COMMENTS OF THE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
ON THE NOTICE OF PROPOSED RULEMAKING BY THE
DEPARTMENT OF LABOR TO REVISE THE REGULATIONS
IMPLEMENTING THE FAMILY AND MEDICAL LEAVE ACT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) by the Employment Standards Administration/Wage and Hour Division of the Department of Labor (Department or DOL) with respect to the regulations implementing the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (FMLA or the Act), at 29 C.F.R. Part 825. 73 Fed. Reg. 7876 (Feb. 11, 2008). Fifty three national and international unions that collectively represent approximately nine million workers belong to the AFL-CIO. Together, we have a vital stake in the scope and effectiveness of the FMLA, not just for workers covered by collective bargaining agreements, but also for the American workforce in general.[1]

This NPRM follows two significant events. First, in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81,88 (2002), the U.S. Supreme Court held that the Secretary of Labor lacked the statutory authority to promulgate the penalty provision in 29 C.F.R. 825.700(a), which states, "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." The NPRM addresses the Court's decision in *Ragsdale* by revising this categorical penalty provision.[2]

Second, the Department published a Request for Information (RFI) in 2006 on a wide range of issues related to the FMLA regulations. 71 Fed. Reg. 69504 (December 1, 2006). The RFI elicited over 15,000 comments from workers and their families, health care professionals, employers, advocacy organizations, and worker representatives, including the AFL-CIO[3] and several of its affiliated unions. *See* 73 Fed. Reg. at 7879. The Department published a report in response to these comments in June 2007. FAMILY AND MEDICAL LEAVE ACT REGULATIONS: A REPORT ON THE DEPARTMENT OF LABOR'S REQUEST FOR INFORMATION, 72 Fed. Reg. 35550 (June 28, 2007) [hereinafter DOL Report].

The Department now proposes to make dozens of changes to the regulations, the vast majority of which impose tighter controls on the taking of FMLA leave in response to the urging of the business community. Workers gain some informational rights under this proposal, but little else.

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[1] Working America, our community affiliate, has submitted separate comments in this rulemaking.
[2] The NPRM notes that lower courts have also found invalid Section 825.100(d), a related notice and penalty provision. 73 Fed. Reg. at 7877-7878.
[3] The AFL-CIO's submission in that proceeding is Doc. R329A. We refer to it in these comments as "AFL-CIO RFI Comments" or "AFL-CIO Comments."

There is no reliable evidence demonstrating widespread problems with FMLA leave. We therefore urged the Department in our comments to the RFI not to upset the balance struck between the needs of workers and employers under the current regulations. This remains our position today. Any greater protections proposed for workers are far outweighed by the increased burdens they and their health care providers will face under this revised regulatory regime.

The Department also seeks public comment on issues to be addressed in final regulations regarding military family leave. 73 Fed. Reg. at 7876. We have not addressed these issues here, but have joined the comments of the National Partnership for Women and Families on these issues. We urge the Department to promulgate regulations on military leave under the FMLA as soon as possible.

Before addressing the specific provisions of the NPRM, we think it is important to review the context in which this rulemaking occurs, including key aspects of the Department's Report.

Background

Although the FMLA covers only slightly more than half of all workers in the United States,[4] and provides for unpaid leave, the Department has concluded that "[n]o employment law matters more to America's caregiving workforce than the Family and Medical Leave Act." DOL Report, 72 Fed. Reg. at 35550. "Broad consensus" exists not only "that family and medical leave is good for workers and their families," but that it "is in the public interest, and is good workplace policy." *Id.*

The Department has published two studies of the FMLA since the statute's enactment. In 1995, it released the results of a survey of workers and employers conducted by the bipartisan Commission on Family and Medical Leave, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES.[5] The Department contracted with Westat, Inc., four years later to update that report. In January 2001, it published the results in BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE [hereinafter Westat Report].[6]

The Westat Report, like its predecessor is based on the results of separate employer and employee surveys, remains the only comprehensive empirical survey of FMLA leave conducted to date. Two of the most significant findings of the report relate to usage and non-usage. According to Westat's employee survey, "approximately 18.3 percent of covered and eligible leave-takers," or "between 2.2 and 3.3 million people," took leave under the Act during the survey period. Westat Report at 3-13. While according to the

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[4] U.S. DEPARTMENT OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS at 3-18 (2001); Jane Waldfogel, *Family Friendly Policies for Families with Young Children*, 5 EMPL. RTS. & EMP. POL'Y J. 273, 274 & n.5 (2001)

[5] http://www.dol.gov/esa/whd/fmla/fmla/1995report/family.htm.

[6] http://www.dol.gov/esa/whd/fmla/fmla/toc.htm.

employer survey, "between 4.6 million to 6.1 million took advantage of the FMLA" during that period. *Id.* at 3-14.[7] On the other hand, the fact that FMLA leave is unpaid remains a major obstacle to employee usage. According to Westat, "[i]n the 2000 survey, the most commonly noted reason for not taking leave was being unable to afford it, reported by 77.6 percent of leave-needers." *Id.* at 2-16. In addition, "the vast majority (87.8%) of these leave-needers would have taken leave had they been able to receive some/additional pay while away from work." *Id.* at 2-16 – 2-17.

Westat also surveyed the effects of complying with the FMLA on business performance. It reported that 76.5 % of businesses saw no noticeable effect on productivity; 87.6 % found no noticeable effect on profitability, and 87.7% found no noticeable effect on growth. Sixty seven percent of employers reported no noticeable effect on employee productivity, and 76.3 % reported no noticeable effect on employee absences. Westat Report at 6-8. In addition, *"[t]he majority of covered establishments reported that intermittent leave has had no impact on productivity (81.2%) and profitability (93.7%)."* *Id.* at 6-11 – 6-12 (emphasis added).

These statistics are significant for purposes of the Department's current rulemaking. First, they confirm the Department's conclusion in its Report that employees rely heavily on FMLA leave to balance their work and family responsibilities; thousands more would rely on FMLA leave if they did not have to lose their pay for a covered absence. In the face of such strong reliance on the FMLA by those Congress intended its protections to reach, the Department needs the strongest countervailing evidence to curtail access to the rights it affords.

Nothing in the Westat data provides such a basis. On the contrary, the statistics refute any argument that FMLA leave -- and in particular, intermittent leave -- has had an appreciable negative impact on American business.

The results of the Department's Request for Information also caution strongly against the revisions proposed in the NPRM. First, after examining the 15,000 responses it received, the Department concluded that "in the vast majority of cases, the FMLA is working as intended." DOL Report, 72 Fed. Reg. at 35552. Thus, the RFI fails to call into question the soundness of the Westat study, and on that basis alone refutes any need to upset the careful balance between employer and employee needs that the FMLA has struck over the last fifteen years.

Second, the Department acknowledges that its "Report on the RFI Comments is not an analysis or comparison of one set of survey data with another some years later" because "[t]he RFI was not meant to be a substitute for survey research about the leave needs of the workforce and leave policies offered by employers." DOL Report, 72 Fed. Reg. at 35551 n.6. In fact, the Report emphasizes "[t]he differences in data-gathering

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[7] Based on the Westat Report, the National Partnership for Women and Families estimates that approximately 50 million people have taken FMLA leave since its enactment. FACTS ABOUT THE FMLA: WHAT DOES IT DO, WHO USES IT, & HOW, *available at* www.nationalpartnership.org/site/DocServer/FMLAWhatWhoHow.pdf?docID=965.

approaches, the depth with which the RFI looked at the regulations, and, of course the self-selection bias by those who took time to submit comments to the RFI." *Id.* The logical conclusion from all of these observations is that the RFI *should not and cannot* substitute for the empirical evidence necessary to make wholesale changes in the carefully-balanced FMLA regulatory scheme.

Moreover, the Department states that the comments it received focused on three issues:

> (1) Gratitude from employees who have used family and medical leave and descriptions of how it has allowed them to balance their work and family care responsibilities, particularly when they had their own serious health condition or were needed to care for a family member; (2) a desire for expanded benefits – *e.g.*, to provide more time off, to provide paid benefits, and to cover additional family members; and (3) frustration by employers about difficulties in maintaining necessary staffing levels and controlling attendance problems in their workplaces as a result of one particular issue – unscheduled intermittent leave used by employees who have chronic health conditions.

DOL Report, 72 Fed. Reg. at 35551. At the same time, the DOL Report sets forth strong considerations against making regulatory changes that respond to such employer "frustration." According to the Report, "the data indicate that if unscheduled intermittent FMLA leave is taken, most employers will be able to resolve these infrequent low cost events on a case-by-case basis by using the existing workforce (or possibly bringing in temporary help) to cover for the absent worker[s], *and likely will view unscheduled intermittent FMLA leave as an expected cost of business*." *Id.* at 35556 (emphasis added). As the Department also notes, some commentators, including employers and their representatives, candidly admitted that "the problems being cited by the employers [with respect to unscheduled intermittent leave] result more from management practices than the FMLA." *Id.* at 35631-32. Employees echoed this view: "[E]mployers are not using the existing FMLA procedures appropriately to challenge medical certifications and are instead simply refusing to accept certifications without seeking clarification or a second opinion." *Id.* at 35554.

The Report also emphasizes the importance of unscheduled intermittent leave to employees. "[C]omments from employees demonstrate that it is the unpredictable nature of certain serious health conditions that makes the use of intermittent leave invaluable." DOL Report, 72 Fed. Reg. at 35631. As health care providers made clear, "often there is no way they can furnish a reliable estimate of the frequency or severity of the flare ups and thus are unable to provide all the information required in the certification." *Id.* at 35554.

Evaluating the comments it received during the RFI, the Department concluded that "[w]hile many employer comments used the words 'abuse' and 'misuse' to describe employee use of unscheduled intermittent leave, the Department cannot assess from the record how much leave taking is actual 'abuse' and how much is legitimate." DOL Report, 72 Fed. Reg. at 35552. It did note, however, that "the use of unscheduled

intermittent leave appears to be causing a backlash by employers who are looking for every means possible (e.g., repeatedly asking for more information in the medical certifications, especially in cases of chronic conditions, to reduce absenteeism)." *Id.* The DOL Report acknowledges that current certification procedures already burden employees, who voiced their "concern[s] about the time and cost of visits to health care providers to obtain medical certifications and the potential for invasion of their privacy." *Id.*

Despite all of these strong reasons cited by the Department against responding to the highly selective complaints about intermittent leave with regulatory changes, the NPRM does precisely that. For example, the NPRM proposes to:

- dictate the intervals between employees' medical treatments;
- increase the amount of notice employees must provide when they seek leave;
- make the content of the employee notice for FMLA leave far more specific;
- require compliance with employer call-in procedures at the start of an intermittent absence;
- require compliance with an employer's paid vacation or personal leave procedures in order to substitute such leave for FMLA leave;
- increase the number of times each year employers have the right to require medical certifications and recertifications;
- allow employers to require fitness-for-duty certifications every 30 days in connection with intermittent absences;
- allow employers to communicate directly with an employee's health care provider instead of through a health care provider hired for that purpose; and
- allow employers to communicate with an employee's health care provider without obtaining a waiver of confidentiality when seeking to verify the authenticity of a certification.

In making such changes, the Department has upset the statutory scheme in which health care providers make professional judgments about their patients' medical conditions and employers who question those judgments have carefully tailored means of verifying them by recourse to additional professional opinions. *See* 29 U.S.C. § 2613(c) (employers are entitled to obtain second opinions when they have "reason to doubt the validity of the certification); *id.* § 2613(d) (employer may obtain "final and binding" third opinion to resolve difference between certification and second opinion and third opinions that are "final and binding" on the parties). Under the proposed regime, employers are now allowed to substitute their own judgment for those of health care providers. This is "manifestly contrary to the statute." *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (quotation omitted).

We oppose these changes and others, as we discuss below. The Department has chosen to listen to employer complaints occurring at the margins of FMLA leave, which the DOL Report itself acknowledges. In changing its longstanding rules, DOL has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United*

States, 371 U.S. 156, 168 (1962)); *see* John Matejkovic & Margaret Matejkovic, *If It Ain't Broke...Changes to FMLA Regulations Are Not Needed*, 42 WILLAMETTE L. REV. 413, 438 (2006) ("[T]he answers to FMLA enforcement challenges are not found in the promulgation of new regulations when the vast majority of current regulations afford acceptable protections for both employers and employees."). Despite some modest revisions that help employees, the Department should leave the current regulations in place.

Section-by-Section Comments

Section 826.106 (Joint employer coverage)

Section 104 of the FMLA entitles an employee to return to the "position of employment" he or she held "when the leave commenced" or to "an equivalent position." 29 U.S.C. § 2614(a)(1)(A)-(B). As the Department recognized in the Preamble to the current regulations, job restoration "is *central* to the entitlement provided by [the] FMLA." 60 Fed. Reg. at 2182 (emphasis in original). Thus, in situations where an employee is jointly employed by two or more businesses, it is crucial to identify which employer bears the responsibility to restore an employee to his or her job at the end of FMLA-protected leave.

Current Section 825.106 of the regulations deals with joint employment. Paragraph (c) states that "[f]or employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer." Paragraph (e) provides that "[j]ob restoration is the primary responsibility of the primary employer" and also makes clear that "[t]he secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee *if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer*" (emphasis added).

In response to the RFI, the AFL-CIO and other commenters urged the Department to revise the primary employer rule with respect to Professional Employer Organizations (PEOs). As we discussed, PEOs engage in "payrolling," a practice "in which client employers transfer the payroll and related responsibilities for some or all of their employees to the PEO . . . but the PEO does not provide placement services." 73 Fed. Reg. at 7880 (referencing AFL-CIO RFI Comments at 16).

Commenters who addressed this issue agreed that, unlike traditional temporary or staffing agencies, "PEOs do not match people to jobs." 73 Fed. Reg. at 7880. They neither hire, fire, train, discipline, supervise, or evaluate their client's employees. *Id.* As a result, it makes no sense to consider PEOs as primary employers. In fact, designating the PEO as the primary employer for purposes of job restoration threatens to deprive employees of their key post-leave FMLA right.

