

**STAFF**

Sherry Leiwant  
*Executive Director*

Nancy Rankin  
*Senior Fellow*

Phoebe Taubman  
*Project Attorney/  
Equal Justice Works  
Fellow*

Yolanda Wu  
*Co-President*

**BOARD**

Dina Bakst  
*Board Chair /  
Co-President*

Risa Kaufman  
*Treasurer*

Roslyn Powell  
*Secretary*

Martha Baker

Anna Wadia

Kathryn Webber

**ADVISORY  
BOARD**

Ann Crittenden  
*Author*

Martha Davis  
*Professor, Northeastern  
University School of Law*

Marlene Debel  
*Managing Director,  
Merrill Lynch*

Deborah Ellis  
*Asst Dean for  
Public Interest Law  
NYU School of Law*

Janet Gornick  
*Professor,  
Baruch College,  
City University of  
New York*

Deborah Epstein  
Henry  
*President,  
Flex-Time Lawyers LLC*

Susan Butler Plum  
*Director, Skadden  
Fellowship Program*

Richard Revesz  
*Dean,  
NYU School of Law*

Joan Williams  
*Distinguished Professor  
and Director, UC Hastings  
College of the Law,  
Center for Worklife Law*

April 10, 2008

**VIA ELECTRONIC SUBMISSION**

Richard M. Brennan  
Senior Regulatory Officer  
Wage and Hour Division  
Employment Standards Administration  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210  
29 CFR Part 825  
RIN 1215-AB35

**Re: Proposed Changes to Family and Medical Leave Act Regulations**

Dear Mr. Brennan:

Thank you for providing us with the opportunity to comment on the Department of Labor's proposed changes to the Family and Medical Leave Act Regulations.

A Better Balance: The Work and Family Legal Center is a non-profit legal advocacy organization dedicated to empowering individuals to meet the conflicting demands of work and family without sacrificing their economic security. We believe that workers should not have to face impossible choices between earning a paycheck and caring for their loved ones. The founders of A Better Balance are a group of lawyers who have successfully worked together on a variety of women's rights and economic issues and now seek to forge a comprehensive multi-strategic approach to addressing the work-family dilemma. We employ a range of legal strategies to promote flexible workplace policies, end discrimination against caregivers and value the work of caring for families. Preserving and strengthening the protections of the Family Medical Leave Act is central to our organization's mission.

The passage of the Family and Medical Leave Act was an important step in the effort to make our society more supportive of working families. The law recognizes the tremendous responsibilities and contributions of workers who provide care to family members and addresses the precarious situation of those who suffer from serious health problems. The FMLA has helped millions of men and women balance work and family obligations but because of various statutory limitations its benefits are limited to a fraction of this country's workers. In the current climate of economic insecurity, and as more Americans struggle to support and care for their families, the Department of Labor should defend the protections guaranteed by the FMLA and should not restrict them any further through regulatory changes.



459 Columbus Avenue #367

New York NY 10024

t: 212-724-1155 f: 212-724-3535

[info@abetterbalance.org](mailto:info@abetterbalance.org)

<http://abetterbalance.org>

Detailed below are comments in response to the Department of Labor's Notice of Proposed Rule Making and Request for Comments. In Part I, we recommend that the Department consider any changes to the FMLA regulations in light of the statute's proven success, as well as the success of the current regulations. In Part II we commend the Department for refusing to further restrict FMLA leave by counting "light duty" against the 12 weeks of guaranteed leave and for requiring more frequent distribution of FMLA information to workers, and urge immediate implementation of the military expansion provisions. Finally, in Part III we advise the Department to reconsider proposed changes that limit employees' access to FMLA leave, and offer proposals to balance more equitably the interests of employees and employers.

Thank you for your consideration.

