R. Part 825 for most employers and employees subject to

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<sup>1</sup> William J. Wiatrowski, "Documenting Benefits Coverage for All Workers," *Compensation and Working Conditions Online*. Available at [<http://stats.bls.gov/opub/cwc/print/cm20040518ar01p1.htm>].

<sup>2</sup> U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006*, Summary 06-05 August 2006.

the act).<sup>3</sup> The various proposals that have been made to amend the act since its inception more than a decade ago are then categorized and discussed. It closes with a review of legislative and regulatory activity.

## The Act's Major Provisions and Regulations

The Wage and Hour Division in the U.S. Department of Labor (DOL) operates a nationwide toll-free referral service at 1-866-487-9243. Those who call with questions about the FMLA, among other statutes administered by the division, are connected to the appropriate federal Wage and Hour district office. The DOL representative provides other information as well, such as the telephone number for the agency responsible for family leave legislation, if any, in the caller's state.

### Coverage and Reasons for Leave

The act requires employers in the private sector (a) who have had 50 or more employees on their payrolls for at least 20 workweeks in the current or preceding calendar year and (b) who are engaged directly or indirectly in commerce, to extend job-protected,<sup>4</sup> unpaid leave to employees who have worked for them for at least 12 (not necessarily consecutive) months,

- a minimum of 1,250 hours (excluding paid or unpaid leave time) in the 12 months preceding the start of their FMLA leave, and
- who work at a facility where 50 or more persons are employed by the employer within 75 miles

for the following reasons:

- the birth of a child of the employee and to care for the newborn child,
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child,
- to care for an immediate family member — spouse, child under age 18 (or of any age if incapable of self-care due to an activity-limiting disability), or parent — with a “serious health condition”<sup>5</sup> that necessitates the employee's presence, or
- to care for the employee's own serious health condition (including maternity-related disability) that makes them unable to perform the functions of their position.

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<sup>3</sup> For a more detailed explanation of the FMLA see CRS Report RL30893, *Explanation of and Experience Under the Family and Medical Leave Act*, by Linda Levine. (Hereafter cited as CRS Report RL30893.)

<sup>4</sup> Generally, employees returning from FMLA leave must be restored to their original jobs or to jobs equivalent in pay, benefits, and other terms/conditions of employment.

<sup>5</sup> If the need for leave is related to a serious health condition, employers may require employees to obtain multiple certifications from health care providers.

(The term “serious health condition” is discussed in detail in the policy section of this report.)

Employers in the public sector (i.e., federal, state, and local governments, including local education agencies) also must provide FMLA leave, regardless of the size of their organizations.

Employees may elect, and employers may require, substitution of accrued paid vacation and personal leave for leave taken under the statute. Employees may substitute accrued paid family and sick leave subject to the employer’s policy concerning the use of these benefits.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994, the time members of the National Guard and Reserves spend absent from civilian employment due to military service is not deemed a break in employment. Thus, reemployed National Guard and Reserve members are eligible for leave under the FMLA

if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniform service, meet FMLA’s [12 months and 1,250 hours] eligibility requirements.<sup>6</sup>

## **Length and Form of Leave**

The maximum length of leave that can be taken under the statute is 12 workweeks in a 12-month period. Employees caring for their own or an eligible relative’s serious health condition can take their leave time intermittently or work a reduced schedule (e.g., fewer hours per day). They must obtain their employers’ agreement to use their leave in this manner for the two other FMLA-qualifying reasons.

In those cases where the need for intermittent or reduced schedule leave is foreseeable, employees must cooperate with their employers to schedule it to avoid disrupting business operations. Regulations issued during the Clinton Administration require employers to grant and account for intermittent leave in the shortest increment that their payroll systems use for other types of leave, so long as it is one hour or less.