We commend the Department for taking careful note of these comments and proposing to revise Section 826.106 to acknowledge the special relationship between the PEO and the client employer. New Section 825.106(b)(2) would provide, in relevant part:

> [I]f in a particular fact situation, a PEO *has the right to* hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer.

73 Fed. Reg. at 7962 (emphasis added). This proposal only partially addresses the problem that DOL has identified, because a PEO "in a particular fact situation" may retain the right *in theory* to hire, fire, assign, or direct or control" the client employer's workforce, but may never *in fact* exercise that right. In these circumstances, it would defeat the purpose of the rule – to preserve an individual's job restoration right under the FMLA -- if the PEO became the primary employer for hiring and firing decisions that it does not exercise. Instead the client employer should bear the responsibilities of a primary employer. In order to better effectuate the intent of the Department to designate as the primary employer the entity capable of fulfilling the statutory responsibilities of that employer, we believe the revision should read: "if in a particular fact situation, a PEO *exercises the right* to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer."

Section 825.108 (Public agency coverage)

Under current Section 825.108, the test for whether a public agency is a separate employer for FMLA purposes is whether the U.S. Bureau of the Census's "Census of Governments" lists the entity as a separate agency. 73 Fed. Reg. at 7881. The NPRM seeks comments on whether the Department should revise this regulation to adopt the FLSA test, which treats the Census of Governments as only one factor in the determination of separate employer status. *Id.*

The FLSA test is more appropriate under the FMLA. The Census determination is based almost entirely on governance and taxation issues. As the Department has noted in two opinion letters, the FLSA factors are employment-specific, and include whether the two entities have separate payroll/personnel systems, separate retirement systems, deal with each other at arm's length concerning the employment of the individuals in question, and whether one employer controls the appointment of the other entity's employees. *See* Wage & Hour Op. Ltr., FLSA 2007-12 (Dec. 31, 2007); Wage & Hour Op. Ltr., FLSA 2006-21NA (Oct. 5, 2006). These factors are more appropriate for the FMLA, an employment statute that "fits squarely within the tradition of the labor standards laws that preceded it" such as the FLSA. S. Rep. No. 103-3 at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7; *see Fain v. Wayne County Auditors*, 388 F.3d 257, 260-61 (7th Cir. 2004).

Section 825.110 ("Eligible" employee)

Under Section 101(2)(A)(i) of the FMLA, an "eligible employee" must "ha[ve] been employed . . . for at least 12 months by the employer." 29 U.S.C. § 2611(2)(A)(i). Under Section 101(2)(A)(ii), the employee must have been employed "for at least 1,250 hours with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A)(ii).

Section 825.110(b)(1)

Current Section 825.110(b) of the regulations provides that "[t]he 12 months an employee must have been employed by the employer need not be consecutive months." DOL "proposes a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted," with two limited exceptions for military service or pursuant to a written or collective bargaining agreement. 73 Fed. Reg. at 7882. We oppose this rule because it imposes an arbitrary time limit on bridges in service and incorporate the arguments we made in response to the RFI. AFL-CIO RFI Comments at 9-11. The revision accedes to the wishes of the employer community without justification.

As the Department itself recognizes, the FMLA imposes *no* limitations on breaks in service, and both the Senate and the House of Representatives made it clear that "[t]hese 12 months of employment need not have been consecutive." 73 Fed. Reg. at 7882 (quoting S. Rep. No. 103-3 at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30; *see also* H.R. Rep. No. 103-8, pt. 1 at 25 (1993). Indeed, in response to the interim regulations, employers argued that "determining past employment was burdensome, [and] too indefinite" and urged the Department to place various limitations on a 12-month coverage test in the final rule, including an upper limit on breaks in service. 60 Fed. Reg. at 2185. The Department found that "there is no basis under the statute or its legislative history to adopt these suggestions." Moreover, the Department noted that employment applications often require "prospective employees to . . . disclose . . . [their] previous employment histories," and the employer's own records "should be readily available" to confirm such information. *Id.*

Contrary to the position it took when promulgating Section 825.110(b), the Department now finds a basis in the statutory text, combined with the legislative history, for limiting an employee's break in service under the 12-month rule. The Department's current view is that "the statute does not directly address the issue . . . and the legislative history provides limited insight into Congressional intent regarding extending breaks in employment." 73 Fed. Reg. at 7882.

Yet the Department advances no credible reasons for this reversal. The NPRM refers to employer objections regarding "the administrative burden associated with combining previous employment periods," but these purported burdens are as vague now as they were when employers made them in 1993. In fact, in light of advances in electronic compilation and retrieval of data since that time, these complaints lack far more credibility now. And, while the Department also bases this revision on its "experience in

administering the FMLA," it has not articulated anything about that experience that argues for, let alone compels, the proposed revision. 73 Fed. Reg. at 7882; *see National Cable & Telecommunications Ass' n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is . . .a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]") (citing *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983).

Nor does the First Circuit's decision in *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006), provide a basis for the five-year rule. *See* 73 Fed. Reg. at 7881-82. In that case, the Court deferred to DOL's view that "a five-year gap in employment, such as the one Rucker had, does not prevent an employee from using his earlier employment to satisfy the 12-month requirement," *Rucker*, 471 F.3d at 13, but declined to fashion a general rule to that effect. *Rucker* hardly stands for the proposition that a five-year rule is any more reasonable than a longer one.

As we stated in our response to the RFI, most employers, whether on the advice of counsel or by following best practices, maintain employment records for more than five years. AFL-CIO RFI Comments at 11 & n.18 (citing seven-year record retention). Under these circumstances, it makes no sense whatsoever to impose a five-year limit on breaks in service. We also noted that employees may retain records of their employment for longer than five years which employers may well be able to verify. *Id.* In addition, imposing a five-year rule is likely to disadvantage certain groups of employees, such as women who take time out from employment to raise a family, on whom care giving responsibilities fall most heavily. *Id.* at 10.

For all of these reasons, we oppose the Department's arbitrary rule imposing a five-year limit on breaks in service and urge it to leave the current rule in place or lengthen it to conform to standard recordkeeping requirements and practices.[8]

Section 825.110(d)

Current Section 825.110(d) states that "[t]he determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences." DOL proposes to clarify "that when an employee is on leave at the time he or she meets the 12-month eligibility requirement, the period of leave prior to

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[8] The Department also proposes to maintain the three-year record retention requirement in Section 825.500(b). 73 Fed. Reg. at 7882. The NPRM further states:

> Thus, employers would have documentation to confirm previous employment for a former employee who at the time of rehiring had a break in service of three years or less. Where an employee relies on a period of employment that predates the employer's records, it will be incumbent upon the employee to put forth some proof of prior employment.

Id. "Employer's records" in the above statement *should not* refer to the employer's *FMLA* records, which would require the employee to prove employment before a break in service of greater than three years. As we discussed in text and in our response to the RFI, most employers keep employment and tax records for several additional years. The employee should only have to prove prior employment where these records no longer exist.

meeting the statutory requirement is non-FMLA leave and the period of leave after the statutory requirement is met is FMLA leave." 73 Fed. Reg. at 7883.

In our response to the RFI (AFL-CIO RFI Comments at 11-12), we urged the Department to affirm this meaning of the regulation, in conformity with the decisions of courts that have considered the issue. *Babcock v. BellSouth Advertising and Publishing Corporation*, 348 F.3d 73 (4th Cir. 2003); *Ruder v. Maine General Medical Center,* 204 F. Supp. 2d 16 (D. Me. 2002). We continue to believe that this is the interpretation of the regulation that best effectuates the 12-month eligibility requirement of the FMLA itself and fully support the proposed clarification.

Section 825.111 (Determining whether 50 employees are employed within 75 miles)

Under Section 101(2)(B) of the Act, employees eligible for FMLA leave do not include those "employed at a worksite at which . . . [the] employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(B)(ii). "[T]he congressional purpose underlying . . . [this] provision was to remove the burden of providing FMLA leave from employers who do not have an abundant supply of temporary replacements in close geographic proximity to the employee requesting leave," regardless of whether their total workforce reaches the 50-employee threshold. *Harbert v. Healthcare Servs. Gp.*, 391 F.3d 1140, 1149 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 356 (2005) (citing H.R. Rep. No. 102-135(I), at 37 (1991)).

Current Section 825.111(a)(3) applies this 50/75 rule to joint employment situations by providing that "[f]or purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports." The RFI sought comments on this definition of "worksite" in light of the decision in *Harbert,* in which the Court invalidated Section 825.111(a)(3) "as applied in this case to a jointly employed employee with a fixed worksite" located at the facility of the secondary employer that had contracted with a placement agency for the employee's services. 71 Fed. Reg. at 69508-09; *see Harbert*, 391 F.3d at 1154. No other court has decided this issue.

The NPRM states that "[a]fter weighing the comments on this issue submitted in response to the RFI, the Department believes it needs to amend the regulations to reflect the decision in *Harbert.*" 73 Fed. Reg. at 7884. Accordingly, the Department proposes to "modify § 825.111(a)(3) to state that after an employee who is jointly employed is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of employee eligibility is the actual physical place where the employee works." *73* Fed. Reg. at 7884, 7965. Thus, the worksite of such an employee shifts from the primary to secondary employer after twelve months have elapsed for purposes of determining eligibility under the 50/75 rule.

While the Department states that "it needs" to revise the regulation pursuant to *Harbert*, it provides no explanation for that conclusion. We oppose this modification, and incorporate our earlier comments as to why the current regulation is a permissible construction of the statute, as the dissent found in *Harbert*. AFL-CIO RFI Comments at 18-21. The proposed modification neither effectuates the purpose of the statute, nor eliminates the "arbitrary" distinctions between solely and jointly employed employees.

As noted above, the rationale behind the 50/75 rule is to alleviate the burden on small employers of finding a replacement for the employee on FMLA leave where the employer may "not have an abundant supply of temporary replacements in close geographical proximity to the employee requesting leave." *Harbert,* 391 F.3d at 1149. By defining the worksite in a joint employment situation as "the primary employer's office from which the employee is assigned or reports," the Department appropriately maintains the focus of the rule in the joint employer context on the entity most likely to have the ability to find a replacement worker. As the dissent stated, "after all, the placement agency [that jointly employs the worker] specializes in hiring and placing employees within the area." *Id.* at 1155 (Kelly, J., dissenting). Shifting the worksite after 12 months to the physical location where the employee performs his or her work does not effectuate the statutory purpose behind the rule, since that worksite now belongs to the employer who bears no responsibility for hiring and transferring employees.

Moreover, the proposal creates an arbitrary distinction between jointly employed employees who have a fixed worksite for at least a year and those who do not. An employee who is eligible for FMLA leave on one day -- because her worksite is the worksite of the primary employer from which she was assigned and where she meets the 50/75 rule -- may find herself ineligible for leave on the very next day -- because her worksite is now the location to which she has reported for at least a year and from which she cannot satisfy the same rule. Thus, we oppose this revision because it creates an arbitrary distinction that undermines the purpose of Section 101(2)(B)(ii) and strikes the wrong balance between the needs of the worker and employers.[9] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 418, 456 (1983).

Section 825.113 (Serious Health Condition)

DOL notes that "[t]here are six separate definitions of serious health condition in the regulations" set forth at Section 825.114. 73 Fed. Reg. at 7885. This is because a serious health condition also involves inpatient care, for which there is one definition in subparagraph (a)(1), or "continuing treatment by a health care provider," for which there are five different definitions in subparagraph (a)(2). 29 C.F.R. § 825.114.

[9] The current rule creates a distinction between sole and joint employers that is in harmony with the purpose of Section 101(2)(B)(ii), because it alleviates the burden on small business to find replacement workers in situations where they normally bear the burden of hiring. *See Harbert,* 391 F.3d at 1155 (Kelly, J., dissenting).

Paragraph (b) of this section discusses what qualifies as "treatment." *Id.* Paragraph (c) addresses itself to serious health conditions by stating in part that:

> Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

Id. The Department proposes to define "serious health condition" generally in Section 825.113, inpatient care in Section 825.114, and continuing treatment in Section 825.115. We support the Department's substantive treatment of serious health condition because it does not -- despite the urging of many employers -- rewrite the definition against Congress's intent.

The proposed definition of "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider" remains essentially unchanged from the current definition in Section 825.114. 73 Fed. Reg. at 7965. We support that approach wholeheartedly.

As we argued in our comments to the RFI (AFL-CIO Comments at 21-24), and as DOL recognizes in the NPRM, the FMLA's definition of "serious health condition," 29 U.S.C. § 2611(11), hinges on whether the individual has received inpatient care or continuing medical treatment, and *not* on the nature or identity of the illness or injury. "Congress declined to establish any bright-line rules of what was covered and what was not." 73 Fed. Reg. at 7886. As many commenters argued in the RFI, there is no objective evidence to show that the definition is not working, or that the definition has caused widespread abuse of FMLA leave. *See* 73 Fed. Reg. at 7885.

Nonetheless, employers have long complained that certain illnesses should never qualify as serious health conditions and have argued that Section 825.114(c) supports such a restrictive definition. Courts have rejected this argument. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820, 834-835 (4th Cir. 2001); *Thorson v. Gemini, Inc.*, 205 F.3d 370, 380-381 (8th Cir.), *cert. denied*, 531 U.S. 871 (2000).

The Department has taken an important step towards foreclosing argument on this point by explaining in the NPRM that the definition of serious health condition does not "categorically exclude" the "common ailments and conditions" enumerated in Section 825.114. 73 Fed. Reg. at 7886. Instead, the Department makes clear that the conditions listed in that section are "merely illustrative of the types of conditions that would not *ordinarily* qualify as serious health conditions." *Id.* (emphasis in original).

The Department expresses concern, however, that since the inception of the Act it has not been able to "identif[y] an alternative approach to the definition that would still cover all the types of conditions Congress intended to cover under the FMLA . . .without . . *including some conditions that many believe the legislative history indicated should not*

be covered." 73 Fed. Reg. at 7885 (emphasis added). Thus, leaving the current definition intact strikes the appropriate balance in this case.