Sincerely,

Phoebe Taubman, Project Attorney  
Sherry Leiwant, Executive Director  
A Better Balance: The Work and Family Legal Center  
459 Columbus Avenue, #367  
New York, NY 10024

## **I. Any Changes to FMLA Regulations Should be Considered in the Context of the Statute's Importance and Overwhelming Success.**

**EXPAND, RATHER THAN LIMIT, THE REACH OF THE FMLA.** In the years since it was passed and signed into law in 1993, the Family and Medical Leave Act (FMLA) has proven critical for millions of workers who need to provide care for their loved ones, and themselves, without sacrificing their jobs or their economic security. The need is great. Nearly half of the American workforce has eldercare and/or childcare responsibilities.<sup>1</sup> Mothers are participating in the workforce in large numbers: in 2006, the labor force participation rate for all mothers was 70.9%, and among mothers with children younger than a year old, 56.1% were in the labor force.<sup>2</sup> More than half of married couples with children under 6 years old have both parents working,<sup>3</sup> and such dual-earner parents work longer on average—81 hours a week—than their counterparts in other industrialized countries.<sup>4</sup> Nationwide, 21 million full-time and 5 million part-time workers provide unpaid care to an elderly, disabled, or chronically ill family member and their numbers are expected to rise by 85% between 2000 and 2050.<sup>5</sup>

The FMLA has aided these workers immeasurably by giving them time to care. It has helped new mothers and fathers spend time bonding with and caring for their fragile new infants. It has also helped the growing number of workers with eldercare responsibilities—including those in the “sandwich generation” with both childcare and eldercare obligations—care for their aging parents. Overall, millions of Americans, including those with serious illnesses of their own, have benefited from the job-protected leave guaranteed by the FMLA.<sup>6</sup> At the same time, the law has not imposed unreasonable burdens on employers. In fact, the existing regulations have done an excellent job of balancing the interests of employers and employees. According to the Department of Labor there is a “broad consensus that family and medical leave is good for workers and their families, is in the public interest, and is good workplace policy.”<sup>7</sup>

As successful as the FMLA has been, it has also been limited in reach. The statute restricts eligibility by size of employer and tenure of employee; to be eligible, employees must work at a

---

<sup>1</sup> *The MetLife Study of Sons at Work Balancing Employment and Eldercare: Findings from a National Study by the National Alliance for Caregiving and The Center for Productive Aging at Towson University*, Mature Market Institute, June 2003, pg. 3, available at <http://geckosystems.com/downloads/sonsatwork.pdf>.

<sup>2</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Employment Characteristics of Families in 2006*, May 9, 2007, available at <http://www.bls.gov/news.release/famee.nr0.htm>.

<sup>3</sup> *Id.*

<sup>4</sup> Janet C. Gornick, *The Government's Gone Fishin': The Absence of Work/Family Reconciliation Policy in the United States*, Presentation at the Work Family Dilemma: A Better Balance Summit (February 1-2, 2007).

<sup>5</sup> *Family Values at Work: It's About Time! Why we need Minimum Standards to Ensure a Family-Friendly Workplace*, Multi-State Working Families Consortium, 2007, pg. 3, available at <http://www.9to5.org/familyvaluesatwork/FV@workSummary.pdf>.

<sup>6</sup> According to data from 2005, approximately 7.0 million covered and eligible workers took FMLA leave that year. 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).

<sup>7</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 124 (June 28, 2007).

worksite with at least 50 employees, or where 50 employees work within 75 miles of the worksite, and employees must have worked for their employers for 12 months before taking leave. Because of these limitations, only 47% of the private workforce is actually eligible for FMLA leave.<sup>8</sup> Furthermore, because the leave guaranteed by the FMLA is unpaid, many workers who are eligible to take time off cannot afford to do so. According to one study, more than three out of four employees (78%) that needed FMLA leave did not take it because they could not afford to take the leave.<sup>9</sup> Nearly nine in ten employees (88%) in the same study reported they would have taken leave had they been able to receive some or additional pay while away from work.<sup>10</sup> Shockingly, almost one out of every ten FMLA leave-takers reported they were forced to go on public assistance while on leave.<sup>11</sup>

