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Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Regulatory Information Number (RIN) 1235-AA03: Comments on the Department of Labor's Notice of Proposed Rulemaking

Dear Wage and Hour Division:

I am writing to comment on the Department of Labor's Notice of Proposed Rulemaking on the Family and Medical Leave Act (FMLA), published in the *Federal Register* on February 15, 2012.

As a labor employment attorney and human resource professional for 25 years, I respectfully submit these comments and I appreciate the opportunity to share my views on how to improve the implementation of this important law.

Initially, I wish to note three things. First, I submitted Comments in 2008 when the Department last revised the FMLA regulations. I found the Department's ultimate decision on almost every issue to be balanced and equitable to those advocating employer interests and those advocating employee interests, with a few exceptions surrounding the issues of intermittent leave and the definition of a chronic condition. Second, I administered the FMLA for eight years as the Director of HR for two organizations with 1,200 and 2,000 employees, and have conducted numerous training sessions on the FMLA for both employers and employees. Third, I am not writing as an advocate for either employers' or employees' interests. While I provide advice to employers and am a member of the Society for Human Resource Management, I am not writing as a member of that fine organization or any other employer organization. As a result, I hope that the Department finds my comments balanced, rational, and not one-sided.

1. The Department requested comment on the proposal to add to the regulations the provision from the 2008 Preamble that "where an employer chooses to waive its increment of leave policy in order to return an employee to work—for example where an employee arrives a half hour late to work due to an FMLA-qualifying condition and the employer waives its normal one hour increment of leave and

puts the employee to work immediately—only the amount of leave actually taken by the employee may be counted against the FMLA entitlement."

Since this language is already contained in the Preamble to the current regulations, it is merely a clarification and there is no cogent reason not to include it. However, I urge the Department, as I did during the Comment period in 2008, to render the FMLA consistent with the Fair Labor Standards Act (FLSA) in a very important way: Add the following language to the first sentence of Section 825.205(a): "*to the nearest quarter hour*" or similar language. Or, to the regulatory provision that "only the amount of leave actually taken by the employee may be counted against the FMLA entitlement" add "*to the nearest quarter-hour*." In that way, employers will be required to track FMLA leave in the same increments as time worked under the FLSA for nonexempt employees. That rule would still entitle employees to have up to 1,920 quarter-hour increments in a 12-month period, and this approach represents a reasonable balance between employer and employee interests, while rendering the FMLA consistent with the FLSA.

The arguments employers make about the administrative burden of tracking FMLA leave to the minute are not without merit (there are potentially up to 28,800 *minutes* of FMLA in a 12-month period). Software systems (see, e.g., the FMLA administration software I developed at www.efmla.com ) and Excel spreadsheets can facilitate this tracking, but the administrative burden argument misses the point. Whether it is difficult and time consuming to track the intermittent use of FMLA leave or not, there is no practical or rational reason for providing more than 1,920 quarter-hour increments of FMLA in a 12-month period, just as there is no rational basis for not making the FMLA consistent with the FLSA (at least for all non-exempt employees).

The issue is arises less frequently among exempt-level employees. For example, in a school district, if a teacher (who is exempt) needs to take off for a FMLA-qualifying reason during the first part of the work (school) day, the school district may be able to retain the services of a substitute teacher for a half day, but not for an hour or two, as substitute teachers often are available only for a full day or sometimes a half day. The same also may be true during the second part of the work (school) day. But if the teacher only needs to leave an hour early, a substitute teacher may not be required at all. In the vast majority of situations involving exempt-level employees, no pay is deducted for the intermittent use of FMLA leave, and exempt level employees generally do not take time off in quarter-hour increments. I continue to believe that the rule for exempt-level employees should be one-hour increments, giving such employees up to 480 increments of FMLA leave in a 12-month period. However, I recognize that a different calculation rule for exempt and none-exempt employees is not within the scope of the Department's proposed changes.

2. "The Department proposes to remove the language allowing for varying increments at different times of the day or shift in favor of the more general principle of using the employer's shortest increment of any type of leave at any time. The Department requests comment on the proposal to remove this language from the regulations."