Proposed § 825.115 (Continuing Treatment; Chronic Conditions)

Section 825.115(a)(1): Continuing Treatment

Section 825.114(a)(2) of the current regulations defines a serious health condition involving "continuing treatment by a health care provider" as, *inter alia*:

> (i) A period of incapacity ... of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
> (A) Treatment two or more times by a health care provider...; or
> (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

The Department proposes to revise the definition of "continuing treatment" by placing it in a new Section 825.115 and by requiring in paragraph (a)(1) "that two visits to a health care provider must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist." 73 Fed. Reg. at 7887. According to the Department, this is necessary because "leaving the treatment requirement open-ended does not provide sufficient guidance for determining when the employee has a qualifying serious health condition." *Id.*[10]

The Department's proposal is arbitrary and capricious. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-847 (1984). First, the current regulation (paragraph 825.114(a)(2)(i)) already makes clear that "treatment two or more times by a health care provider," must "*relat[e] to the same condition*" for which the employee takes FMLA leave. The treatment requirement is not open-ended, as the Department asserts, but maintains a connection between the two visits through their relationship to the illness at hand. It is highly unlikely that two visits to a health car provider for the flu or other respiratory conditions will occur six months apart. But they may occur more than 30 days apart, depending on medical issues identified by the health care provider. Nonetheless, both visits will occur because of the same condition, and therefore satisfy the "continuing treatment" requirement. Thus, current regulations properly "do not specify a time period during which the minimum two examinations must take place." *George v. Associated Stationers*, 932 F.Supp. 1012, 1015 (N.D. Ohio. 1996); *see also Summerville v. Esco Co.*, 52 F. Supp. 2d 804, 810 (W.D. Mich. 1999); *Jones v. Willow Gardens Ctr.*, 2000 U.S. Dist. LEXIS 3559 (N.D. Iowa 2000).

[10] While the Department characterizes this change as a "clarification," we do not see how the 30-day requirement is anything other than a major revision, since the current rule does not have a temporal requirement.

The proposed regulation retains the requirement that the two visits relate to the same condition. *See* 73 Fed. Reg. at 7966. There is no need to place an additional, temporal limit on the two visits.

The Department's choice of 30 days is also arbitrary and capricious because there is no evidence to support the agency's choice of that interval as opposed to any other. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Nowhere in the NPRM does the Department discuss the medical reasons – or any other reasons – why two visits to a health care provider that occur within 30 days distinguishes between serious and non-serious health conditions for FMLA purposes. In fact, the only reference to alternative periods is the Department's rejection of the Tenth Circuit's three-day test in *Jones v. Denver Pub. Sch.*, 427 F.3d 1315 (2005). 73 Fed. Reg. at 7887.[11] And, while the DOL Report notes that many employers urged the Department to adopt that test, it does not refer to any other comments on this issue. *See* 72 Fed. Reg. at 35570; *Ragsdale v. Wolverine*, 535 U.S. at 93 (agency rules invalid where they are based on "generalizations [that] fail to hold in the run of cases").

Even with the extenuating circumstances exception in proposed § 825.115(a)(1), the 30-day treatment requirement will likely place significant obstacles in the path of employees with a serious health condition who seek to use FMLA leave. As the Department recognized in its Report, "[e]mployees are concerned about the time and cost of visits to health care providers." 72 Fed. Reg. at 35552. The financial costs associated with visiting a health care provider two or more times within a 30-day period may indeed be significant for many employees.

The Department's proposed revision is arbitrary and capricious. It interferes with the legitimate decisions of health care providers about the appropriate timing of medical visits for serious health conditions that require absences from work and places unnecessary burdens on employees to schedule their visits within the regulatory time frame. This proposal should be deleted from the final rule.

Section 825.115(c)(1)

Current Section 825.114(a)(2)(iii)(A) defines a serious health condition involving "continuing treatment by a health care provider" as "[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition," and defines "chronic serious health condition as one which "[r]equires periodic visits for treatment by a health care provider." It does not define the term "periodic."

Proposed Section 825.115(c) seeks "to define the term 'periodic' as twice or more per year, based on an expectation that employees with chronic serious health conditions generally will visit their health care providers with that minimum frequency." 73 Fed. Reg. at 7888-89. The Department believes that defining the term "periodic" is

[11] We agree with the Department's decision not to adopt the Tenth Circuit's interpretation in *Jones*, 427 F.3d 1315, that the two treatments must occur during the period of more than three days' incapacity to qualify as a serious health condition. 73 Fed. Reg. at 7887.

appropriate because the lack of such a definition "leaves employers and employees in an untenable situation." *Id.* at 7888.

We oppose this revision for all of the reasons we oppose the 30-day requirement for "continuing treatment." Although the Department believes that the two or more treatments per year requirement is reasonable, it cites no empirical medical evidence or data showing that "employees with chronic serious health conditions generally will visit their health care providers with that minimum frequency." 73 Fed. Reg. at 7888-89. In other words, the Department has failed to demonstrate that requiring two or more treatments per year in order to qualify for intermittent leave bears any rational relationship to the nature or treatment of chronic medical conditions. Once again, the Department appears to base its proposal on the business community's unsubstantiated claims that absences due to chronic health conditions constitute frequent and substantial abuse of unscheduled intermittent leave. *But see* 72 Fed. Reg. at 35552 ("[w]hile many employer comments used the word 'abuse' and 'misuse' to describe employee use of unscheduled intermittent leave, the Department cannot asses from the record how much leave taking is actual 'abuse' and how much is legitimate").

It is far more reasonable to assume that many individuals may make several trips to their health care provider at the onset of a chronic condition such as asthma, migraines or diabetes, but return as little as once per year after learning how to manage the condition. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93. Under the new requirement, these employees will experience significant financial and time burdens in order to exercise their rights under the FMLA, and their health care providers will have no choice but to engage in unnecessary oversight and treatment. These visits will become a waste of time. *See* DOL Report, 72 Fed. Reg. at 35552 ("[e]mployees are concerned about the time and cost of visits to health care providers"). Given the fact that large numbers of employees are responsible for paying all or an increasingly larger share of the rising costs of health care, imposing a requirement of two or more treatments per year will likely result in financial hardship for a significant number of employees. We urge the Department to withdraw this proposal.

Section 825.122 (Definition of Spouse, Parent, Son or Daughter, Adoption and Foster Care)

Section 825.122(c)

The Department proposes to move the current definition of spouse, parent, son and daughter (for whom an employee is entitled to take FMLA leave for a qualifying reason) from current Section 825.113 to proposed Section 825.122. We comment, below, on the substantive change that DOL proposes to make in paragraph (c) of the new rule.

The current definition of son or daughter includes a son or daughter age 18 or older and "incapable of self-care because of a mental or physical disability." 29 U.S.C. § 825.113(c). DOL proposes one "substantive addition" to paragraph (c) "to specify that

the determination of whether an adult child has a disability should be made *at the time leave is to commence*." 73 Fed. Reg. at 7890.[12]

We question whether the Department needs to clarify the regulation in response to a single district court opinion issued a decade ago, particularly where it has not pointed to actual "confusion about coverage." 73 Fed. Reg. at 7890. We are also concerned that the regulation could be read to mean that where an employee takes non-FMLA leave to care for an adult child because the child does not have a disability when the leave commences, the employee does not have the right to convert the absence into FMLA leave if the adult child subsequently satisfies the definition. We believe that the regulations support such a conversion of leave into FMLA-leave. This is consistent, for example, with the fact that an employee who has not worked 12 months for the employer at the start of the leave has the right to treat the leave as FMLA-qualifying once the employee meets the 12-month eligibility requirement. *See* 73 Fed. Reg. at 7883.

Section 825.122(f)

Current Section 825.113(d) provides that "[f]or purposes of confirmation of family relationship, the employer may require the employee giving the notice of the need for leave to provide reasonable documentation or statement of family relationship." It also provides that "[t]his documentation may take the form of a simple statement from the employee, or a birth certificate, a court document, etc."

The Department proposes to revise this provision, which will appear in new Section 825.122(f). The NPRM, however, provides a misleading description of the revision by stating that it "*adds* language in proposed paragraph (f) to clarify that the example of a statement by the employee as documentation should be a sworn, notarized statement." 73 Fed. Reg. at 7890 (emphasis added). In fact, the proposal *deletes* altogether the term "simple statement" and substitutes for it the requirement of a sworn, notarized statement or other official documents: "This documentation may take the form of a child's birth certificate, a court document, a sworn notarized statement, a submitted and signed tax return, etc." 73 Fed. Reg. at 7968.

We see no reason to prevent employees from proving the existence of a family relationship through a "simple statement" that is not notarized, as the regulations have allowed for 15 years. Indeed, the Department provides no explanation for this change except for "consistency with the other examples used in the current regulations." In the absence of any evidence that simple non-notarized statements have proven problematic, this change is nothing more than one more hurdle for employees to qualify for FMLA leave. We therefore oppose this revision.

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[12] This change responds to the court's analysis of whether an adult child had a disability for purposes of FMLA coverage based on facts and circumstances in *Bryant v. Delbar*, 18 F. Supp. 2d 799 (M.D. Tenn. 1998), in which, according to DOL, "the court conducted an analysis that occurred *well after* the leave commenced." 73 Fed. Reg. at 7890. The Department asserts that relying on "information acquired after-the-fact causes confusion about coverage for both employees and employers." *Id.*

Section 825.200 (Amount of Leave)

Current Section 825.200(f) provides that "[f]or purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave." The Department proposes language in new paragraph (f) to clarify how leave should be counted when an employee takes less than a full week of FMLA leave during a week including scheduled holidays.

Under the revision, when "an employee needs less than a full week of FMLA leave, and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day." 73 Fed. Reg. at 7892. According to the Department, this proposed language is rooted in the principle that "the pertinent question for both overtime and holidays is whether the employee is required to be at work." *Id.*

We agree with the proposed language for § 825.200(f) that "if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday." 73 Fed. Reg. at 7970. The Department is right in recognizing that an absence should not be counted against an employee's 12-week FMLA entitlement when the employee is not required to be at work. Congress intended that employers count only "the amount of leave actually taken" against an employee's 12-week entitlement. 29 U.S.C. § 2612(b)(2). *See also* S. Rep. No. 103-3 at 27, 29, *reprinted in* 1993 U.S.C.C.A.N. 3, 31. To hold otherwise would be to "deny" the exercise of an employee's right to the full amount of statutory leave, as well as to treat FMLA leave more harshly than other forms of workplace leave. Thus, the Department correctly concludes that:

> For an employee with a Monday through Friday work week schedule, in a week with a Friday holiday on which the employee would not normally be required to report, if the employee needs FMLA leave only for Wednesday through Friday, *the employee would use only 2/5 of a week of FMLA leave because the employee is not required to report for work on the holiday.*

73 Fed. Reg. at 7892 (emphasis added).

At the same time, we strongly disagree with the Department's contention that "it may lack the authority to change th[e current] regulation to not count against the FMLA entitlement holidays that fall within *weeks-long blocks of FMLA leave*," 73 Fed. Reg. at 7891 (emphasis added), because "[d]iscounting the holidays that regularly fall within those weekly blocks of leave could well impermissibly extend an employee's leave

period beyond the statutory 12 normal workweeks of leave that the Act permits." *Id.* at 7892.[13]

The Department's rationale alludes to the Supreme Court's holding in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002). That case addressed whether or not a period of leave *that would otherwise have qualified as FMLA leave* but for the employer's failure to designate it as FMLA leave should not have been charged to an employee's statutory entitlement under Section 825.700(a) of the regulations. *Id.* The Court invalidated that provision because it would have allowed the employee to take 12 weeks of *FMLA* leave and then another 12 weeks of *FMLA* leave in contravention to the statute. *Id.* The question addressed here, however, is whether or not a particular day of absence should or should not count toward FMLA leave to begin with. If it does not so qualify, then it does not count against the 12-week statutory allotment. This question had no place in the facts or analysis of *Ragsdale*.

As we said in our prior comments (AFL-CIO RFI Comments at 25), Section 825.200(f) "treat[s] continuous leave in a way that is both internally inconsistent and inconsistent with the method of counting intermittent leave." The NPRM identifies the correct principle, namely, "whether the employee is required to be at work," 73 Fed. Reg. at 7892, and the Department should revise the language of paragraph (f) accordingly.[14] *See Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 862 (1984); *see also N.L.R.B. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).[15]

Section 825.204 (Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave)

The Department seeks comment on whether and how current Section 825.204 should be changed to remove the distinction between foreseeable and unforeseeable leave as it relates to temporary transfer to an alternative position. We oppose any changes to this rule. 73 Fed. Reg. at 7893.

Under the FMLA, an employer may transfer an employee to an "alternative position" with equivalent pay and benefits when the employee needs to take intermittent or reduced

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[13] The Department's "belie[f] that it may lack the authority to change this regulation" because it would entitle employees to more than 12 weeks of leave, 73 Fed. Reg. at 7891, alludes to the Supreme Court's holding in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). That case, however, did not deal with how to count absences, for purposes of FMLA entitlement on days for which the employee would not otherwise have to report for work, and we think it sheds no light on the issue presented by Section 825.200.

[14] It is noteworthy that for purposes of establishing whether an employee has worked the required 1,250 hours, only "hours actually worked" count towards the total. 29 C.F.R. § 825.110. Holidays do *not* count toward an employee's total hours for determining eligibility. *See* Wage & Hour Op. Ltr., FMLA-70 (Aug. 23, 1995).

[15] While the NPRM cites employer concerns about the burden of having to take into consideration holidays when computing an employee's leave, *see* 73 Fed. Reg. at 7891, employers already have to do so with respect to intermittent leave under Section 825.205(a).

schedule leave "that is foreseeable based on planned medical treatment." 29 U.S.C. § 2612(b)(2). Neither the statute nor the current regulations allows employers to transfer an employee to an alternative position when the employee takes *unforeseeable* intermittent or reduced schedule leave. In response to the RFI a significant number of employers "questioned why the regulations permit an employer to transfer an employee only when the employee's need for leave is foreseeable based on planned medical treatment as opposed to a chronic need for unforeseeable leave." 72 Fed. Reg. at 35608.