These statistics are especially disappointing when compared to leave statistics in other nations around the world. One hundred and thirty-seven countries mandate some paid annual leave that can be used to care for family members.<sup>12</sup> In one study of 173 countries, 168 were found to guarantee paid leave to women in connection with childbirth, with 98 of them offering 14 or more weeks of paid leave.<sup>13</sup> The United States is one of *only four* nations—along with Liberia, Papua New Guinea and Swaziland—that do not provide paid leave to new mothers.<sup>14</sup>

Given the established success of the FMLA, the continuing and ever-growing need among working Americans for job-protected family and medical leave, and the relative weakness of U.S. work/family policies compared to the rest of the developed world, any revisions of the FMLA implementing regulations should expand access to leave to the greatest extent possible within statutory limits. The Department's proposed changes, when added together, threaten to limit workers' access to leave and impose further burdens on their ability to exercise their rights under the law. For this reason, we urge the Department to reconsider the proposed regulations with the purpose of expanding, not limiting, the reach of the FMLA.

**Recommendation:** Make expanded access to FMLA leave a primary purpose of any changes to the FMLA implementing regulations.

---

<sup>8</sup> Ellen Galinsky, James T. Bond, and E. Jeffrey Hill, *When Work Works: A Status Report on Workplace Flexibility. Who has it? Who wants it? What difference does it make?*, Families and Work Institute, 2004, pg. 18, available at <http://familiesandwork.org/3w/research/downloads/status.pdf>.

<sup>9</sup> Betty Holcomb, *Why Americans Need Family Leave Benefits and How they Can Get Them*, National Partnership for Women and Families, pg. 1, available at <http://www.nationalpartnership.org/site/DocServer/WhyAmericansNeedFamilyLeaveBenefits.pdf?docID=1058>.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Jody Heymann, *Caring for Families: Will Cities Lead the Way?*, Presentation at The Work Family Dilemma: A Better Balance Summit (February 1-2 2007).

<sup>13</sup> Id.

<sup>14</sup> Jody Heymann, Alison Earle and Jeffrey Hayes, *The Work, Family, and Equity Index: How Does the United States Measure Up?*, Project on Global Working Families, pg. 1, available at <http://www.mcgill.ca/files/ihsp/WFEIFinal2007.pdf>.

## **II. The Department Did Well to Clarify and Strengthen Certain Regulations and Should Implement the FMLA Military Expansion Provisions Immediately.**

**LIGHT DUTY RULES PROPERLY CLARIFIED.** The Department's proposed changes to § 825.220(d) are welcome and well-advised. Under current regulations, workers who voluntarily accept a light duty position in lieu of taking FMLA leave may have that time counted against their 12 weeks to be reinstated to their regular position. As the Department has pointed out, at least two courts have further interpreted this to mean that an employee can use up his or her entire allotment of FMLA leave while working in a light duty assignment, even though he or she has been at work, and distinctly not on leave, the entire time.<sup>15</sup>

It is critical that employees who are able to work in light duty positions retain their full 12 weeks of FMLA leave to care for their children, their family members or their own serious health problems. It would be contrary to purpose of the FMLA, i.e. to guarantee workers 12 weeks away from their jobs when they need it, if time spent in light duty were permitted to diminish an employee's right to family and medical leave. The Department has properly clarified that "when an employee is performing a light duty assignment, that employee's rights to FMLA leave and to job restoration are not affected by such light duty assignment."<sup>16</sup>

**INCREASED INFORMATION TO EMPLOYEES IS VITAL.** The Department has correctly recognized the need for better communication between employers and employees regarding employee rights under the FMLA.<sup>17</sup> It has also recognized its own role in facilitating such communication, explaining that "[i]t is clear the Department has more work to do to further educate employees and employers regarding their rights and responsibilities under the law."<sup>18</sup> The Department's proposal for a comprehensive section in the regulations addressing employers' notice obligations is an important first step. We also endorse the proposal to require annual distribution of a general notice describing the FMLA and employees' rights under the law. We agree with the Department that "communication will be more effective if the notice is provided routinely and annually rather than only when an employee is facing a significant family event like the birth or adoption of a child or a serious medical emergency affecting the employee or family member."<sup>19</sup> Because the need for family and medical leave often arises unexpectedly, upon an accident or serious diagnosis, employees must be able to act quickly, and with full knowledge of their rights, to address those emergencies.