## **Notification**

When the need for leave is foreseeable, employees are to provide their employers with 30 days’ notice. If the need for leave is unanticipated, employees are to provide notice “as soon as practicable,” which the Labor Department has

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<sup>6</sup> U.S. Department of Labor, “Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules,” 70 *Federal Register* 75308, December 19, 2005.

interpreted to mean within one to two business days of employees' realizing the need for time off.

Employees should provide employers with enough information to allow them to determine whether the leave is for a FMLA-qualifying reason, but employees do not have to refer to the FMLA when notifying employers. In those cases in which employees did not make employers aware that they were absent from work for an FMLA reason and in which employees want the absence to be counted toward their entitlement, employees are to give employers timely notice of their desire (i.e., within one to two business days of returning to work).

Employers must, within one to two business days of having received an employee's notice of need for leave, provide them with written notice stating that the leave will count against their FMLA entitlement; detailing whether the employee must furnish medical certification; and, among other things, explaining the employee's right to substitute accrued paid leave for unpaid FMLA leave and whether the employer is requiring such substitution, the employee's right to job restoration upon returning from leave, and the employee's obligation to make their share of premium payments for maintenance of employer-provided group health insurance. (The only fringe benefit that employers are required to continue providing to FMLA leave-takers is group health insurance.)

## **Enforcement**

If private sector, state and local government, and some federal employees believe their employer has violated the law (e.g., by denying them leave under the statute or retaliating against them for having taken FMLA leave), they may file a complaint with DOL's Wage and Hour Division.<sup>7</sup> These employees also may bring a private civil action without filing a complaint. (The right of state employees to sue their employers for violations of the FMLA was affirmed by the Supreme Court in May 2003, when it decided that state governments are subject to the act due to their history of sex discrimination.)<sup>8</sup> If, after investigating a complaint, the Wage and Hour Division cannot resolve the matter to its satisfaction, the Department's Office of the Solicitor may seek to compel compliance through the courts.

Federal courts have considered the application of various aspects of the FMLA, including determination of employee eligibility and designation of leave under the

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<sup>7</sup> In the case of Congress and some congressional agencies (e.g., the Congressional Budget Office), the Office of Compliance handles FMLA enforcement. Some other legislative branch agencies (e.g., the Government Accountability Office and the Library of Congress) handle FMLA enforcement internally. The Office of Personnel Management issues the FMLA regulations that cover executive branch employees. They are not entitled to sue and can only obtain appellate judicial review of Merit Systems Protection Board decisions in the federal circuit.

<sup>8</sup> For more information, see CRS Report RL31604, *Suits Against State Employers Under the Family and Medical Leave Act: Analysis of Hibbs v. Nevada Department of Human Resources*, by Jody Feder.

act.<sup>9</sup> The Supreme Court decided in *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 81 (2002), for example, that the appropriate remedy for an employer's failure to designate leave as falling under the FMLA is not the automatic provision of an additional 12 weeks of time off. The divided court held that employees have to prove they were harmed by the employer's failure to notify them that their absence would be subtracted from their FMLA entitlement. In this instance, the employee had taken the maximum amount of leave allowed by the company (30 weeks), which is more than twice the act's mandated minimum. The Supreme Court's decision overrides the DOL's regulation at 29 C.F.R. § 825.700(a), which states that if employees take leave but the employer does not designate it as FMLA leave, the leave does not count against the 12-week FMLA entitlement. The court noted that the duration of FMLA leave was a carefully balanced compromise which the regulation would have extended for some employees, and that a contrary ruling might have prompted employers with more generous leave policies to curtail them which would have been antithetical to the stated intent of lawmakers. It is in part because of this ruling that the Labor Department put the FMLA on its regulatory agenda.

## FMLA Policy Issues

Since its inception, proponents and opponents of the FMLA have suggested ways to change the statute to make it more employee-friendly or more employer-friendly. Some of the proposals are examined below.