For several reasons, we urge the Department to resist removing the distinction between foreseeable and unforeseeable leave for purposes of temporary transfer to an alternative position. First, doing so is contrary to the plain language of Section 2612(b)(2). That provision reflects specific congressional intent to prohibit transfers to an alternative position in the context of unforeseeable intermittent or reduce schedule leave. As the statute itself plainly prohibits transfers of this nature, the current regulations should not be changed.

Second, the congressional distinction embodied in the statute makes sense. When an employee notifies the employer about the need for scheduled medical treatment, the employer has an opportunity to make a reasoned decision as to whether a temporary transfer is both feasible and desirable and can make any necessary preparations. Often, such treatment will occur over a period of weeks or months, and this provides the stability necessary for a temporary transfer to benefit the needs of the business and the employee. In contrast, when an employee takes unforeseen intermittent or reduced schedule leave, there is virtually no opportunity to plan or effectuate a transfer. And, since there is no regular pattern to intermittent leave, the employer will not be able to transfer the employee to the same position each time. It is difficult to see how this will work to the benefit of either the employer or the employee.

Third, the current regulations prohibit an employer from "transfer[ing] the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee." 29 C.F.R. § 825.204(d). However, given the animosity that many employers have exhibited towards the use of unforeseeable intermittent or reduced schedule leave, the AFL-CIO believes that removing the distinction would allow employers to more easily retaliate against employees who take unforeseeable leave by requiring the employee to move from position to position, as described above. This is precisely what the FMLA prohibits.

Section 825.205 (Increments of Leave for Intermittent or Reduced Schedule Leave)

Intermittent Leave

The Department proposes to address the minimum increment of FMLA-qualifying leave that employees may take, by moving language from current Section 825.203(d) into new Section 825.205(a). This new provision would state: "When an employee takes leave on an intermittent or reduced leave schedule, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or

use of leave, provided it is one hour or less." 73 Fed. Reg. at 7971. In so doing, "[t]he Department is not proposing to increase the minimum increment of intermittent leave at this time," despite urging by employers to do so. *Id.* at 7893-7894.

Consistent with our prior comments (AFL-CIO RFI Comments at 33 n.50), we support the Department's decision to make no changes in this provision. While employers have alleged that they face administrative burdens of keeping track of increments of intermittent FMLA leave, the regulation simply holds them to the standard they themselves have chosen for other absences or leave where they also face administrative burdens. Moreover, many of the employer objections to permitting the use of small increments of intermittent leave cited in the NPRM are, in fact, objections to intermittent leave in general, regardless of the amount used. *See* 73 Fed. Reg. at 7893.

The Department appropriately recognizes "the importance of such leave to employees with serious health conditions" in deciding to maintain the current rule. 73 Fed. Reg. at 7894. Requiring employees to take intermittent leave in larger blocks of time would cause unnecessary absence and deprive employees of their full 12 weeks when they most need it. This result clearly violates the underlying purpose of the FMLA.

Current Section 825.205(a) also provides that "[i]f an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled." In Wage & Hour Op. Ltr., FMLA-42 (Aug. 23, 1994), a flight attendant took three hours of intermittent leave once a week for two months that caused her each time to miss her ten-hour workday and the employer sought guidance as whether it could charge the entire occurrence to FMLA leave. The Department reiterated that under Section 825.205(a), the employer could only charge the employee for the three hours of leave that she actually took, and noted that the employer could require the employee to use another form of leave to cover the remainder of the time. *Id.*

The Department now questions whether the likely result of such a rule is that the employee will face discipline for missing the rest of the scheduled shift and asks whether "it is more appropriate to extend FMLA protection to the entire period of leave taken from the employee's assigned schedule in this situation." 73 Fed. Reg. at 7894. It therefore seeks comment as to whether it should permit an exception to the rule in Section 825.205(a) "in situations in which physical impossibility prevents an employee using intermittent leave or working a reduced leave schedule from commencing work mid-way through a shift . . . to allow the entire shift to be designated as FMLA leave and counted against the employee's FMLA entitlement." *Id.*

We appreciate the Department's concern about the disciplinary consequences of its current rule. However, we believe that the statutory prohibition against interfering with or restraining the exercise of FMLA rights does not permit an employer to impose discipline on an employee who returns from intermittent leave and is ready to work. 29 U.S.C. § 2615(a). Moreover, DOL has not pointed to any comments in the RFI, or other evidence, indicating that employees are facing discipline in such situations.

The suggestion that employers should have the right to charge their employees for a full shift when they cannot return to work mid-shift because of the nature of the business appears to be driven entirely by complaints from common carriers and other transportation employers. *See* 73 Fed. Reg. at 7894. One employer has suggested that employees can abuse intermittent leave by taking just a few minutes in order to avoid a "heavy flight bank." 73 Fed. Reg. at 7894. As we stated in our response to the RFI, the regulations provide employers with adequate tools to assess whether employees are abusing their FMLA leave. *See* AFL-CIO RFI Comments at 32-33. Another employer that operates an urban transportation system seeks guidance on "scheduling intermittent leave" so as not to interfere with a transportation run, 73 Fed. Reg. at 7894, but this appears to be a concern about *scheduled* intermittent leave. Both the current and proposed regulations at Section 825.302(f) provide that "[t]he employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider." *See* 73 Fed. Reg. at 7981.

Common carriers and other transportation employers face scheduling issues with respect to sick leave, not just FMLA leave. They generally have comprehensive systems designed to replace employees who take all types of scheduled leave, as well as those who call in with unscheduled absences for a variety of reasons.[16] *See Bhd. of Maintenance of Way Employees v. CSX Transp., Inc.*, 478 F.3d 814, 818-819 (7th Cir. 2007) (special characteristics of railroad industry, including "managing a work force" "that must start on time or . . . miss the train" has led to "elaborate" agreements that "balance the needs of the carriers and the needs of the workers"). Workers should not have to sacrifice their FMLA leave to deal with these scheduling issues.

For all of these reasons, we do not think that carving out a special exception for specific industries to deal with such a narrow exception is warranted.

Overtime

"The Department also wishes to clarify the application of FMLA leave to overtime hours." 73 Fed. Reg. at 7894. The NPRM correctly observes that "[a]n employee may be limited to working eight hours per day or 40 hours per week due to a serious health condition, and, under FMLA, has the right not to work overtime hours without being subject to any discipline. It is a reduced leave schedule." Nonetheless, "[e]mployers continue to have questions . . . as to whether and how the overtime hours not worked due to the serious health condition may be counted against the employee's entitlement." *Id.* According to the Department, language in the preamble to the current rule, *see* 60 Fed. Reg. at 2202, along with subsequent guidance provided by DOL, *see* Wage & Hour Op. Ltr., FMLA-107 (July 19, 1999), has caused confusion.

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[16] Flight attendants and pilots often fail to meet the 1,250 hours eligibility requirement, and they are two of the largest groups of workers unable to begin a workday in mid-shift. Therefore, airline employers may be overstating the impact of this issue for their business. We support the request of the Air Line Pilots Association in this rulemaking that the Department reconsider its refusal to count the time spent on layovers, on-call periods, and reserve status towards the minimum hours requirement.

We believe that this issue raises two related questions: First, when has the employee taken FMLA leave? Second, if the employee has taken FMLA leave, what portion of the employee's 12-week allotment does the leave account for? We address ourselves to the first question, below, which seems to have generated a large part of the confusion.

In a situation where the employee would be required to work overtime except for the fact that he has a serious health condition that limits him to working eight hours a day or 40 hours a week, and declines the overtime on the basis of the serious health condition, the employer should be able to count the number of overtime hours the employee does not work as FMLA leave. Thus, we agree with the Department that "[i]f the employee would be required to work the overtime hours were it not for being entitled to FMLA leave, then the hours the employee would have been required to work (but did not) may be counted against the employee's FMLA entitlement." 73 Fed. Reg. at 7894. We believe this is the same as saying that if "the employee would otherwise be required to report for duty but for the taking of FMLA leave," then the hours not worked "may be counted against the employee's FMLA entitlement." *Id.*

In our view, the key distinction *is* between voluntary and mandatory overtime, because employees do not have to "report for duty" when overtime is voluntary, but do have to "report for duty" when overtime is mandatory. Thus, the Department's apparent rejection of that distinction, disavowing its earlier reliance on it, 60 Fed. Reg. at 2202, is confusing. Similarly, the statement that "the correct focus should be not on whether the employee would normally be required to use leave to cover the overtime hours," which precedes the revised formulation, is a convoluted way of stating that the test is whether the employee is required to work the overtime, and deflects from an understanding of the Department's current view. 73 Fed. Reg. at 7894.

We urge the Department to make its overtime discussion clearer, along the lines that we have suggested. In addition, we think that the Department should provide several examples of FMLA calculations in the overtime context.

Section 825.207 (Substitution of Paid Leave)

Section 825.207(e)

FMLA Section 102(d)(2) governs the substitution of paid leave for FMLA leave. 29 U.S.C. § 2612(d)(2). As the Department recognizes in the NPRM, 73 Fed. Reg. at 7895, FMLA paragraph (d)(2)(A) allows an employee "to substitute . . . accrued paid vacation leave, personal leave, or family leave . . . for [FMLA] leave" taken for the birth or adoption of a child or because of the employee's own serious health condition. Paragraph (d)(2)(B) allows an employee "to substitute . . . accrued paid vacation leave, personal leave, or medical or sick leave . . . for [FMLA] leave" to care for a covered family member because of the employee's own serious health condition but also states that an employer has no obligation "to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave."

The fact that the statute provides a limitation on an employee's use of sick leave but no limitation on an employee's ability to substitute accrued paid vacation, personal or family leave led the Department to promulgate current Section 825.207(e), which states, "[n]o limitations may be placed by the employer on substitution of paid vacation or personal leave." As the Department stated in the preamble to current Section 825.207:

> There are no limitations . . . on the employee's right to elect to substitute accrued paid vacation or personal leave for qualifying FMLA leave, and the employer may not limit the timing during the year in which paid vacation may be substituted for FMLA-qualifying absences or impose other limitations.

60 Fed. Reg. at 2205. The Department proposes to "clarify" current Section 825.207 in a manner which "now clearly states that the terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave." 73 Fed. Reg. at 7896. We oppose this change because it is not supported by the statutory language itself.[17]

The Department would read paragraph (A) as if it contained language similar to paragraph (B), such that an employer has no obligation to provide paid vacation leave "in any situation in which such employer would not normally provide any such paid leave." But "Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 772-773 (1979). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted). Thus, the Department has no basis on which to conclude that "the differing language in the two subsections has the same meaning in each." *Id.*

The Department's attempt in the NPRM to harmonize the two provisions of Section 102(d)(2) falls short. After repeating what is already evident about paragraph (B), namely that it "clarifies the limits on the employer's obligation to allow the substitution of paid sick or medical leave," the Department states that "as the language in both sections of the statute makes clear, in all cases the substitution of paid leave pursuant to section 102(d)(2) is limited to the substitution of accrued paid leave." 73 Fed. Reg. at 7896. This is what the text of Section 102(d)(2) states. But the common definition of "accrued" is "due and payable" or "vested." BLACK'S LAW DICTIONARY, 6th Ed. (1990). Accrued vacation is vacation that is due the employee. It is vacation in which the employee is vested because the employee has earned it. Contrary to the later interpretation by the Department in various opinion letters cited in the NPRM, *see* 73 Fed. Reg. at 7896, vacation time that is "accrued" by the employee does not lose that character simply because the employee cannot use it "during the FMLA leave period" by virtue of other employment rules. Wage & Hour Op. Ltr. FMLA-18 (Nov. 15, 1993). Accordingly, the text and structure of the FMLA make abundantly clear that Congress

[17] The Department's proposed change amounts to much more than a mere "clarification." Instead, it represents a dramatic reversal of the current regulation. 29 U.S.C. § 2612(d)(2).

intended that no limitations be placed on employee's ability to substitute paid vacation or personal leave while on FMLA leave.

Moreover, as we discussed in our response to the Request for Information (AFL-CIO RFI Comments at 28) "[t]he ability to substitute paid vacation or personal leave has had a significant impact on employee's ability to take FMLA leave." Indeed, DOL's own data shows that the availability of paid leave not only affects whether employees take FMLA leave, but is the single most important determinant of whether someone who needs leave actually takes it. Many collective bargaining agreements require employees to bid on vacation on an annual basis, and the Department's reinterpretation would foreclose the use of paid vacation in these workplaces. The Department correctly assessed the difficulties associated with taking unpaid leave when it gave employees the right to substitute paid leave for FMLA-qualifying leave.

For all of these reasons, the Department should adhere to the plain meaning of the statute and its current regulation and refrain from imposing limitations on the use of paid vacation or personal leave.

Section 825.207(i)

"[T]he Department proposes to revise current § 825.207(i) to allow the use of compensatory time accrued by public agency employees under the Fair Labor Standards Act . . . to run concurrently with unpaid FMLA leave when leave is taken for an FMLA-qualifying reason." 73 Fed. Reg. at 7897.[18] DOL believes that this "would be beneficial to both the employee . . .and to the employer." *Id.* In addition, the Department "believes the proposed revision is consistent with the U.S. Supreme Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000)." *Id.* We oppose this change for the reasons stated below.

Under Section 7(o) of the FLSA, 29 U.S.C. § 207(o),"States and their political subdivisions may compensate their employees for overtime by granting them compensatory time or 'comp time'." *Christensen*, 529 U.S. at 578. Comp time is a "form of compensation" for overtime in lieu of cash wages paid at the end of each pay period. *Id.* at 579.

As discussed above, Section 102(d)(2) of the FMLA allows employees to elect to substitute, or the employer to require "any of the accrued paid vacation leave, personal leave, or family leave of the employee" for FMLA leave. The Department's current regulation at § 825.207(i) addresses the substitution of FLSA compensatory time for FMLA leave. That section provides, "[c]ompensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave."

[18] FLSA comp time affects only employees of "a public agency which is a State, a political subdivision of a State, or an interstate governmental agency." 29 U.S.C. § 207(o). Therefore, the Department's regulation does not govern the use of comp time in the federal sector.

