a better balance
the work and family legal center

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Submitted Electronically

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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Regulatory Information Number (RIN) 1235-AA30

Director DeBisschop:

On behalf of A Better Balance, we are writing in response to the Notice 85 FR 43513, a request for information ("RFI") published in the Federal Register on July 17, 2020, which seeks to gather information regarding the effectiveness of the regulations implementing the Family and Medical Leave Act of 1993 ("FMLA").

A Better Balance, a national nonprofit advocacy organization, uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through policy work, strategic litigation and direct legal services, and public education, our expert legal team combats discrimination against pregnant workers and caregivers, and advances fair and supportive workplace policies like paid sick time, paid family and medical leave, predictable and flexible scheduling, and more.

A Better Balance operates a free, confidential legal helpline to help workers around the country understand their rights related to paid sick time, family and medical leave, and pregnancy and parenting in the workplace. During the COVID-19 pandemic, calls to our helpline have quadrupled, as workers have become desperate for information about how to stay healthy while maintaining their jobs. After speaking with almost 2,000 workers over the past six months, we have gained an even greater understanding of the concerns and challenges facing workers seeking to exercise their workplace rights, including the right to FMLA leave. Consequently, we are writing to share what we've learned and urge you to take this opportunity to strengthen the FMLA regulations to better protect workers. Specifically, we are writing to urge you to (1) simplify the regulations around the definition of "incapacity and treatment;" (2) implement additional language in the regulations that would strengthen employers' obligations to ensure

that "no fault" attendance policies are not used to interfere with employees' exercise of FMLA rights; (3) consider modifying the standard FMLA posters to include information indicating that FMLA leave can be used by workers during pregnancy; and (4) clarify that the statutory provision allowing employers to require substitution of employees' accrued paid leave does not apply to employees receiving benefits through a state paid family or medical leave program. We believe that these modifications are critical to ensuring that workers are able to exercise their FMLA rights and consistent with the Wage & Hour Division's goal of increasing compliance with the FMLA. Additionally, we write to show our support for the continuing robust availability of intermittent leave, a crucial component of the FMLA.

i. Regulations Concerning Serious Health Conditions

The FMLA provides eligible workers with up to 12 weeks of unpaid, job-protected leave to bond with a new child, care for a seriously ill or injured family member, address their own serious health condition, or address needs related to a family member's deployment; or up to 26 weeks to care for a servicemember or veteran injured or ill as a result of their service. Since it became law, the FMLA has been used nearly 280 million times, and approximately 13 million workers take FMLA-type leaves each year.[1] In enacting the FMLA, Congress laid out findings regarding the need for job security for parents, family caregivers, and people with serious health conditions that temporarily prevent them from working, as well as the need for equal employment opportunities for women and men. These considerations are no less important today and must remain central to any proposed updates to the regulations and guidance.

DOL's most recent comprehensive survey on the FMLA reveals that the most vulnerable workers — including low-wage workers, women, workers of color, and single parents — are disproportionately more likely to need FMLA leave and be unable to take it. Nearly half of workers with an unmet need reported the reason being that they were afraid to lose their jobs — which is precisely the fear that the FMLA was enacted to counteract. Other significant reasons included fear of being treated differently, difficulty with the process or notice requirements for taking leave, privacy concerns and lack of awareness. These findings point to an urgent need for DOL to engage in worker outreach to increase awareness and identify compliance gaps and barriers to use.

In response to the RFI's question about the regulations concerning serious health conditions, we believe the regulations around the definition of "incapacity and treatment" should be simplified to remove unnecessary barriers to people taking the leave they need. The statute defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." The regulatory definition of "incapacity and treatment" for the purposes of continuing treatment includes strict and complex requirements around the length of the initial period of incapacity, the length of time within which one must receive in-person treatment, and the number of times one must receive treatment over a certain