### Expanding the FMLA

**Coverage and Eligibility.** DOL last surveyed employees and employers about their experience with the FMLA in the 1999-2000 period. According to the surveys, almost 90 million out of 144 million public and private sector employees worked at covered establishments and met the act's eligibility criteria in 1999-2000.<sup>10</sup> That left 33.6 million who did not work at covered establishments and 21.5 million workers who, although working for covered employers, did not fulfill P.L. 103-3's hours-of-work and length-of-service requirements. In other words, almost two out of every five employees were not entitled to leave under the FMLA during the survey period.

Proponents of the FMLA's approach to work-family balance would like to extend it to additional workers. To make the leave entitlement an option for more employees, it has been suggested that the threshold for coverage of private sector employers be lowered from at least 50, to at least 25, employees. Other suggested ways to afford more employees the opportunity to take FMLA leave include (1) eliminating the requirement that employees must have worked 1,250 hours in the

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<sup>9</sup> "Study Shows 58 Legal Challenges to the Validity of 11 Different FMLA Rules," *Daily Labor Report*, April 12, 2002.

<sup>10</sup> U.S. Department of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. A summary of the results appears in CRS Report RL30893.



preceding 12 months, (2) prorating the 12-week leave entitlement based on the number of hours worked by part-time employees, and (3) eliminating or reducing the requirement that employees must have been on an employer's payroll for 12 months.

**Reasons for Leave.** Broadening the situations for which FMLA leave can be taken could well increase what some view as the law's low utilization rate. According to the DOL survey of employees, those who took FMLA leave in 1999-2000 accounted for 11.7% of all leave-takers and 1.9% of all employees.<sup>11</sup> The rate of leave-taking under P.L. 103-3, according to DOL's survey of employers, was 6.5 FMLA leave-takers per 100 covered employees.

A health-related problem was the explanation most often provided by employees in one study who took time off to care for family members. Nonetheless, the reason accounted for a minority (29%) of employees' absences associated with family caregiving.<sup>12</sup> Another 26% of caregiving absences from work was related to the provision of transportation or other instrumental support for family members; 22%, to school/child care problems; 15%, to the provision of emotional or other support for family members; 5%, to the provision of elder care; and 3%, to coping with a family member's death. Thus, some members of the public policy community have suggested that employees be able to use FMLA leave for such reasons as attending parent-teacher conferences, participating in children's educational and extracurricular activities, taking children or elderly relatives to routine medical or dental appointments, and participating in activities that result from domestic violence.

**Care Recipient Groups.** According to one estimate, 15% of employee absences resulted from caring for parents; 12%, for spouses or partners; 7%, for grandchildren; and 24%, for other family members. The remaining 42% of employee absences were linked to caring for not only a child's health, but also for a child's educational, childcare, and other needs.<sup>13</sup> Reflecting the broad range of individuals to whom employees provide assistance, it has been proposed that the care recipient groups under the statute be extended to include elderly relatives besides the employee's own parents (e.g., a parent-in-law or grandparent), domestic partners, and non-disabled children age 18 or older.

Employers could well oppose loosening firm coverage or employee eligibility requirements, broadening the qualifying reasons, or increasing the care recipient groups. If these expansions were to increase utilization of the statute, it would impose a greater administrative and operational burden on more employers (e.g., determining whether leave qualifies under the FMLA and arranging for leave-takers' duties to be accomplished while they are absent).

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<sup>11</sup> Leave-takers were defined as individuals, regardless of their status under the FMLA, who took leave during the survey period for FMLA-qualifying reasons.

<sup>12</sup> Jody S. Heymann, *The Widening Gap: Why American Working Families are in Jeopardy and What Can be Done About It* (New York: Basic Books, 2000). (Hereafter cited as Heymann, *The Widening Gap*.)

<sup>13</sup> Ibid. Note: "Children" included those of preschool and school age as well as adult children.