The Department bases its proposal on its "enforcement experience [which] indicates some confusion regarding this provision including some employers who have interpreted this language to permit the use of a larger increment of FMLA leave at certain points in a shift than the increment used for other forms of leave in the same time period."

This proposal changes the way employers would track FMLA leave when an employee uses intermittent or reduced schedule leave, eliminating an employer's limited flexibility to utilize different increments of FMLA leave at different times of the day or shift. Instead of removing the provision entirely, the Department could simply clarify that employers may only use the shortest increment of FMLA leave at any point in a shift as is used for other forms of leave during the same time period.

3. "The Department also proposes to remove the optional-use forms and notices from the regulations' Appendices."

This proposal is a wise decision. The Department adopted a number of the suggestions I made in 2008 regarding the revision of the forms, but they all still suffer (and always will) from the same basic shortcomings: It is impossible to develop a form that (a) can be used for every employer around the country, and (b) that takes into account all of the varying policies regarding substitution of paid leave, health insurance during FMLA leave, and other issues that the Department attempts to capture in the Rights and Responsibilities Notice. By way of examples:

- The Eligibility Notice cannot be modified to reflect whether the employee's leave is in the past, present or future;
- The Eligibility Notice cannot be modified to reflect whether, for example, the employee must substitute paid sick leave if the leave is for his or her own serious health condition, but some other type of paid leave (e.g., personal or vacation) if the leave is to care for a family member;
- The Eligibility Notice is organized in terms of *Rights* on the one hand and *Responsibilities* on the other. That means that there are two sections that address Substitution of paid leave, two that address health insurance, etc. Such organization is confusing to employees and often causes questions among employees.
- The Eligibility Notice does not permit employers to list specific information about, for example, health insurance premiums during unpaid FMLA leave, or add other information not contained in the regulatory requirements but referenced elsewhere in the regulations (e.g., life insurance, disability insurance, seniority, retirement vesting).

Obviously, as the Department points out, the references to the prototype forms currently in the Appendices also would need to be modified throughout the regulations.

I also urge the Department to clarify the reference to the Section 825.301(c)(1) regarding the Notice of Rights and Responsibilities that must be provided to employees. That section states: "This notice shall be provided to the employee each time the eligibility

notice is provided pursuant to paragraph (b) of this section . . .Such specific notice must include, as appropriate:" and then the list of information is set out. It is imperative for the Department to clarify that if the employee is not eligible for FMLA leave, then none of the information in the regulations is relevant, and therefore, not "appropriate" to be provided. Only FMLA eligible employees need to receive the Notice of Rights and Responsibilities. This interpretation is the only one that makes any sense, and this clarification is needed. I have spoken with the Department in Washington D.C. about this issue, and a senior official agrees with my interpretation. Please see my letter to Branch Chief Applewhite dated February 11, 2011, also included in these comments.

4. "The Department seeks public comments regarding the burdens imposed by the information collection contained in this proposed rule. In particular, the Department seeks comments that evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses."

So long as it is clear that electronic record-keeping and submission of electronic forms to employees and health care providers, the burden is minimal at best, and keep in mind that I provide employment law and human resource management advice to employers, not to employees. Again, I have developed a very easy way for employers to comply with FMLA with my eFMLA software, www.efmla.com, which can be used throughout the country, except, ironically, by private sector employers in Connecticut, because the state FMLA conflicts with the federal FMLA in so many ways that employers in Connecticut must develop their own system and forms to comply with both the state and federal laws and regulatory schemes. At any rate, eFMLA tracks all of the FMLA leave time off with FMLA balances, and dates and times of leave; all of the forms can be completed, sent and submitted electronically; there are cover letters and a return to work form; "more info" tips with references to the regulations; a place to document all conversations; and much more. Suffice it to say that while human resource professionals around the country cite FMLA administration as a paper-intensive, time-consuming endeavor, there are creative ways to lessen the burden.

Yes, "the proposed collection of information is necessary for the proper performance of the functions of the agency," and again, I provide advice to employers.

Respectfully submitted,

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