---

<sup>15</sup> 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).

<sup>16</sup> Id.

<sup>17</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 124 (June 28, 2007).

<sup>18</sup> Id.

<sup>19</sup> 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).

In addition, we propose expanding the annual notice requirement to include employers who do not currently have any eligible employees, but whose employees may be working their way towards eligibility and would benefit from knowing about their rights so they can plan for the future. This is especially relevant for future parents, who may not yet be eligible for leave when they begin their family planning, but will become eligible by the time their child is born. The additional burden on employers of such a requirement is minimal as much of the information necessary for the general notice is summarized by the Department in a poster and fact sheet available on its website.

We also propose expanding the annual notice requirement to include employers who have employee handbooks. Under current regulations, such employers can place the required FMLA notice in their handbooks. The proposed rule allows employers to provide general notice either by including it in an employee handbook *or* by distributing a copy to each employee at least once a year. Unless the rule also requires that employee handbooks be redistributed every year, the goal of annual information may still go unmet. Thus, the Department should make clear that employers with employee handbooks are also obligated to give annual notice of the FMLA's availability.

**Recommendation:** Require annual FMLA general notice by all covered employers, including those without any presently eligible employees and those who use employee handbooks.

**EXPEDITE MILITARY EXPANSION.** The Military Expansion for Injured Servicemembers Act, the first expansion of the FMLA since 1993, provides much-needed leave benefits to families of service members and should be put into effect immediately. Tens of thousands of American service members have suffered injuries in Iraq and Afghanistan over the past six years, and with no definite end to those conflicts in sight, their numbers will continue to rise. A record number of wounded troops have suffered traumatic brain injury<sup>20</sup> and at least thirty to forty percent of Iraq war veterans, or about half a million service members, will face a serious psychological wound, including depression, anxiety or post traumatic stress syndrome.<sup>21</sup> Veterans rely on their families to care for and support them as they recover from their injuries and return to civilian life. These working caregivers deserve the 26 weeks of FMLA leave recently granted to them by Congress and we urge the Department to act with haste to put these new benefits into effect.

In addition to caring for injured service members, military families are facing the challenges posed by multiple deployments. Children whose parents are on their second, third or even fourth tour of duty are especially hard hit by the stress of war, and often require increased attention and support from other family members.<sup>22</sup> The military has recognized the crushing impact on

---

<sup>20</sup> Iraq and Afghanistan Veterans of America, *Traumatic Brain Injury: The Signature Wound of the Iraq War*, January 2008, pg. 1, available at [http://www.iava.org/documents/TBI\\_Quickfacts.pdf](http://www.iava.org/documents/TBI_Quickfacts.pdf).

<sup>21</sup> Iraq and Afghanistan Veterans of America, *Mental Health Injuries: The Invisible Wounds of War*, January 2008, pg. 1, available at [http://www.iava.org/documents/Mental\\_Health\\_Injuries\\_Quickfacts.pdf](http://www.iava.org/documents/Mental_Health_Injuries_Quickfacts.pdf).

<sup>22</sup> David McLemore, "Soldiers' Kids Struggle to Cope with Multiple Tours," Dallas Morning News, June 5, 2007, available at [http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/DN-militarykids\\_05tex.ART0.State.Edition2.436f46f.html](http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/DN-militarykids_05tex.ART0.State.Edition2.436f46f.html).

families of multiple deployments, and has ramped up its own support programs in response.<sup>23</sup> The new provisions of the FMLA that allow military family members to use their 12 weeks of leave to help with “qualifying exigencies” arising out of deployment are a necessary complement to the military’s support programs and should be implemented as soon as possible.