**Paid Leave.** About two-thirds of employees who took leave for FMLA reasons received some compensation during their absence, principally through an employer's sick leave plan, according to the DOL employee survey. Most paid leave-takers (72%) received their full paychecks for the whole period, but 58% of leave-takers who received no or partial pay reported difficulty making ends meet. "Lack of money" was the reason offered most often by those who needed but did not take leave in 1999-2000 for FMLA reasons.

Three approaches have been advanced to provide employees with paid time off for all or some FMLA-qualifying reasons. They are briefly described below but not discussed further in this report.

- One approach would amend the Fair Labor Standards Act of 1938, which requires private sector employers to pay an overtime premium to hourly employees who work more than 40 hours in a week. Instead of giving employees their overtime in cash, private employers would be allowed to offer them compensatory time off which employees could use for whatever reasons they saw fit (e.g., for family-related reasons).<sup>14</sup>
- Another alternative would initiate a demonstration grant program to assist states interested in supplementing the income of parents who take leave for such reasons as the birth or adoption of a child, or to care for a newly born or adopted child, or who leave their jobs to care for a seriously ill infant.<sup>15</sup>
- The approach most recently advanced would require employers to provide leave with pay to employees caring for their own health and the health of other eligible individuals. Two different methods have been proposed: one mandating employers to offer their employees a paid sick leave benefit (broadly defined); the other imposing a payroll tax to establish a trust fund from which the government compensates eligible employees while on leave for FMLA-qualifying reasons.<sup>16</sup>

## Clarifying or Tightening the FMLA

**Serious Health Condition.** At 29 C.F.R. § 825.114, a "serious health condition" is defined as an illness, impairment, injury or mental/physical condition that involves

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<sup>14</sup> For additional information, see CRS Report RL31875, *Compensatory Time vs. Cash Wages: Amending the Fair Labor Standards Act?* by William G. Whittaker.

<sup>15</sup> See, for example, in the 110<sup>th</sup> Congress H.R. 1369, The Family and Medical Leave Expansion Act.

<sup>16</sup> See, for example, in the 110<sup>th</sup> Congress H.R. 1542/S. 910, The Healthy Families Act, and S. 1681, The Family Leave Insurance Act. For information on voluntary and mandated paid leave practices, see CRS Report RL34088, *Leave Benefits in the United States*, by Linda Levine.

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential mental facility;
- a period of incapacity requiring absence of more than three consecutive days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider;<sup>17</sup>
- any period of incapacity due to pregnancy or for prenatal care;
- a period of incapacity that is permanent or long-term due to a chronic condition for which treatment may not be effective (e.g., Alzheimer's disease, severe stroke, and the terminal stages of a disease); or
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on a referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy and radiation for cancer, physical therapy for severe arthritis, and dialysis for kidney disease).

Some have argued that the DOL expanded the meaning of the term beyond the kinds of health problems envisioned by lawmakers.<sup>18</sup> At a February 15, 2000 oversight hearing of the House Government Reform Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, it was asserted that a DOL nonregulatory guidance (opinion) letter effectively said that the underlying medical condition (e.g., a cold or an earache) did not matter if other requirements were met (e.g., an absence of at least three consecutive days that involves continuing treatment from a health care provider). It has been claimed that, as a result, employees are able to use their FMLA entitlement for minor health problems and to thereby abuse their employer's sick leave policy.<sup>19</sup> According to a survey conducted by the Society for Human Resource Management (SHRM), almost two-thirds of the human resources (HR) professionals who responded indicated that the FMLA entitlement had caused their firms to retain employees who otherwise would have been terminated for poor attendance.<sup>20</sup> Others have countered that not all employees work for firms that offer sick leave as part of their benefit package.

In recognition of the charge that employees may take FMLA leave for something other than a serious condition, the DOL's employee survey asked individuals who gave health-related reasons for taking leave under the act (excluding disability due to pregnancy) whether their condition required care from a doctor or

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<sup>17</sup> Continuing treatment means treatment at least twice by a health care provider or once if it results in a continuing regimen of care.