We agree with the Department's initial view that the type of "accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave" does not include FLSA compensatory time. As the Court made clear in *Christensen*, comp time under FLSA § 7(o) is a form of overtime pay. By virtue of the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787, Congress gave "States and their political subdivisions [the ability] to compensate employees for overtime by granting them compensatory time at a rate of 11/2 hours for every hour worked." *Christensen*, 529 U.S. at 579.

Thus, we believe that the Department's reversal of position is contrary to the statute. *See Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 844 (1984). And, absent an explanation for why it now believes that FMLA § 102(d)(2) authorizes employers to require the substitution of compensatory time the Department has proposed a revision to § 825.207(i) that is arbitrary and capricious. *See id.*

In addition, we do not agree that the proposed revision "is consistent" with *Christensen.* 73 Fed. Reg. at 7897. That case did not deal with the FMLA, let alone the interplay between FMLA Section 102(d)(2) and FLSA Section 7(o).

Section 825.214 (Employee Right to Reinstatement)

Section 104(a)(1) of the FMLA entitles an employee who returns from FMLA leave "(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(A), (B). The current regulations give effect to that right. 29 C.F.R. § 825.114.

The NPRM notes that some employers want to restrict the right to job reinstatement for workers who take intermittent leave. We support the Department's conclusion that "no changes [in this provision] are appropriate under current law." 73 Fed. Reg. at 7898. Indeed, we do not believe that the Department has the authority to make any such changes, since Section 101(a)(1) provides an unequivocal right to reinstatement to the same or equivalent position. *See* 60 Fed. Reg. at 2182 (job restoration "is central to the entitlement provided by the FMLA.")

Section 825.215 (Equivalent Position)

Current Section 825.215(c)(2) prohibits an employer from disqualifying an employee who takes FMLA leave from receiving a perfect attendance bonus if the employee "ha[s] met all the requirements for" this bonus "before FMLA leave began." The Department proposes to eliminate this provision so that employers have the right to disqualify employees from perfect attendance awards if they take FMLA leave. 73 Fed. Reg. at 7899-7900.

We oppose this change. Where an employee exercises a legitimate statutory right to take leave, penalizing such leave violates the statute. As the Department stated in Wage and Hour Opinion Letter FMLA-31 (March 31, 1994), "[t]o deny such [perfect attendance]" to an employee returning from FMLA leave, in situations where the employee is "otherwise . . . qualified for the bonus except for taking FMLA leave" is tantamount to "interfering with the exercise of the employee's rights by discouraging the use of FMLA leave . . .as well as discriminating against such an employee."

Section 825.216 (Limitations on an employee's right to reinstatement)

Current Section 825.216(a)(1) "addresses what happens when an employee is laid off or the employee's shift is eliminated while the employee is on FMLA leave." 73 Fed. Reg. at 7899. The Department notes one commenter's view that under this provision a collective bargaining agreement's seniority provision might not "yield to the FMLA," whereas it would under Section 825.700. *Id.*

We do not subscribe to this view. The FMLA itself governs the relationship between collective bargaining agreements and employees' statutory rights. Section 302, 29 U.S.C. § 2652, entitled "Effect on existing employment benefits" provides:

> (a) **More protective**
> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.
>
> (b) **Less protective**
> The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

Courts have interpreted Section 302 to mean that the provisions of a collective bargaining agreement are trumped by the FMLA only where those provisions—whether they directly address family and medical leave or affect such leave by virtue of neutral rules—diminish FMLA rights. "Internal sick leave policies *or any collective bargaining agreements* are only invalidated to the extent they diminish the rights created by the FMLA." *Callison v. Phila.*, 430 F.3d 117, 121 (3d Cir. 2005) (emphasis added); *see also Bhd. of Maintenance of Way Employees v. CSX Transp. Inc.*, 478 F.3d 814, 820 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1110 (2008) (employers cannot require substitution of paid leave if such requirement violates contractual provisions); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 714 (7th Cir. 1997) (where "FMLA does not tell employers how to send notices," employer "safely may use" collective bargaining agreement's "neutral rules").

We believe the regulations are consistent with the statute and judicial opinions. Section 825.216(a) provides that "an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." As an example, paragraph (a)(1) provides that:

> If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, *provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.*

Because the provisions of a collective bargaining agreement prevail where they would entitle the employee to greater rights than the FMLA, 29 U.S.C. § 2652(a), the example in the current rule is correct. If the agreement (including its "neutral rules" governing seniority, *Diaz*, 131 F.3d at 714) give the employee who is laid off while on FMLA leave a right to recall at the end of the leave, continuation of benefits, or other rights not provided under the FMLA, then the provisions of the agreement prevail.

Section 825.700(a) states, in relevant part:

> An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. . . .

Because collectively bargained rights cannot "diminish" FMLA rights, 29 U.S.C. § 2652(b), the example provided in this rule is also correct. Thus, we believe that the rules are consistent and do not need to be clarified.[19]

Section 825.220 (Protection for Employees Who Request or Otherwise Assert FMLA Leave)

Section 825.220(b)

The Department has proposed several changes to Section 825.220. First, paragraph (b) "sets forth the remedy for interfering with an employee's rights under the FMLA." 73 Fed. Reg. at 7900. In particular, the proposed language for Section 825.220(b) provides:

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[19] We are unsure why the first two sentences of Section 825.700(a) do not refer to collective bargaining agreements. This paragraph seems to tracks Section 302 of the statute, 29 U.S.C. § 2652, which speaks in terms of plans, and benefit programs or plans *and* collective bargaining agreements. The third sentence of Section 825.700(a), which illustrates the rule by reference to an agreement, is an indirect way of including collective bargaining agreements within the scope of the rule.

> An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)).

73 Fed. Reg. at 7978. We agree with this proposed change for Section 825.220(b). It accurately and concisely states the remedies for interference with an employee's rights under the law. We also share the Department's view that "it is important that the general rule governing an employer's obligations under the Act also provide guidance on the remedy for such violations." 73 Fed. Reg. at 7900.

The new language also appears in Section 825.300 and 825.301. We also comment on those provisions, below.

Section 825.220(d)

"[T]he Department proposes deleting the final sentence of current § 825.320(d), which states that job restoration rights are available until 12 weeks have passed within the 12-month period including all FMLA leave taken *and the period of light duty*." 73 Fed. Reg. at 7901 (emphasis added). We agree with the Department that "the current regulatory language does not serve the Act's purpose to provide job protection when FMLA leave is taken." *Id.*; *see* Wage & Hour Op. Ltr., FMLA-55 (Mar. 10, 1995).

Light duty is not "leave" under the plain meaning of Section 102(a)(1) of the Act. 29 U.S.C. § 2612(a)(1). Thus, as the Department has recognized, "[t]he period of time employed in a light duty assignment cannot count . . . against the 12 weeks of FMLA leave." Wage & Hour Op. Ltr., FMLA-55; *see* 73 Fed. Reg. at 7901. As we argued in our comments to the RFI (AFL-CIO Comments at 34), treating light duty as the equivalent of FMLA leave violates the statute's proscription against employer interference with statutory rights.

The Department "has invite[d] comment on whether the deletion of this language may negatively impact an employee's ability to return to his or her original position from a voluntary light duty position." 73 Fed. Reg. at 7901. The NPRM makes clear 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." *Id.* Therefore, deletion of the conflicting language in current Section 825.220(d) should not have such an impact. Including the above-quoted language in the text of new Section 825.220(d) would reinforce this point.

The Department also "proposes to clarify" in Section 825.220(d) "that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court." 73 Fed. Reg. at 7901. We oppose this change, as we did in our response to the RFI. (AFL-CIO RFI Comments at 36-39).

In *Taylor v. Progress Energy* (*Taylor I*), 415 F.3d 364, 369 (4th Cir. 2005), *aff'd and reinst. on reh., Taylor v. Progress Energy* (*Taylor II*), 493 F.3d 454 (2007), the court held that Section 825.220(d) "prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the DOL or a court." *Taylor* I, 415 F.3d at 369. On rehearing, the Secretary articulated her view of the regulation at issue, which was similar to the NPRM proposal described above. Nonetheless, the court "remain[ed] convinced that the plain language of section 220(d) precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act." *Taylor*, 493 F.3d at 456-457. *But see Faris v. Williams WPC-I Inc.*, 332 F.3d 316 (5th Cir. 2003).

Taylor II rejected the Secretary's interpretation of Section 825.220(d) as "inconsistent with the regulation." 493 F.3d at 457. That court's discussion also belies the Department's assertion that the proposed revision does not represent "a change in the law." 73 Fed. Reg. at 7901. Indeed, the court traced the Department's "evolving argument" as to the meaning of the regulation – the agency first made a distinction between unwaivable "rights" and waivable "claims" (including the right to sue), then "acknowledged the problem" with this position, and finally modified it by stating that the rule prohibits only the prospective waiver of rights (including the right to sue). *Taylor II*, 493 F.3d at 458.

Moreover, as it did in *Taylor I*, the court on rehearing rejected the Department's contention that "its reading of section 220(d) is consistent with the well-accepted policy disfavoring prospective waivers of rights, but encouraging settlement of claims, in employment law." *493 F.3d* at 459 (quotation omitted). As the court noted, the Department's argument "overlooks an important exception in employment law to the general policy favoring the post-dispute settlement of claims," namely, that "settlement of waiver of claims is not permitted when 'it would thwart the legislative policy which [the employment law] was designed to effectuate.'" *Id.* at 459-460 (quoting *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 704 (1945)). Congress intended the FMLA to "follow[] the FLSA model." "As with the FLSA, private settlements of FMLA claims undermine Congress's objective of imposing uniform minimum standards" of employment. Thus, "section 220(d) follows the FLSA model and prohibits the waiver of all FMLA rights." *Id.* at 460.

The Department asserts in the NPRM that the current regulation "was intended to apply only to the waiver of prospective rights." 73 Fed. Reg. at 7901. As the discussion in both *Taylor I* and *II* reveals, this argument has no merit. Exercising extreme caution in deferring to an agency's post-promulgation interpretation of a regulation, the court rejected the Department's current view of Section 825.220(d) because it is "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated." 493 F.3d at 461. Indeed, the Court summarily dismissed the Department's argument that it had never addressed this issue in promulgating the final rule. *Id.* Quoting *Taylor I*, the Court concluded that "'[b]y rejecting business's suggestion that waivers and releases should be allowed in connection with the post-

dispute settlement of FMLA claims, the DOL made clear that § 825.220(d) was never intended to have only prospective application.'" *Taylor II*, 493 F.3d at 462.

The NPRM offers only one reason -- advanced solely by employers -- for its current interpretation of Section 220(d), namely, that prohibiting retrospective waivers without DOL or court approval will "encourage[] litigation and interfere[] with the public policy favoring private resolution of disputes." 73 Fed. Reg. at 7901. We have already discussed the *Taylor* court's rejection of the public policy rationale. As to encouraging litigation, the court in *Taylor II* remarked:

> We are confident that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner. The DOL already has a system in place for reviewing FMLA claim settlements in administrative cases, and it has had even broader experience in supervising FLSA settlements. The courts will only be supervising settlements in court actions brought pursuant to the FMLA, and we do not believe that this responsibility will create an undue burden.

493 F.3d at 462-463. Important rights are at stake in Section 220(d). Congress intended to protect those rights by prohibiting the settlement of FMLA claims without DOL or court approval. This is what the statute as well as the current regulation, as interpreted by the Department at the time it promulgated this rule, compels. The Department should not deny employees this protection by clinging to a shifting and unpersuasive interpretation of a rule that the Fourth Circuit has twice discredited.[20]

Section 825.300 (Employer Notice Requirements)

Section 825.300(a)

The Department seeks comment on whether its FMLA electronic posting of notice alternative "is considered workable and will ensure that employees and applicants obtain the required FMLA information." 73 Fed. Reg. at 7903. We believe that electronic posting of FMLA notice may be a useful supplemental tool to apprise employees and applicants for employment of their rights and responsibilities under the Act. However, we oppose any measure that would supplant or weaken the statutory requirement (29 U.S.C. § 2619) that employers conspicuously post notice on their premises.

We can easily envision situations in which electronic posting will not reach all employees and applicants. Large numbers of employees, particularly those with limited financial resources, may lack access to computers. Many others, particularly older employees, are unfamiliar or uncomfortable with using computers and other electronic devices. Therefore, we are reluctant to embrace any change that would diminish the place of conspicuous posting of notice on an employer's premises.

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[20] The Department's decision to ignore the two holdings in *Taylor* contrasts with its decision to abide by the holding in *Harbert v. Healthcare Servs. Gp.*, 391 F.3d 1140, 1149 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 356 (2005); *see* 73 Fed. Reg. at 7884. What the Department's approach to these cases has in common, however, the weakening of employee protections under the FMLA.

Section 300(a)(3)

Proposed Section 825.300(a)(3) seeks to clarify the general notice requirements for covered employers with eligible employees as it relates to employee handbooks. In particular, Section 825.300(a)(3) provides:

> If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by either including the notice in employee handbooks distributed to all employees or distributing a copy of the general notice to each employee at least annually (distribution may be by electronic mail).

73 Fed. Reg. at 7978. The proposed regulation modifies the existing regulations by specifying that employers that do not utilize handbooks describing employee benefits and leave provisions must distribute a copy of the FMLA general notice to each employee at least once per year and may do so in written or electronic form.

As we stated in our response to the RFI (AFL-CIO Comments at 40), the Department should provide annual notice to employees of their FMLA rights. Requiring such distribution only by employers who do not have employee handbooks severely curtails the effectiveness of annual notice, particularly in light of the low level of knowledge about the FMLA on the part of employees. *See* DOL Report, 72 Fed. Reg. at 35554. We urge the Department to require annual distribution to all employees.

Section 825.300(b)

Proposed Section 825.300(b) seeks to change the current regulatory timeframe for an employer to notify an employee of his or her eligibility to take FMLA leave from two business days to five business days. The Department "specifically seeks comment on whether this timeframe will both impart sufficient information to employees in a timely manner and whether it is workable for employers." 73 Fed. Reg. at 7904. We urge the Department to make no changes to the current regulatory timeframe. The current two-day notification period is reasonable and comports with legislative intent.