**Recommendation:** Immediately implement the proposed regulations on the military expansion as interim regulations to ensure that the provisions of the Military Expansion for Injured Servicemembers Act go into effect immediately.

### **III. The Department Should Not Implement Regulatory Changes That Would Restrict Workers’ Ability to Exercise Their Rights Under the FMLA.**

**ELIMINATE RESTRICTIONS ON, AND REQUIRE CLEAR COMMUNICATION OF RULES REGARDING, ACCRUED PAID LEAVE.** The Department’s proposed changes to § 825.207 of the FMLA regulations will make it harder for workers to keep their households afloat while they are away from work on FMLA leave. Under current regulations, employees are relatively free to use their earned vacation and personal time while on FMLA leave in order to maintain their income and cover their expenses.<sup>24</sup> The new regulations would restrict that flexibility by requiring employees to meet various requirements in their employers’ paid leave policies in order to use their earned leave concurrently with FMLA leave.<sup>25</sup>

As many as three in four workers who are eligible for FMLA leave simply cannot afford to take such leave without pay.<sup>26</sup> These workers need to be able to use paid leave they have earned on the job to cover their expenses while caring for themselves or their loved ones. According to a 2000 survey of employees, of the 65% who took FMLA leave and received some pay, 61% reported using paid sick leave, 40% reported using vacation leave, and 26% reported using personal leave.<sup>27</sup> Expanding, not restricting, workers’ access to accrued leave is essential to make the promise of family and medical leave a reality.

Changes to the regulations that serve to constrain and complicate employees’ ability to take concurrent accrued paid leave are especially problematic given the trouble so many employees already face when trying to navigate their rights under the law. We recently heard from a woman who works for a New York City agency and wanted to take paid leave concurrently with FMLA leave after the birth of her child. She thought she would be able to use her accrued sick leave, but was told she could only use that leave if she herself was sick. As it turns out, the agency’s policy does not explicitly prohibit use of sick leave during maternity leave, but rather says sick leave must be used, and counted against FMLA leave, if an absence is due to the

---

<sup>23</sup> Id.

<sup>24</sup> 29 CFR § 825.207 (2007).

<sup>25</sup> 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).

<sup>26</sup> Betty Holcomb, *Why Americans Need Family Leave Benefits*, at 1.

<sup>27</sup> Jean Flatley McGuire and Kaitlyn Kenny, *Fact Sheet on Extended Time Off*, Workplace Flexibility 2010, pg. 2, available at <http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/EPTOFactSheet.pdf>.

employee's own serious health condition. We discovered that the woman could use her accrued sick leave to be paid while recovering from childbirth only if she secured a note from her doctor stating that she was disabled. In this case, it took a call to our organization, and the help of other city officials, to decipher the sick and maternity leave policies of one city agency.

In another example, Karen Deonarain, the mother of a 1-pound-10-ounce premature baby, believed she would be able to return to her job after her daughter was discharged from the hospital.<sup>28</sup> Despite several conversations with and assurances from her supervisor that the company understood her situation, Karen later discovered that her job had been terminated because, her employer claimed, she had failed to contact the company and account for her absence within three days. Although Karen's employer was just shy of 50 employees at the time, and thus not covered by the FMLA, her story provides another harsh example of how employees can suffer from poor communication and implementation of employer leave policies.

In order for employees to be able to exercise their statutory rights under the FMLA, including the right to substitute paid accrued leave for FMLA leave, employers must clarify their policies and communicate them more effectively to their employees. Unfortunately, such effective communication has not been the norm. Employers' written leave policies are often confusing and fail to provide clear information to potential FMLA leave-takers. The Department has recognized this as a problem area, citing that "many employees are misinformed about the fact that paid leave can be substituted for, and run concurrently with, an employee's FMLA leave."<sup>29</sup> Given the widespread and persistent misinformation among employees about substituting accrued paid leave for FMLA leave, the Department should reconsider its proposed changes to § 825.207. If, despite these problems, the Department implements the proposed changes, it should require employers who deny substitution of paid leave to bear the burden of proving that they did so only after effectively communicating their leave policies to their employees.