<sup>18</sup> Deborah Billings, "Business Groups Tell OMB Manufacturers Would Benefit From Overhaul of FMLA Rules," *Daily Labor Report*, August 5, 2004. (Hereafter cited as Billings, *Business Groups Tell OMB*.)

<sup>19</sup> Cindy Skrzycki, "The Regulators: Businesses Sore About Medical Leave," *Washington Post*, February 4, 2003. (Hereafter cited as Skrzycki, *The Regulators*.)

<sup>20</sup> Society for Human Resource Management, *SHRM 2000 FMLA Survey*.

an overnight stay in a hospital. Virtually all (99%) those who took leave in 1999-2000 to deal with their own or a family member's illness responded that a doctor's care was required. About two-thirds reported that they or a family member had to be hospitalized overnight.

To remedy the perceived problem — which allegedly permits abuse of the act, increases employers' administrative burden, and sparks litigation — it has been proposed that the regulation be clarified. One idea that has been advanced would explicitly state in the statute that an illness, injury, impairment or condition for which treatment and recovery are brief (e.g., fewer than seven or 14 days) does not constitute a serious health condition.

It further has been suggested that the law be revised to list specific examples of serious health conditions. In responding to questions posed during a hearing held by the Subcommittee on Children and Families of the Senate Committee on Health, Education, Labor, and Pensions on July 14, 1999, the Deputy Administrator of the DOL's Wage and Hour Division expressed concern that such a list might imply that illnesses that "everyone would agree are normally not serious conditions" could never warrant FMLA leave. He pointed out that the flu — an often-used example of a nonserious condition for which FMLA leave currently can be taken if it lasts more than three days and requires the continuing treatment of a health care provider — kills tens of thousands of people each year. He also mentioned that examples of serious health conditions are included in the regulations.

**Intermittent Leave.** As previously noted, the DOL regulation states at 29 C.F.R. § 825.203 that employers must account for intermittent leave in the smallest increment that their payroll systems use to account for other absences, as long as it is 1 hour or less. It has been argued that keeping track of such short segments of time is burdensome, particularly if the firm's payroll and attendance systems are not integrated or if the system for recording leave is not automated. However, a minority of employees take leave on an intermittent basis under the statute: according to the DOL's employee survey, about one-fifth of FMLA leaves were taken on an intermittent basis in 1999-2000. And, HR professionals reported a statistically significant decline between the SHRM's 2000 and 2003 FMLA surveys in the degree of difficulty scheduling intermittent leave in minutes.<sup>21</sup>

In order to lessen the record-keeping burden, a suggestion has been made to extend the minimum increment of leave under the act.<sup>22</sup> Others have countered that lengthening the increment would substantially penalize leave-takers by withholding, for example, half a day's pay when the employee only needed to be absent for 30 minutes. The size of the penalty could potentially discourage some employees from taking leave intermittently.

One argument that has been put forth against intermittent leave — particularly when employees provide little notice — is that it deprives employers of the ability to mitigate work disruptions, and consequently, can have significant negative effects

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<sup>21</sup> Personal communication with SHRM about its 2000 and 2003 surveys.

<sup>22</sup> Billings, *Business Groups Tell OMB*.

on the duties and schedules of a leave-taker's co-workers who typically must pick up the slack. This, in turn, could adversely affect labor productivity and the morale of a leave-taker's co-workers. HR professionals who participated in an SHRM survey noted that fewer than half of FMLA leave-takers scheduled it in advance (48%),<sup>23</sup> but DOL's employee survey found that co-workers of leave-takers generally did not think the act adversely affected them. If the use of intermittent leave remains unchanged despite extension of the minimum increment and instead, leave-takers were absent for four hours rather than 30 minutes, for example, then the act's reported burden on co-workers might worsen.