[1] National Partnership for Women & Families. (2020, January). *Key Facts: The Family and Medical Leave Act.* Retrieved 9 September 2020, from https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/key-facts-the-family-and-medical-leave-act.pdf

time period. These inflexible requirements fail to account for the variability of medical conditions, treatments, individual provider practices, and other external circumstances (such as pandemic-related limitations on in-person visits). This requirement also does not reflect progress over the past several decades in surgeries and other medical developments that have led to individuals recovering in the safety of their own homes rather than risking a longer hospitalization and the attendant infections or other harms. These requirements are arbitrary and difficult to navigate for workers, employers and health care providers and provide too many excuses for an employer to deny a legitimate need for leave. Rather than relying on arbitrary time limitations, deference should be given to health care providers to state when an individual needs leave.

ii. "No Fault" Attendance Policies

In June 2020, we published a major report, *Misled & Misinformed: How Some U.S. Employers Use "No Fault" Attendance Policies to Trample on Workers' Rights (And Get Away With It)*[2], detailing how "no fault" attendance policies are routinely used by employers to mislead and misinform workers about their legal rights to take time off without punishment for certain medical and caregiving needs, including leave protected by the FMLA.

After analyzing the "no fault" attendance policies of 66 U.S. employers, impacting an estimated 18 million workers, we found that employers' "no fault" attendance policies regularly provided incomplete or misleading information to workers regarding their right to time off under the FMLA. Roughly *one-third* (30%) of the policies that we reviewed failed to indicate that workers would not receive "points" or "occurrences" or otherwise face punishment for absences protected by the FMLA. This omission is dangerously misleading, because these policies typically communicate in unequivocal terms that workers will be punished for every absence *unless* it is specifically carved out as exempt from points. Thus, a reasonable worker reviewing such a policy would be unlikely to understand that they may have additional protections for certain absences that are not included in the policy. Indeed, we often hear from workers who are so scared to leave work or miss a day, or even inquire about whether an absence would be protected, and thus jeopardize their health or the health of a loved one for fear of getting points.

Furthermore, although 70% of the attendance policies that we reviewed did indicate that workers would not receive punishment for absences protected by the FMLA, the vast majority of these policies simply identified "the Family and Medical Leave Act" or "FMLA" as a reason for an absence that would exempt a worker from discipline. Noticeably absent was *any* detail about what those terms mean, including the types of absences that may qualify for FMLA protection or its eligibility requirements.

Even more troubling, we found that some employers' "no fault" attendance policies contained information about the FMLA that is clearly inaccurate. For example, several policies indicated

[2] DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) (A Better Balance 2020), https://www.abetterbalance.org/misled-misinformed/.

that no points would be assessed for FMLA leave, as long as that leave was approved *in advance* of the absence—leaving no room for the possibility that the need for FMLA leave may be unforeseeable, which is explicitly contemplated by the regulations.[3] Others implied that employees would *only* be protected by the FMLA if they were absent for a period of several days—which is also plainly wrong, because the FMLA can cover intermittent absences of less than a day.[4] Based on this review, we are extremely concerned that "no fault" attendance policies are being used by employers to mislead workers about their FMLA rights and prevent them from exercising those rights.

Additional clarity in employers' "no fault" attendance policies about what the FMLA protects is needed – and in our view, it is crucial that this information be provided *within* attendance policies themselves. It is important to recognize that their employers' policies are frequently a low-wage worker's *only* source of information about their legal rights. Our experience, based on countless conversations with workers who have contacted our free and confidential legal helpline, is that when a worker needs time off from work unexpectedly, such as in a personal or family health emergency, they are likely to access their employer's attendance policy, and nothing else – and if that policy does not describe which absences are protected and how to invoke those protections, the worker is unlikely to seek any additional information.

The current regulations address "no fault" attendance policies, making explicitly clear that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; *nor can FMLA leave be counted under no fault attendance policies*."[5] Although this language is useful in clarifying that disciplining a worker under a "no fault" attendance policy for an FMLA-qualifying absence would constitute FMLA interference, it has not curbed the misleading practices described above, and we believe that this information needs to be affirmatively communicated to workers in order to be effective.

We therefore propose that the DOL consider additional regulations **clarifying the obligations of employers who maintain "no fault" attendance policies, particularly as they pertain to notices that must be given to employees**.

iii. The Use of FMLA Leave During Pregnancy

Additionally, there is a critical need for information clarifying the rights of pregnant workers to utilize FMLA leave before they give birth. Although existing regulations make clear that pregnant workers are entitled to use FMLA leave before they give birth, for prenatal care or when their pregnancy makes them unable to work,[6] there is still widespread confusion about these protections.