**Recommendation:** Reject proposed changes to § 825.207—do not require that employees follow employers' rules for taking vacation or personal leave in order to use such leave concurrently with FMLA leave.

**REQUIRE PAID SICK TIME FOR ADDITIONAL MEDICAL APPOINTMENTS.** The Department's proposed regulations will impose additional burdens on workers by increasing the number and frequency of medical visits required to use FMLA leave for a chronic condition and/or intermittent leave. Proposed changes to § 825.114(a)(2)(iii), which requires periodic medical visits for treatment of a chronic serious health condition, will define the term "periodic" to mean two or more times a year.<sup>30</sup> Similarly, changes to current § 825.308, regarding recertification of a medical condition, will allow employers to request recertification every six

---

<sup>28</sup> Eyal Press, "Family-Leave Values," New York Times, July 29, 2007.

<sup>29</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 124 (June 28, 2007).

<sup>30</sup> 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).



months.<sup>31</sup> Finally, changes to current § 825.310 will require employees to furnish, at their own expense, a fitness-for-duty certificate every 30 days if they have used intermittent leave during that period and reasonable safety concerns exist.<sup>32</sup>

These additional medical visits will hit workers hard in the wallet at a time when medical costs are skyrocketing and will cost many workers in lost wages because they lack paid sick time. According to the Bureau of Labor Statistics, 43% of workers in the private sector do not have access to paid sick leave.<sup>33</sup> The numbers are even starker among low-income workers, only 21% of whom receive paid sick days.<sup>34</sup> These workers will not be able to recoup the earnings they have lost taking time away from work (sometimes as much as a day due to travel time) to visit their doctors. Even among workers who have access to paid sick time, a chronic condition will likely mean burning through their paid sick days at an accelerated rate. Thus workers both with and without paid sick days may soon find themselves in the position of having to take additional unpaid time from work, beyond that required for care of their condition, simply to satisfy regulatory requirements.

The Department is aware of the burden on workers imposed by these new regulations and has asked for comment on ways to minimize the burden and on whether its proposal strikes the appropriate balance. Given the large proportion of workers who lack even one day of paid sick time to cover medical appointments and treatment of their chronic health condition, and considering the difficulties that those with paid sick time often have using that leave, the Department should require employers to share a greater portion of the cost of the required medical visits by providing paid sick time to cover those appointments. In addition, employers who do not provide health insurance to their employees should pay the cost of their employees' FMLA leave-related medical appointments.

**Recommendation:** Require employers to provide employees with paid sick leave for time taken from work to attend medical appointments required under proposed regulations and require those employers who do not provide health insurance to cover the costs of the medical visits as well.

**NO WAIVER OF WORKERS' FMLA CLAIMS WITHOUT REVIEW.** Current regulations, which have both been in effect and effective for over a decade, do not allow employees to waive, or employers to induce employees to waive, their FMLA rights.<sup>35</sup> The Department proposes to change these rules to allow for employee waiver of FMLA claims, without court or Department approval, in connection with a settlement or severance package. This is a step backwards and one that poses risks to employees who are often unrepresented or

---

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> U.S. Department of Labor, Bureau of Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2007*, August, 2007, pg. 28 available at <http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf>.

<sup>34</sup> *Family Values at Work: It's About Time! Why We Need Minimum Standards To Ensure A Family-Friendly Workplace*, MultiState Working Families Consortium, September 2007, pg. 6, available at <http://www.9to5.org/familyvaluesatwork/FV@workReport.pdf>.

<sup>35</sup> 29 CFR § 825.220(d) (2007).

lack access to representation in the severance process. The original rationale behind prohibiting waiver, i.e. protecting employees and their FMLA rights from coercive pressure of employers, still holds. The uneven power dynamic between employers and employees remains and thus prohibitions against employees waiving their rights, and employers inducing employees to waive their rights, continue to constitute sound public policy.