Unscheduled intermittent leave continues to be one of its most controversial features of the law, according to comments made by business and employee representatives during a June 2005 roundtable discussion convened by the Senate Health, Education, Labor, and Pensions Committee. A hospital's HR director stated that "on any given day, 25 people [medical assistants who had obtained certifications from doctors that their chronic conditions required use of intermittent leave] could call in, and there's nothing you can do about it," and a manufacturer's representative asserted that employees utilized the FMLA to circumvent disciplinary procedures in their collective bargaining agreement.<sup>24</sup> In contrast, an employee described how her ability to take intermittent leave for the years during which her child was being treated for cancer also enabled her to continue working and receiving paychecks. Jody Heymann, Director of Harvard University's Center for Society and Health Policy, noted that with the prevalence of chronic health conditions increasing and hospitalizations decreasing, access to intermittent leave "allows the worker to miss as little work as possible."<sup>25</sup>

On the basis of surveys conducted by SHRM in 2006 and 2007, it appears that HR professionals continue to have difficulty administering the act and report negative consequences more often when leave is taken intermittently for chronic health conditions as opposed to catastrophic health conditions or when leave is taken to care for a newborn or newly placed adopted or foster child. The short notice (less than one week) employees often give for taking time off for episodic conditions — which reportedly makes it difficult for companies to deal with absences — may partly be the cause of these findings.<sup>26</sup>

### **Employer Response Time to Notification of Need for Leave.**

Employers must respond in writing within one to two business days to an employee's notification of the need for leave, as stated at 29 C.F.R. § 825.208. Some have asserted that this is an extremely short period in which to determine whether the

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<sup>23</sup> Society for Human Resource Management, *SHRM 2003 FMLA Survey*.

<sup>24</sup> Fawn H. Johnson, "'Roundtable' Panel Debates Usefulness of 'Intermittent Leave' in Family Leave Law," *Daily Labor Report*, June 24, 2005, p. A-10.

<sup>25</sup> *Ibid.*, p. A-11.

<sup>26</sup> Society for Human Resource Management, *FMLA: An Overview of the 2007 FMLA Survey*, May 2007. See also *Family Medical Leave*, SHRM Weekly Online Survey, January 9, 2007, and *Leave Administration under the FMLA*, SHRM Weekly Online Surveys, November 7 and 15, 2006.

leave comes under the FMLA and to provide further guidance to employees, particularly as employees do not have to mention the FMLA in their notification and especially if employees informally tell their immediate supervisors rather than directly informing the employers' HR personnel who process the paperwork.

It has been suggested that employer's response time be lengthened. It also has been urged that employees be required to request FMLA leave specifically.<sup>27</sup> In addition, some have proposed that employers be allowed to make retroactive designations of absences as having fallen under the FMLA.

## Current Legislative and Regulatory Activity

### Legislative Activity

**Leave for Relatives of Military Servicemembers.** Foreign military operations involving members of the National Guard and Reserves conducted in the last several years have prompted congressional interest in modifying the FMLA.<sup>28</sup> The House, in May 2007, included in the FY2008 Department of Defense authorization bill (H.R. 1585, Section 675) an amendment that makes eligible for 12 workweeks of FMLA leave spouses, children, or parents of persons on or notified of an impending call to active duty in the Armed Forces in support of a contingency operation. The intent is to enable FMLA-covered workers to use leave under the act to deal with family-related matters arising from the call to duty (e.g., making child-care arrangements). In contrast, the leave program mandated temporarily in H.R. 1585, as passed by the Senate in October 2007, for federal employees designated by persons performing certain military service to care for their family members does not amend the FMLA; neither does the voluntary private sector leave program also set to expire on December 31, 2010. The conference report (H.Rept. 110-477), issued in early December, includes Section 675 and substitutes a slightly modified S. 1975 for the language contained in the Senate-passed version of H.R. 1585. The President vetoed the Defense appropriations bill in December 2007.