Under the current regulations, the employer must notify an employee of his or her eligibility for FMLA leave "as soon as practicable" after the employee notifies the employer of the need for FMLA leave. 29 C.F.R. § 825.110(d). Section 825.110(d) defines "as soon as practicable" as "two business days absent extenuating circumstances." *See also* 29 C.F.R. § 825.208(b)(1). As recognized in the preamble to the final rule, the FMLA's eligibility notice provisions were specifically designed to require employers to make eligibility determinations "'immediately' upon learning that [an employee's request] qualifies as FMLA leave." 60 Fed. Reg. at 2207. This enables "both the employer to plan for the absence and the employee to make necessary arrangements for the leave." *Id.* at 2188. Expanding the regulatory timeframe for eligibility determinations from two days to five days would make it more difficult for employees "to make necessary arrangements for the leave." For example, a parent that requests FMLA leave to care for a seriously ill child will find it difficult to make appropriate arrangements while waiting five days for the employer to make a

determination. For these reasons, the Department should make no changes to the current two-day regulatory timeframe for employers to make eligibility determinations.

Moreover, the "absent extenuating circumstances" clause obviates the need to change the regulatory timeframe for eligibility notice from two days to five days. This provision was specifically designed to relieve employers from the two-day requirement where they face extraordinary difficulty in making eligibility determinations. Thus, it addresses the type of employer concerns referenced in the NPRM, 73 Fed. Reg. at 7904, and represents an appropriate balance between employer and employee interests.

We support DOL's proposal to "require[] the employer to notify the employee whether leave is still available in the applicable 12-month period." 73 Fed. Reg. at 7904. Increased workplace communication about statutory leave will promote better employee-employer relations about a process that has become fraught with controversy.

Section 825.300(c)

The Department seeks comment on whether its proposal to jettison the "provisional designation" concept set forth in the current regulations will "effectively communicate the required information to employees about their FMLA rights while relieving some of the administrative burdens for employers under the current process." 73 Fed. Reg. at 7903. The Department believes that the current preliminary designation process "may cause confusion over whether leave is protected prior to the actual designation." *Id.* at 7903. We urge the Department to resist attempts to jettison the concept of provisional designation.

The current provisional designation rules are an effective mechanism for facilitating the exchange of information between employers and employees concerning an employee's reasons for requesting FMLA leave. Preliminary designation of FMLA leave gives employees the comfort of knowing that their requests for leave will be approved provided they give their employer requisite information "which confirms the leave is for an FMLA reason." 29 C.F.R. § 825.208(e)(2). Preliminary designation also gives employers the flexibility to "withdraw the designation" if the "medical certifications fail to confirm that the reason for the absence was an FMLA reason." 29 C.F.R. § 825.208(e)(2). We think that removing the concept of provisional designation would impede "effective communication between employees and employers" relating to the employee's reasons for requesting FMLA qualifying leave. 73 Fed. Reg. at 7902. Accordingly, we oppose the Department's attempts to eliminate the concept of provisional designation.

Proposed Section 825.300(c) outlines the Department's new requirements for designation notice that an employer must provide. Current Section 825.208(b) requires employers to "promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. § 825.208(b). The Department's proposed designation notice requirement would require that "an employer notify the employee within five business days (a change from the current requirement of two business days) that leave is designated as FMLA leave

once the employer has sufficient information to make such a determination." 73 Fed. Reg. at 7095.

For the same reasons we oppose DOL's attempt in Section 825.300(b) to change the regulatory timeframe for employers to notify an employees of their eligibility to take FMLA leave from two business days to five business days, the AFL-CIO strongly opposes similar language in proposed Section 825.300(c). In addition, as we noted in our response to the Request for Information (AFL-CIO RFI Comments at 28) "[t]he ability to substitute paid vacation or personal leave has had a significant impact on employee's ability to take FMLA leave." Indeed, DOL's own data shows that the availability of paid leave not only affects whether employees take FMLA leave, but is the single most important determinant of whether someone who needs leave actually takes it. Permitting employers to delay the decision to designate paid leave for up to five days will have the effect of discouraging employees from taking FMLA leave. The uncertainty associated with a longer timeframe for designating paid leave for purposes of substitution of unpaid FMLA leave will surely make it more difficult for employees "to make necessary arrangements for the leave." 60 Fed. Reg. at 2188.

For these reasons, the Department should not expand the regulatory timeframe for an employer to provide designation notice from two business days to five business days. We agree, however, that the employer must notify the employee "of the number of hours, days or weeks, if possible, that will be designated as FMLA leave." 73 Fed. Reg. at 7905. This requirement should enable employees to more accurately plan their leave and therefore provide greater workplace stability.

The Department specifically seeks comment on whether proposed Section 825.300(c)'s requirements for employers to provide employees with more substantive information than they must provide under the current regulations "both adequately protect employee rights and are workable for employers." 73 Fed. Reg. at 7905. The AFL-CIO supports these additional requirements. We discuss each proposed change below.

We agree with proposed Section 825.300(c)'s additional language that "expressly requires the employer to inform the employee of the number of hours, days or weeks, if possible, that will be designated as FMLA leave." 73 Fed. Reg. at 7905. This requirement will allow employees to make more effective decisions with respect to arrangements for their leave. The Department accurately recognizes that in situations where an employee requests a block of foreseeable leave and provides an employer with appropriate notice, "it should be relatively straightforward for the employer to provide the employee with the amount of leave that will be designated as FMLA." 73 Fed. Reg. at 7905.

In the context of unforeseeable intermittent leave for a chronic serious health condition where the exact amount of leave is unknown, we support proposed Section 825.300(c)'s requirement that employers "must inform the employee every 30 days that leave has been designated and protected under the FMLA and advise the employee as to the amount so designated if the employee took leave during the 30-day period." 73 Fed. Reg. at 7905.

This information will also facilitate leave-related decisions by employees who take unforeseen, intermittent leave.

The AFL-CIO supports the proposed section's new requirement that "an employer notify the employee if the leave is *not* designated as FMLA leave due to insufficient information or a non-qualifying reason." 73 Fed. Reg. at 7905. However, we believe that proposed Section 825.300(c)(2) should specify that in the event that leave is not designated as FMLA leave due to insufficient information, the employee must have an opportunity to submit additional information that would establish an FMLA-qualifying reason for leave.

Section 825.300(d)

In light of the Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002), the Department has undertaken to revise its regulations concerning remedies for an employer's failure to designate FMLA leave or determine eligibility in a timely fashion. In this regard, the Department seeks to codify in proposed Section 825.300(d) *Ragsdale's* holding that remedies for a violation of the FMLA's notice requirements must be tailored to the individualized harm. For the same reasons discussed above with respect to proposed Section 825.220(b), we believe that the proposed language concerning remedies accurately reflects the law in light of *Ragsdale.*

Proposed Section 825.301(d) (Employer Designation of FMLA Leave)

In proposed Section 825.301(d) the Department seeks to allow employers to retroactively designate leave as FMLA leave as long as they give "appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee." 73 Fed. Reg. at 7980. We oppose such an open-ended designation. In order to minimize the harm that may be caused to employees, the Department should allow employers to make retroactive designations only within a short period of time after commencement of the leave.

In proposed Section 825.301(e), DOL sets forth the remedies for an employer's failure to timely designate leave under § 2617. 29 U.S.C. § 2617. For the same reasons discussed in our comments on proposed Section 825.220(b) we agree with the Department's language concerning remedies for proposed Section 825.301(e).

Section 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave)

Section 825.302(a)

The Department seeks to change employee notice requirements for foreseeable FMLA leave in proposed Section 825.302(a) by adding the requirement that "[i]n those cases where the employee does not provide at least 30 days notice of foreseeable leave, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information." 73 Fed. Reg. at 7980. Under the current regulations, an employee has no such obligation to explain the timing of the notice.

We strongly oppose proposed Section 825.302(a)'s explanation-upon-request provision because it unduly intrudes upon employee privacy. There is no reason to give employers unfettered discretion to demand that employees explain why they did not give 30 days notice of leave, particularly where the explanation may require the disclosure of sensitive medical or other personal information. Indeed, the Department notes one employer representative who conceded that employers "often refrain from asking employees why they are absent for fear that they may invade an employee's medical privacy." 73 Fed. Reg. at 7908. The Department's proposal is nothing less than an invitation to cross that line with impunity. In addition, a medical certification would provide a sufficient explanation as to the situation and alleviate the need for personal disclosure to a management representative.

Section 825.302(c)

Current Section 825.302(c) states that "[a]n employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." However, "[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example." The burden then shifts to the employer to "inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought . . . and obtain the necessary details of the leave to be taken." *Id.*

The Department attempts to clarify in proposed Section 825.302(b) what information constitutes "sufficient" notice when employees notify their employers of the need for FMLA leave. In particular, the Department proposes to add the following language to paragraph (c):

> [S]ufficient information must indicate that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities), the anticipated duration of the absence, and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment.

73 Fed. Reg. at 7908. We oppose the Department's attempts to revise the definition of the information that constitutes sufficient employee notice.

Courts that have construed the employee notice provisions of the FMLA and its implementing regulations have repeatedly held that "in providing notice, the employee need not use any magic words." *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, (3d Cir. 2007). Rather, the courts of appeals have recognized that "[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995); *see also Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005); *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 421 (6th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005).

Thus, proposed Section 825.302(c) represents a significant increase in employee notice requirements. The new language shifts the burden to employees to provide information that is currently the employer's obligation to obtain if the initial notice is insufficient. The revision will also have the effect of requiring employees to know precisely when they must take leave and the duration of their leave before they provide notice. *Cf. Sarnowski,* 501 F.3d at 402-403 (employees may provide FMLA qualifying notice before knowing the exact dates or duration of the leave). In addition, we are concerned that employees will remain unaware of their increased notice responsibilities under the new rule, which will jeopardize even further their ability to take FMLA leave.

Section 825.302(d)

Under current Section 825.302(d), an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. However, "failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice." 29 C.F.R. § 825.302(d). The Department seeks to revise the current rule to allow employers to impose a penalty for noncompliance with their normal procedures for requesting leave.

The AFL-CIO opposes the Department's proposal. This revision will likely have the effect of permitting minor deviations from an employer's internal notice policy to result in wholesale denial or delay of rights guaranteed under the FMLA. For example, an employee who calls a deputy supervisor instead of the chief supervisor may be penalized for not following the employer's customary call-in policy. The "unusual circumstances" exception in proposed Section 825.302(d) will not alleviate this problem.

Section 825.302(g)

The Department proposes to eliminate confusion in current Section 825.302(g). We appreciate the Department's intent to provide clarity in this important provision, but we believe that the proposed revision creates its own ambiguity and therefore suggest an alternative revision.

The first sentence of paragraph (g) states, "[a]n employer may waive employees' FMLA notice requirements." The second sentence provides, "[I]n addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer." The second sentence is important because it deals with negotiated agreements that provide for "less strict notice requirements," which are not the same as an employer's unilateral "waive[r]" of notice requirements altogether. Therefore, we think it is important to retain the second sentence so that there is no confusion over the effect of contractual provisions that shorten the notice period.

We agree with DOL that the third sentence of current paragraph (g) does not illustrate the principle of the second sentence with respect to collective bargaining, because the example provided deals with paid vacation leave, and not with family and medical leave.

Therefore, we support DOL's proposal to delete this sentence. We would retain the fourth sentence of paragraph (g) because it follows logically from the second sentence.

Taken as a whole, the provision would give guidance as to when an employer has the right to insist on the FMLA's notice requirements and when it does not. The confusion caused by the current language would be eliminated.

Proposed Section 825.303 (Employee notice requirements for unforeseeable FMLA leave)

Section 825.303(a)
DOL proposes to retain the language of current Section 825.303(a), which provides that "[w]hen the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case." However, "the Department expects that in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave at least prior to the start of their shift." 73 Fed. Reg. at 7910.

We urge the Department not to include this clarifying language in the preamble to the final rule. The regulatory standard obliges the employee to notify the employer promptly, but recognizes at the same time that promptness depends to some degree on the particular medical situation faced by the employee. This is an appropriate standard. On the other hand, the prefatory language imposes a rigid, nearly universal standard that imposes unrealistic expectations on employees. This guidance conflicts with the rule itself and will inevitably lead to disputes about the timeliness of notice.

Proposed Section 825.303(b)
In proposed Section 825.303(b), the Department proposes "to require that the employee provide the employer with sufficient information to put the employer on notice that the absence may be FMLA-protected." 73 Fed. Reg. at 7911. For the reasons discussed with respect to our comments on proposed Section 825.302(c), we oppose the Department's language concerning what constitutes sufficient information when an employee requests unforeseeable FMLA leave.

Section 825.305 (Medical certification, general rule)

Current Section 825.305 sets forth the general rules applicable to medical certifications requested by employers when their employees seek FMLA leave, including their timing and content. Taken together, the proposed changes to this section make it more difficult for employees to take FMLA leave and expand employer rights to request information as a condition of taking leave, and we therefore oppose them.

Section 825.305(b)

Current Section 825.305(b) provides that when an employee has given at least 30 days notice of foreseeable leave, then "the employee should provide the medical certification before the leave begins." This section also provides that:

> When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

No time limits for submitting medical certifications are specified in this section for unforeseen leave.

Proposed Section 825.305(b) imposes more restrictive time frames on employees in several ways. First, DOL proposes that this provision be "modified to clearly apply the 15-day standard for both foreseeable and unforeseeable leave." 73 Fed. Reg. at 7912. Thus, employees will no longer have the right to submit their certifications at any time before their leave begins where they have given at least 30 days notice of foreseeable leave, and they will now have only 15 days in which to submit the certification in cases of unforeseeable leave.

Many workers who request FMLA leave face serious medical crises of their own or a family member. The proposed revisions impose tighter deadlines on employees at precisely the moment when they are least able to meet them. The stricter time constraints also impose greater burdens on health care providers.