[3] 29 CFR § 825.303.
[4] 29 C.F.R. §§ 825.202, 825.205(a).
[5] 29 C.F.R. § 825.220(c) (emphasis added).
[6] 29 C.F.R. § 825.120(a)(4).

Through A Better Balance's legal helpline, we have heard from so many pregnant workers – many who struggled to get time off to attend routine doctor's appointments or were threatened with discipline when they needed to miss work to seek emergency medical care – who did not realize that the FMLA could protect their absences prior to giving birth. Had they been armed with the information that they were legally entitled to such leave and could not be punished for it, they would have been much better equipped to advocate for their needs – and less likely to face the impossible choice between a job and a healthy pregnancy.

For workers who are subject to "no fault" attendance policies, this knowledge gap is most acute. Shockingly, our review of employers' policies for *Misled & Misinformed* revealed that only <u>one</u> of the 66 policies we reviewed mentioned that FMLA leave could be used during pregnancy. Perhaps this is not surprising, because the workplace posters provided by the DOL also fail to mention that FMLA leave can be used during pregnancy. We believe that this omission is extremely problematic, and **strongly recommend that the DOL consider modifying its standard poster to include information indicating that FMLA leave can be used by workers during pregnancy.** We also believe this underscores the need for stronger obligations on employers who utilize "no fault" attendance policies, as we have discussed above.

iv. Substitution of Paid Leave and State Paid Family and Medical Leave Laws

We urge the Department to issue regulations clarifying that the statutory provision allowing employers to require substitution of paid leave (29 U.S.C. § 2612(d)(2)) does not apply to situations where a worker is receiving wage replacement through a state paid family or medical leave program. Current regulations (29 C.F.R. § 825.207(d)-(e)) state that the law's provisions allowing employers to require employees to substitute accrued paid leave for unpaid FMLA leave do not apply to FMLA leaves during which employees are receiving wage replacement through a disability leave or workers' compensation plan. Those regulations specify that, because the leave is not unpaid, the provision allowing employers to require substitution is inapplicable. By the same logic, the substitution of paid leave provision should not apply where workers are receiving wage replacement through a state paid family or medical leave law. However, at present, the regulations do not explicitly extend the same reasoning to wage replacement under state paid family or medical leave laws, likely due to the fact that the current regulations were enacted prior to the passage or implementation of many of today's state paid family and medical leave laws. This has resulted in confusion for employers and employees. We urge the Department to explicitly extend the existing regulatory exclusion to cover state paid family and medical leave laws.

v. The Importance of Intermittent Leave

Finally, the RFI inquires about intermittent leave under the FMLA. Intermittent leave is a vital part of the FMLA because many health conditions are, by nature, unpredictable. Intermittent leave is crucially important for people with disabilities and their family members, as well as other people dealing with serious health conditions, and will only grow in importance as the demographics and direction of the workforce evolve (indeed, usage of intermittent leave has

increased by nearly 30 percent since DOL's 2012 FMLA survey).[7] For example, given the nationwide shortage of direct care workers, it is very likely that if a direct care worker is sick, the care recipient's family member must step in. And although a few employers report negative effects from intermittent leave, a strong majority report neutral or even positive impacts.[8] After all, a caregiver who has access to intermittent leave can take such leave when necessary while still continuing to work as much as possible, rather than completely leaving their job for months on end. Intermittent leave is also critically important for military families, whose needs in relation to deployment may not occur all at once.

The economy and workforce have changed dramatically in the 27 years since the FMLA's passage. In updating the regulations and guidance around the law, DOL must center the workers who need greater economic security the most if it wishes to meet the promise and purpose of the law. Thank you for the opportunity to share these comments.

Sincerely,

A Better Balance

[7] Brown, S., Herr, J., Roy, R., & Klerman, J. A. (2020, July). *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, pp. 54. Retrieved 27 August 2020, from U.S. Department of Labor website: https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf

[8] Ibid.