S. 1975 is one of several bills to amend the FMLA introduced in response to a recommendation of the Dole-Shalala Commission. In late July 2007, the President's Commission on Care for America's Returning Wounded Warriors (the Dole-Shalala Commission) released its report. One of the commission's recommendations is to lengthen the FMLA leave period from 12 workweeks to 6 months for otherwise FMLA-eligible spouses and parents caring for injured servicemembers. Shortly after the report's release, several similar servicemember family leave bills were introduced:

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<sup>27</sup> Skrzycki, *The Regulators*.

<sup>28</sup> For example, attempts failed during the 108<sup>th</sup> Congress to provide leave under the act to FMLA-eligible relatives of members of the Armed Forces who become actively deployed in support of a contingency operation so that they could deal with issues associated with the deployment.

- S. 1975/H.R. 3481 and H.R. 3502 amend the FMLA to entitle current FMLA-eligible relatives and next of kin<sup>29</sup> caring for recovering servicemembers to 26 workweeks of leave;
- S. 1894 amends the FMLA to entitle primary caregivers of servicemembers with combat-related injuries to 26 workweeks of leave; S. 1898/H.R. 3391 amends the FMLA to entitle current FMLA-eligible relatives caring for recovering servicemembers to 26 workweeks of leave, and H.R. 3556 does so for 24 workweeks; and
- S. 1885 (which does not amend the FMLA) entitles to 52 workweeks of job- and benefit-protected leave relatives currently eligible under the FMLA as well as siblings at FMLA-covered employers who are caring for recovering servicemembers.

H.R. 976 as passed by the Senate on August 2, which principally dealt with reauthorization of the State Children's Health Insurance Program (SCHIP), incorporated S. 1885 and S. 1975.<sup>30</sup> On September 25, the House passed a modified version of H.R. 976 that contained both leave provisions. The Senate accepted those amendments two days later. Shortly after the President vetoed H.R. 976, the House and Senate passed a modified version — H.R. 3963 — that included only the language from H.R. 976 amending the FMLA to entitle currently eligible relatives as well as next of kin caring for recovering servicemembers to 26 weeks of unpaid job-protected time off from work. The President subsequently vetoed H.R. 3963.

**Other Unpaid Family Leave Bills.** Other bills seek to expand who is eligible for leave under the FMLA and the reasons for which leave may be taken. H.R. 2792, for example, would entitle same-sex spouses, domestic partners, parents-in-law, adult children, siblings, and grandparents to leave under the act. And, H.R. 2808 allows time off under the statute to employees who provide living organ donations.

H.R. 1369 is a broad proposal that, in addition to lowering the firm-size threshold to 25 employees, would extend the FMLA entitlement to employees addressing domestic violence. Another wide-ranging bill, H.R. 2392, would add as reasons for taking time off under the FMLA employee attendance or participation in an activity sponsored by a school or community organization that the employee's child or grandchild attends and meeting routine family medical care needs (e.g., transporting a grandchild for vaccinations or visiting a parent in a nursing home). The bill also adds caring for grandchildren to the act. H.R. 2392 lowers the firm-size threshold to 15 employees and the employee eligibility requirement to 1,050 hours as well.

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<sup>29</sup> Next of kin is defined as the servicemember's nearest blood relative.

<sup>30</sup> *Congressional Record*, August 2, 2007, pp. S10739-S10740 and pp. S10829-S10830.

## Regulatory Activity

Citing the need to reflect the Supreme Court's decision in *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 81 (2002), the Labor Department has included the FMLA in each semiannual regulatory agenda since 2003. (See the earlier discussion of the court case in the section on enforcement.)