**Recommendation:** Reinforce prohibition against waiver of FMLA rights and clarify that employees may not waive FMLA claims in severance or settlement packages without court or DOL approval.

**FMLA LEAVE SHOULD NOT COUNT AGAINST ATTENDANCE AWARDS.** The Department’s proposed changes to § 825.215(c), regarding an employee’s right to reinstatement to a position with equivalent pay, would improperly penalize workers for taking leave that they are entitled to under law. Currently, employers cannot penalize employees for taking FMLA leave in order to disqualify them from receiving perfect attendance awards, which often come with financial rewards. The proposed changes would allow employers to deny payment based on achievement of a goal, such as hours worked, products sold, or perfect attendance, if an employee has not met the goal due to FMLA leave.<sup>36</sup> This change would create an incentive for employees to avoid taking necessary FMLA leave, especially when doing so would mean jeopardizing already fragile family finances.

The Department should not penalize workers for taking time guaranteed by law to address their family responsibilities and provide much-needed care. Such penalties and disincentives violate the purpose of the FMLA, which was enacted to protect workers and their jobs in the face of extreme personal health or family caregiving demands. Specifically, § 825.220 prohibits employers from interfering with employees’ rights under the law, and defines “interfering with” the exercise of an employee’s rights to include “discouraging an employee from using such leave.”<sup>37</sup> Disqualifying employees from potentially lucrative attendance awards if they take FMLA leave openly discourages them from exercising their rights under the law.

The proposed changes to § 825.215(c) also run counter to the principle embodied in § 825.220(c), which prohibits employers from using the taking of FMLA leave as a negative factor in employment actions and from counting FMLA leave against employees under “no fault” attendance policies. FMLA leave should not count against an employee for purposes of calculating attendance, whether it be to prevent her eligibility for attendance awards or to penalize her for missing work under a “no fault” attendance policy. In both cases, counting FMLA leave against the employee is a violation of the statute.

**Recommendation:** Reject proposed changes to § 825.215(c)—allow workers who take FMLA leave to continue to be eligible for attendance awards, and reaffirm that FMLA leave may not be counted against employees under “no fault” attendance policies.

---

<sup>36</sup> 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).

<sup>37</sup> 29 CFR § 825.220 (2007).

**REJECT NEW NOTICE REQUIREMENTS FOR WORKERS SEEKING LEAVE IN LIGHT OF INSUFFICIENT EMPLOYEE EDUCATION.** As discussed above in Section II, communication and understanding between employers and employees regarding FMLA rights, and procedures for exercising those rights, must be improved. The Department agrees with this assessment, affirming that “a better understanding on the part of both employees and employers as to their respective FMLA rights and obligations will better ensure that employees who qualify for FMLA leave obtain such leave.”<sup>38</sup> The Department also acknowledges, however, that it has a long way to go; “It is clear the Department has more work to do to further educate employees and employers regarding their rights and responsibilities under the law.”<sup>39</sup>

Given the dearth of employee education about FMLA rights and responsibilities that have been in effect for 15 years, it undermines the purpose of the statute to impose still further requirements on employees seeking leave. The Department’s proposed changes include truncating the timeline for employees to provide notice of leave and adding requirements as to what they must say when requesting leave and to whom they must say it. They also require that employees using concurrent paid leave conform to their employers’ individualized leave rules. These new requirements erect additional hurdles and pose potential hazards for already ill-informed employees seeking leave. We fear that the proposed changes will prevent even more employees who qualify for FMLA leave from obtaining such leave, further frustrating the purpose of the statute.

**Recommendation:** Abandon increased and tightened notice requirements for employees seeking leave.

**Respectfully submitted,**

Phoebe Taubman, Project Attorney  
Sherry Leiwant, Executive Director  
A Better Balance: The Work & Family  
Legal Center  
459 Columbus Avenue, #367  
New York, NY 10024

Dated: April 10, 2008

---

<sup>38</sup> 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 28 (proposed February 11, 2008).

<sup>39</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 124 (June 28, 2007).