The Department takes the position that the timeliness requirements for both foreseeable and unforeseeable leave are set forth in Section 825.311(a) and (b) and that its proposed revision of Section 825.305(b) makes the rules "consistent" with each other. 73 Fed. Reg. at 7912. But the Department should not treat the later section as controlling. Section 825.305 answers "[w]hen must an employee provide medical certification to support FMLA leave?" while Section 825.311 answers "[w]hat happens if an employee fails to satisfy the medical certification and/or recertification requirements?" The logical conclusion is that the later section does not accurately restate the rules with respect to timeliness. This conclusion is reinforced by the fact that paragraph (a) of that section refers only to the 15-day period for submitting a certification in the case of foreseeable leave, which is plainly inconsistent with Section 825.305(b)'s allowance of 30 days. The Department has simply chosen to follow the provision with the tighter restrictions.

Proposed Section 825.305(b) makes an exception to the deadline if "it is not practicable under the particular circumstances to do so [submit a certification within 15 days] despite the employee's diligent, good faith efforts." 73 Fed. Reg. at 7911-12. Given the fact that timely submission of a medical certification is in the hands of a health care provider once the employee makes the request, we have serious concerns about the effectiveness of this provision. We believe that an employee who has requested a medical certification and

has followed up at least once with his or health care provider has made "diligent, good faith efforts" that would excuse the failure to submit the certification on time, but we doubt whether employers, without specific instructions from the Department, would agree.

The Department's proposal to add language to Section 825.305(b) requiring an employer to notify an employee "if the certification has not been returned" may lessen leave denials to some degree. However, we believe it is appropriate to provide an additional fifteen calendar days for obtaining the certification. This would conform the proposal to the facts in *Urban v. Dolgencorp of Texas, Inc.*, 393 F.3d 572 (5th Cir. 2004), a decision that, in the Department's view, makes it "necessary" to make this revision. 73 Fed. Reg. at 7912.

Section 825.305(c)

The Department proposes to add a new Section 825.305(c). This section would distinguish between an "incomplete" and "insufficient" certification and define both terms, require the employer to provide the employee with written notice of the particular aspects of the certification that are incomplete or insufficient, give the employee seven calendar days to cure the deficiency, allow the employer to deny FMLA leave if the employee fails to cure, and make clear that a certification that is never filed is "a failure to provide certification" rather than an incomplete or insufficient one. 73 Fed. Reg. at 7912.

The Department has ample justification to require employers to "state in writing what additional information is necessary" when an employee's certification is either incomplete or insufficient. 73 Fed. Reg. at 7913. As noted in the NPRM, many employees, as well as their advocates, complained that an employer's insistence on additional information often becomes a moving target that ultimately defeats the request for FMLA leave. *Id.* at 7912-13. Along the way, the employee spends significant time and resources attempting to provide the information the employer has led him to believe is missing. *Id.*

Nonetheless, we are greatly troubled by the Department's definition in proposed Section 825.305(c) of "an insufficient certification." 73 Fed. Reg. at 7912. Employers voiced criticism that "a certification is 'incomplete' if a doctor states 'unknown' or 'as needed' [in response] to any question." *Id.* The Department has responded by "agree[ing] that an adequate FMLA certification requires responsive answers" and defining an "insufficient certification as one where the information provided is 'vague, ambiguous or nonresponsive.'" *Id.*

Comments to the RFI from the health care community made it clear that certainty is not possible as to the duration of many medical conditions, particularly those that are chronic and long term, as well as the frequency and/or duration of medically necessary leave. *See, e.g.,* DOL Report, 72 Fed. Reg. at 35590; Comments of American Academy of Family Physicians (Doc. FL 25) at 2-3 ("despite medical advances, absolute cures do not exist for all conditions making the duration of these conditions 'indefinite' or 'lifetime'

from the current medical perspective.") Representatives of the medical community strongly reinforced this fact during the Department's stakeholders meeting conducted in September 2007 about medical certification. Therefore, defining an insufficient medical certification as one that provides "vague, ambiguous or non-responsive" answers falls prey to the very difficulty that the medical community has identified, namely, that employers continue to demand certainty where none exists. *See* Proposed Form WH-380 (Certification of Health Care Provider); 73 Fed. Reg. at 7994, Questions 5, 6.[21]

The Department proposes that an employer "state in writing what additional information is necessary and provide the employee with seven days to cure the deficiency." 73 Fed. Reg. at 7912, 7982. However, the inevitable result of the proposed definition of an insufficient medical certification is that an employer will be able to deny leave under Section 825.305(d), when, in its unilateral judgment, the employee has not "cured" a health care provider's "vague, ambiguous or non-responsive" answers to medical questions that simply are not amenable to such specificity. *See* 73 Fed. Reg. at 7913. This result penalizes employees for the state of current medical knowledge, a result that is illogical, unfair, and without any basis in the FMLA itself.

Section 825.305(e)

Current Section 825.305(e) provides that "[i]f the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements" under the FMLA regulations "and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized . . .only the employer's less stringent sick leave certification requirements may be imposed." We oppose DOL's proposal to eliminate this provision.

As justification for its proposal, the Department asserts that it "has heard feedback that it is unclear what constitutes less stringent information and how that information would allow an employer to determine if the leave should be designated as FMLA leave." 73 Fed. Reg. 7913. The NPRM does not disclose the nature and content of that feedback, and the RFI did not seek comments on this issue. Thus, the Department has not given the public any basis on which to evaluate the merits of this claim. Instead, the Department cites a single Wage and Hour Opinion Letter, FMLA-108 (Apr. 13, 2000), in which it found that the employer's certification procedures were more stringent than those under the FMLA for many obvious reasons. *Id.* If this is the only "feedback" received by the Department, it does not provide any justification, let alone adequate justification, for making it harder for employees to substitute paid leave for unpaid FMLA leave in the new rules. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984).

Finally, we oppose the Department's proposal in Section 825.305(e) that "[w]here the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's [qualifying family member] lasts beyond a

[21] For these same reasons, we oppose including the statement in the revised medical certification form warning health care providers that "terms such as 'lifetime,' 'unknown,' or 'indeterminate' may not be sufficient to determine FMLA coverage." 73 Fed. Reg. at 7995.

single leave year . . . the employer may require the employee to provide a new medical certification in each subsequent leave year." 73 Fed. Reg. at 7913. This results in unnecessary visits to health care providers as well as increased paperwork burdens and is yet another hurdle DOL has placed in front of employees who try to access their FMLA rights.

Both current Form WH-380 (Question 5.a.) and proposed Form WH-380 (Question 1(b)) ask the health care provider to state "the probable duration of the condition." Where the health care provider has specified that the condition is likely to last for more than a year, there is no purpose served by requiring a certification before that period has lapsed. Yet, as with the proposal to allow for recertifications every six months even where the condition will last longer, *see* 73 Fed. Reg. at 7918, the Department has given employers one more tool to discourage FMLA usage.

The Department relies on Wage and Hour Opinion Letter FMLA 2005-2-A (Sept. 14, 2005) at 2, in which the Administrator concluded that "an employer may reinitiate the medical certification process with the first absence in a *new* 12-month leave year" (emphasis in original). That conclusion was based on Wage and Hour Opinion Letter FMLA-112 (Sept. 11, 2000) at 2, which held that an employer has the right to "recalculate[]" whether the employee satisfies the 1,250 hours of service requirement under the statute "at the time of the first absence for the condition after the conclusion of the 12-month period" (but not at the start of each period of intermittent leave during a single 12-month FLMA period). As the earlier opinion letter makes clear, the employer's right to recalculate an employee's eligibility for leave on an annual basis is based on the FMLA's definition of an "eligible employee," which includes fulfillment on an annual basis of 1,250 hours of work. 29 U.S.C. § 2601(2)(A)(ii).[22] The statute has no analogous provision with respect to certification of an employee's health condition. Thus, there is no basis for relying on the annual eligibility determination as ground for requiring in all situations an annual certification of the employee's serious health condition. The Department's proposed revision is arbitrary and capricious. *See Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 844 (1984).

[22] Wage and Hour Op. Ltr., FMLA-112 (Sept. 11, 2000) (citing *Barron v. Runyon,* 11 F. Supp. 2d 676 (E.D. Va. 1998)), in which the court held that an employee must fulfill the 1,250 hours eligibility requirement at the start of the first period of intermittent leave for a serious health condition, rather than at the start of each period of such leave during the FMLA 12-month period). In rejecting the employer's suggestion that this would allow employees to satisfy the hours of service requirement only once during their employment, the court stated, "[c]ontrary to defendant's suggestion, however, leave cannot be taken 'forever' on the basis of one leave request. Instead, the statute grants an employee twelve weeks of leave *per twelve-month period*, not indefinitely." *Id.* at 682-83 (emphasis in original). Neither the issue presented in *Barron*, nor the court's discussion, had any bearing on the issue in Wage and Hour Opinion Letter FMLA2005-2-A on which DOL now relies, and the Opinion Letter quotes the statement in *Barron* court entirely out of context. Read properly, the court's statement lends no credence to the reasoning of the Opinion Letter.

Section 825.306 (Content of medical certification)

FMLA Section 103(a) sets forth the requirements for a "sufficient certification." 29 U.S.C. § 2613(a). Pursuant to this statutory provision, "[c]urrent § 825.306 [of the regulations] addresses how much information an employer can obtain in the medical certification to substantiate the fact that a serious health condition exists." 73 Fed. Reg. at 7913. The Department has now proposed revisions to this regulation. *Id.* at 7915, 7983. Our comments below address several aspects of this proposal.

Section 825.306(a)(3)

The Department proposes to "add[] guidance in this . . . section as to what constitutes sufficient medical facts for purposes of" showing that the employee or family member has a serious health condition. 73 Fed. Reg. at 7915. Toward that end, proposed Section 825.306(a)(c) provides that:

> Such medical facts *may* include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment[.]

Id. at 7983 (emphasis added).[23] We oppose this revision.

The Department states that it "does not intend to suggest, by including such language, that a diagnosis is a necessary component of a complete FMLA certification." 73 Fed. Reg. at 7915. However, specifying the medical facts, including diagnosis, that "may" be included in a certification will lead many employers to consider a certification that lacks such information as "insufficient" under Section 825.305(c); they will therefore deny FMLA leave to an employee who does not cure such a perceived "insufficiency" under Section 825.306(d). The employer comments cited by the Department in both the NPRM, 73 Fed. Reg. at 7915, as well as those discussed in the DOL Report, 72 Fed. Reg. at 35590, substantiate this concern, because employers continue to question whether certain conditions can ever qualify as serious health conditions, and resist the premise of the certification process that "[t]he health care provider determines the appropriate relevant medical facts in any case." 73 Fed. Reg. at 7915. This provision will give employers one more tool for denying FMLA leave to their employees.

Section 825.306(c)

We also oppose the Department's proposal to include in Section 825.306(c) language that states:

> an employer may request additional information in accordance with a paid leave policy or disability plan that requires *greater information* to qualify for payments or benefits, provided that the employer informs the employee that the additional

[23] DOL notes that it chose not to require that the current certification include a diagnosis. 73 Fed. Reg. at 7915 (citing 60 Fed. Reg. at 2222).

> information only needs to be provided in connection with receipt of such payments or benefits.

73 Fed. Reg. at 7983 (emphasis added); *see id.* at 7916. This revision is inconsistent with the proposal to eliminate from current Section 825.305(e) language that provides:

> If the employer's sick or medical leave plan imposes medical certification requirements that are *less stringent* than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized . . ., only the employer's *less stringent* sick leave certification requirements may be imposed.

(emphasis added). As discussed, the Department's rationale for eliminating the provision permitting employers to satisfy an employer's "less stringent" sick leave requirements is that it "has heard feedback that it is unclear what constitutes less stringent information . . ." *Id.* at 7913. At the same time, however, the Department takes the position that employers should be able to determine unilaterally that their paid leave or disability plans require "greater information" and require employees to satisfy those requirements. This exercise in double standards penalizes employees twice, for now they can no longer take advantage of easier qualifying standards for some types of paid leave, and also become subject to employers' higher standards under other types of paid leave. The Department has exercised its selectivity in the service of employers and at the expense of employees.

Section 825.306(d)

The Department proposes to add a new Section 825.306(d) which states that where a "serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA." 73 Fed. Reg. at 7983; *see id.* at 7916. We oppose this revision because it fails to make clear that an employer cannot require an employee to provide medical information required only by the ADA if the employee chooses to pursue her FMLA leave rights exclusively. This is an important issue. As comments to the RFI demonstrate, employers continue to press for greater medical information than the FMLA permits. *See* DOL Report, 72 Fed. Reg. at 35589-92. The possibility that an employee who seeks FMLA leave might also have a disability under the ADA that would require accommodation *if* the employee sought ADA protection should not provide an excuse to demand information exceeding the employer's entitlement under the FMLA.

The Equal Employment Opportunity Commission has published a Fact Sheet on the FMLA and ADA.[24] These Questions and Answers make clear that an employer cannot lawfully seek information under the ADA when an employee chooses to invoke FMLA rights only. For example, Question 16 asks "[i]f an individual requests time off for medical treatment, should the employer treat this as a request for FMLA leave and ADA reasonable accommodation?" The Answer provided is as follows:

[24] *Available at* http://www.eeoc.gov//policy/docs/fmlaada.html.

> If an employee requests time off for a reason related or possibly related to a disability . . . , the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave. The employer may require FMLA certification and may make additional disability-related inquiries if necessary to decide whether the employee is entitled to reasonable accommodation because s/he has a covered disability. *However, if the employer states that s/he only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage.*

Id. (emphasis added; footnote omitted); *see also id.* at Question 18 ("While the FMLA does not prevent an employee from accepting an alternative to leave, the acceptance must be voluntary and uncoerced"). Without a warning that employers should not make additional inquiries related to ADA coverage when an employee elects to invoke only his or her FMLA rights, the proposed revision creates an opportunity for employers to exceed their authority under the FMLA.

Section 825.306(e)

The Department proposes to add a new Section 825.306(e) stating that employers may not require employees to sign releases of confidentiality in order to qualify for FMLA leave. This is an important amendment to the regulations in light of the widespread practice of requiring such waivers, as documented by employees and their representatives in the RFI proceedings. *See* 73 Fed. Reg. at 7916; *see also* 60 Fed. Reg. at 2222 (rejecting waiver requirement in current regulations). Although the employee bears the ultimate burden of providing sufficient information to qualify for leave, this should not entail a forfeiture of privacy rights.