On March 9, 2005, the Office of Management and Budget (OMB) announced that it would look into revision of FMLA regulations, among others, in response to recommendations by industry and nonprofit groups that stemmed from a 2004 OMB request for public comment on changes to rules, guidance, etc. from DOL and other agencies. The Labor Department responded to the recommendations by stating that a proposal to revise the FMLA regulations would be issued in 2005.<sup>31</sup> However, at an April 5, 2005, hearing of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, the DOL Assistant Secretary for Employment and Standards testified that "it is unclear when that proposal will be released or what it will contain."<sup>32</sup> Shortly thereafter, in a letter dated April 12, 2005, House Democrats asked that DOL not make regulatory changes that would "undercut the critical protections [the law] provides."<sup>33</sup>

In December 2006, the department issued a request for information from the public on the need for possible changes to the act, among many other things.<sup>34</sup> The release of the information request left some wondering whether it might be a harbinger of DOL's soon proposing changes to FMLA regulations, and others wondering why the department issued it rather than a proposed rule.<sup>35</sup> The wide-ranging request asked about the definition of a serious health condition and about attendance policies, for example. It sought guidance on how to determine the use of intermittent leave and its financial impact, and whether its impact differs by employer size.<sup>36</sup> The comment period closed in February 2007.

DOL released a report based on the public's input in June 2007, *without including proposed changes to the FMLA regulations*.<sup>37</sup> The report concludes that

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<sup>31</sup> "Federal Agencies to Move on 76 Suggestions by Public to Lower Costs for Manufacturers," *Daily Labor Report*, March 11, 2005.

<sup>32</sup> Fawn H. Johnson, "No Deadline for FMLA Rule, Official Says," *Daily Labor Report*, April 6, 2005, p. AA-1.

<sup>33</sup> Eric Lekus, "House Democrats Send Letter to DOL Opposing Major Changes to Family Leave Law," *Daily Labor Report*, April 13, 2005.

<sup>34</sup> "Request for Information on the Family and Medical Leave Act of 1993," 71 *Federal Register* 69504, December 1, 2006.

<sup>35</sup> Michael R. Triplett, "DOL's Information Request Regarding FMLA Gets Attention of Business, Worker Groups," *Daily Labor Report*, December 4, 2006.

<sup>36</sup> Michael R. Triplett, "DOL Requests Public Information on FMLA in First Major Examination of Regulations," *Daily Labor Report*, December 1, 2006.

<sup>37</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor's (continued...)



the act appears to be working well with regard to leave taken for birth or adoption and for health conditions “that require blocks of time and are undeniably ‘serious’ health conditions.” It notes that employee commentators expressed a desire for more time off, leave with pay, and coverage of additional family members — all of which are beyond the department’s statutory authority; employer commentators voiced concern about disruption to business operations and attendance problems associated with unscheduled intermittent leave taken for chronic health conditions. Neither employees nor employers nor health care providers are content with the medical certification process, according to the report. A chapter of the report is devoted to each of the following issues:

- the value of the FMLA to employees,
- the Ragsdale court decision,
- serious health conditions,
- unscheduled intermittent leave,
- employee rights and responsibilities,
- the medical certification process,
- relationship between the FMLA and the Americans with Disabilities Act,
- transfer of employees to another position to accommodate foreseeable intermittent leave or a reduced leave schedule,
- substitution of paid leave,
- joint employment, and
- data on FMLA coverage, usage, and economic impact.

On October 1, 2007, while speaking at an American Bar Association event, Assistant Secretary for the Employment Standards Administration Victoria Lipnic mentioned that discussions were taking place within the department and with concerned parties about changes to the medical certification procedure that could be made outside the regulatory process (e.g., changing the model form that may be used for FMLA certification by health care providers). She also said that the department was considering the impact of a court ruling that “found DOL must approve settlement agreements that involve a waiver of FMLA rights.”<sup>38</sup>

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<sup>37</sup> (...continued)

Request for Information; Proposed Rule, *Federal Register*, June 28, 2007.

<sup>38</sup> Michael R. Triplett, “DOL Considering Changes to Forms Used for FMLA Health Care Provider Certifications,” *Daily Labor Report*, October 1, 2007.