Section 825.307 (Authentication and clarification of medical certification)

"Current § 825.307(a) explains that a health care provider working for an employer can contact the employee's health care provider with the employee's permission for purposes of clarification and authentication of the medical certification." 73 Fed. Reg. at 7916. The Department proposes two changes to this rule. First, it proposes to eliminate the requirement of employee consent when an employer seeks to authenticate the medical certification. Second, it has proposed to eliminate the requirement that all employer contacts with the employer's health care provider for purposes of both authentication and clarification occur through a health care provider hired by the employer. Both revisions jeopardize the confidentiality of employee medical information and provide employers with opportunities to abuse the information they receive. We therefore oppose them.

Proposed Section 825.307(a) now states, in part:

> For purposes of these regulations, "authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized

by the health care provider who signed the document; no additional medical information may be requested and the employee's permission is not required.

73 Fed. Reg. at 7983. "Authentication" stands in contrast to "clarification," which under the same provision "means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response." *Id.*

Limiting the scope of the "authentication" inquiry to whether the health care provider completed/authorized the certification is neither tenable nor enforceable, despite the admonition against asking for "any additional medical information," because contacts between people in the real world do not adhere to such definitional neatness. In fact, this proposal creates an invitation for employers to gain confidential facts about an employee's health condition and then use them as a basis for denying FMLA leave.

The Department has no statistical data whatsoever indicating that there are widespread authenticity problems with respect to medical certifications. The NPRM notes only "several comment[]s" on this issue among the tens of thousands it received in response to the RFI. 73 Fed. Reg. at 7916. Responding to these few comments by denying employees basic protections against disclosure of confidential medical information, defies logic and fairness and is arbitrary and capricious. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984).

The proposal itself is deeply flawed for other reasons. First, it relies entirely on employers to respect the line between authentication and clarification in their dealings with health care providers, which they cannot do so without first understanding the distinction between the two inquiries. However, as the Department acknowledged in its Report, all the available evidence shows that there is widespread ignorance of the FMLA and its current rules among employers and employees. 72 Fed. Reg. at 35582. There is no reason to think that employers will readily absorb the more complicated rules the NPRM envisions. Moreover, employers will have to understand the relevant provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. Law No. 104-91, and its implementing regulations, 45 C.F.R. Parts 160, 164.

Comments by employees and their representatives also indicate that even under the current rules, "employers are already using the clarification process improperly to seek additional information beyond that included in the certification form or even to challenge the employee's health care provider's medical judgment." DOL Report, 72 Fed. Reg. at 35592-93. Permitting employers to authenticate medical certifications without a waiver provides one more avenue for improper requests for information.

Even the unwitting employer may ask "authentication" questions that cross the line to "certification" and elicit disclosures of protected health information under FMLA or HIPAA; the deliberate employer may make this a standard practice. HIPAA prevents disclosure of "protected health information" by a covered entity except with the authorization of the individual who is the subject of the information. 45 C.F.R. § 164.502(a). Protected health information means individually identifiable health

information, *see id.* § 164.501, and "[r]elates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of heath care to an individual." *Id.* § 160.103. Such a broad definition creates the strong likelihood that even a request for authentication will elicit the disclosure of confidential medical information. In fact, one commenter urged the Department to allow employers to "confirm date, time and place of appointments, but not . . . to discuss the medical facts, the need for leave and the frequency and duration of leave" as part of the authentication process, thus demonstrating how easy it is to make faulty assumptions about what constitutes protected information. DOL Report, 72 Fed. Reg. at 35593.[25]

Employees who are the victims of unauthorized disclosure of their medical information will have virtually no recourse. Not only will it be difficult to determine whether an authentication request has led to the disclosure of substantive health-related information, but even if the employee learns of this unlawful behavior, he or she will have no meaningful or timely way to challenge it. HIPAA provides remedies against covered entities (such as health care providers), but not against employers. *See* 45 C.F.R. §§ 160.306, 160.312. And, by the time an employee follows the enforcement provisions of the FMLA, the need for leave will have passed.

The Department also proposes to allow employers to contact health care providers directly, *see* 73 Fed. Reg. at 7983, instead of through "a health care provider representing the employer," as current Section 825.307(a) requires. "The Department believes that this change would significantly address the unnecessary administrative burdens the current requirement creates and, in light of . . . HIPAA . . ., will not significantly impact employee privacy." 73 Fed. Reg. at 7917-18.

As the Department notes, the AFL-CIO objected to this change in our comments to the RFI. 73 Fed. Reg. at 7917. We continue to oppose it, especially in light of the relaxed restrictions on obtaining "authenticating" information from the employee's health care provider. Employer comments relied on by the Department reveal that health care providers take their HIPAA obligations seriously in order to avoid unauthorized disclosures. *Id.* Provider-to-provider contacts are far more likely to result in HIPAA-compliant communications, since both individuals will understand and respect the importance of medical confidentiality. Employees voiced strong concerns about the privacy of their health information that underscore this concern. DOL Report, 72 Fed. Reg. at 35593.

Allowing employers to communicate directly with health care providers also carries substantial risks of inaccuracy and misinterpretation. Laypersons do not have the background to understand complex medical issues, and may also misinterpret simple

[25] The fact that DOL proposes to permit authentication in proposed Section 825.307(a) and prohibit a request for "any *additional* medical information" certainly suggests that the information sought by the employer in authenticating the document constitutes medical information. Employers who choose to read the regulation this way may well believe they are justified in asking questions that go beyond authentication and into the realm of clarification and supplementation. 73 Fed. Reg. at 7983.

medical information for a variety of reasons. As one employer commenter stated in response to the RFI, requiring provider-to provider contact "not only protects the privacy of employees but also ensures that medical information discussed and terminology used while clarifying and authenticating complete medical certifications are understood and correctly interpreted." DOL Report, 72 Fed. Reg. at 35592.

We are also extremely concerned that the proposed regulation permits *any* representative of the employer to contact the employee's health care provider. The breadth of this rule creates the potential for serious breaches of confidentiality by management representatives who do not understand or appreciate the need for it, and a lack of decision-making standards when many such representatives receive and interpret medical information. It also creates the potential for retaliation against employees by management officials dissatisfied with the employee's job performance or use of protected leave. The employee protections afforded by requiring provider-to-provider contact far outweigh any expense or delay incurred as a result of such requirement.

Section 825.308 (Recertifications)

Current Section 825.308 regulates the intervals at which an employer may request a recertification from an employee. We oppose virtually all of the changes to this provision because they impose unnecessary burdens on employees who take FMLA leave as well as on their health care providers.

Paragraph (a) of the current regulation permits an employer to request a recertification every 30 days for pregnancy, chronic, or permanent/long term conditions but "only in connection with an absence by the employee" (unless certain circumstances apply). For other conditions, paragraph (b)(1) provides that "If the minimum duration of the period of incapacity specified on a certification . . . is more than 30 days, the employer may not request recertification until that minimum duration has passed" (unless certain circumstances apply). Similarly, where "leave [is] taken intermittently or on a reduced leave schedule basis," paragraph (b)(2) provides that "the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave." Where no duration is specified, then the employer may request a recertification every 30 days (unless certain circumstances apply). *See* 73 Fed. Reg. at 7918.

The Department proposes to change the intervals at which employers may request recertifications. Proposed Section 825.308(a) states a general rule that "an employer may request a recertification no more often than every 30 days and only in connection with an absence by the employee." 73 Fed. Reg. at 7984. New paragraph (b) provides:

> If the medical certification indicates that the minimum duration of incapacity is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification . . . . In all cases, an employer may request a recertification every six months in connection with an absence by the employee.

The NPRM states that under this revised rule, "certified durations of 'indefinite,' 'unknown,' or 'lifetime'" would be subject to recertification every six months instead of every 30 days "under current law." 73 Fed. Reg. at 7919 (citing Wage and Hour Op. Ltr., FMLA2004-2-A (May 25, 2004)). We support this change for all of the reasons provided by commenters to the RFI and relied on by the Department in the NPRM. 73 Fed. Reg. at 7919. Recertifications on a 30-day basis for long term conditions are not only burdensome to employees and their health care providers, but are highly unlikely to elicit useful information for making leave decisions under the FMLA. We note, however, that the proposed rule itself does not include language making clear that the six-month rule applies to conditions that are indefinite, unknown, or likely to last a lifetime, and urge the Department to revise the language accordingly.

For the same reasons, we oppose allowing recertifications every six months for conditions lasting longer than that. Providing for a six-month interval between certifications, regardless of the duration of the health condition, defeats the rule that employers cannot seek recertification before the period of the condition has expired. This will lead to precisely the same duplication of effort by employees and their health care providers that the Department has eliminated with respect to conditions of indefinite duration, as discussed above. For example, under the Department's proposal, an employer could require an employee with a health condition certified to last for nine months, who takes leave in the fifth month, to recertify at the six-month mark and then again at the nine-month mark. No purpose is served by requiring the employee in such circumstances to recertify in rapid-fire succession.

Similarly, an employer could require an employee who had a degenerative condition certified to last a "lifetime," and who took leave at least once every six-months, to recertify every six months, despite the fact that the health care provider has already certified that the condition will not abate. *See* DOL Report, 72 Fed. Reg. at 35595 (health care provider commenting that "[c]hronic conditions extending a patient's lifetime such as diabetes and hypertension are not going to change and there is no reason the form has to be updated multiple times throughout the year.") *Id.* Such requirements are burdensome and expensive to both the employee and the health care provider and are highly unlikely to produce anything but duplicative information. We urge the Department to eliminate the cumulative recertifications that the proposal now authorizes.

Finally, new Section 825.308(e) states, "the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern." 73 Fed. Reg. at 7985. This is consistent with the position already taken by the Department in Wage and Hour Opinion Letter FMLA2004-2-A under current Section 825.308(a)(2), and nothing in the revisions would change require a change in that position. Thus, we believe that it is not necessary to revise the regulation to include this provision.[26]

[26] The NPRM seeks comment on whether DOL should revise the regulations to provide for second and third opinions on recertification. 73 Fed. Reg. at 7920. For all of the reasons we state in this submission with respect to the additional burdens already caused by permitting more frequent certifications,

Section 825.310 (Fitness-for duty certification)

Current Section 825.310 governs the circumstances under which an employer may require a fitness-for-duty certification when an employee returns from FMLA leave. The Department has acceded to employer demands to expand their right to obtain such certifications. As the Department notes, many worker advocates, including the AFL-CIO, urged the Department in response to the RFI not to make such a change because of the unwarranted burden this would place on employees. *See* 73 Fed. Reg. at 7920, 7922. We reiterate our opposition to these changes.

Section 825.310(c)

Current Section 825.310(c) provides that "[a]n employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave." It states further that "[t]he certification itself need only be a simple statement of an employee's ability to return to work."

The Department proposes to revise this provision, in pertinent part, as follows:

> An employer may require that the certification address the employee's ability to perform the essential functions of the employee's job by providing a list of essential functions with the eligibility notice required by § 825.300(b). If the employer timely provides such a list, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification.

73 Fed. Reg. at 7985. This expansion is unwarranted. The overwhelming number of employer comments relied on in the NPRM about fitness-for-duty deal with a perceived need for greater information with respect to employees in *safety-sensitive jobs*. *Id.* at 7920.[27] Yet, the Department's proposed change to Section 825.310(c) allows employers to require "certification that the employee can perform the [identified] essential functions of the job" in *all* jobs, regardless of whether safety concerns play any role at all. *Id.* at 7922. DOL has failed to show why "a simple statement of an employee's return to work" in the overwhelming number of cases is no longer sufficient. Thus, we object to the scope of this proposal. It vastly exceeds what employers have asked for without providing any justification, and is therefore arbitrary and capricious. *See Chevron U.S.A., Inc.*, 467 U.S. at 844.

We are also troubled by the fact that the proposal gives the employer the ability to come up with a list of the "essential functions" of a job regardless of whether a written job

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recertifications and fitness-for-duty certifications, we oppose this change. We see no benefit to be obtained from second and third opinions on recertifications.

[27] *See also id.* at 7921 (noting that "employer comments indicate that the primary purpose of requiring a fitness-for-duty certification is to make sure the employee is able to resume work safely without harming the employee, co-workers, or the public").

description outlining them already exists. In a workplace that lacks written job descriptions for hiring, evaluation, and other decisions, the employer should not have the authority to create such a list for the purposes of determining if an employee is fit to return from FMLA leave. This increases the likelihood that employers will use this as an opportunity to create arbitrary lists of "essential" functions in order to penalize employees for having taken leave.

Moreover, the record lacks any evidence, received in response to the RFI or elsewhere, of employers' need to authenticate and/or clarify fitness-for-duty certifications. Under these circumstances, there is no basis for imposing these additional requirements on employees and their health care providers at the end of a period of FMLA-protected leave.

For the same reasons why we oppose enhanced fitness-for-duty certifications, we oppose amending the regulation to require any additional information, such as second and third opinions. 73 Fed. Reg. at 7920-7921. As the Department notes, it did not seek comments on this issue in the RFI. *Id.* at 7921. Nonetheless, it now solicits comments in response to a few statements by employers. The Department rejected this suggestion when drafting the current rule. It noted that the statute provides for second and third opinions on certification and recertification of a serious health condition, but not with respect to fitness-for-duty. Thus, the Department concluded that it was "unable to incorporate this suggestion in the Final Rule." 60 Fed. Reg. at 2226. *Compare* 29 U.S.C. § 2613(c)-(d), *with* 29 U.S.C. § 2613(e). The same statutory barrier still applies. The FMLA does not permit second and third opinions for fitness-for-duty. *See Albert v. Runyon*, 6 F.Supp. 2d 57, 63 (D. Mass. 1998).[28]

Section 825.310(g)

Current Section 825.310(g) prohibits fitness-for-duty certifications when employees return from intermittent leave. In response to employer requests, the Department now proposes to give employers the right to request such a certification when an employee returns from intermittent leave "up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave." 73 Fed. Reg. at 7985.

We oppose this change and reiterate the concerns we stated in our response to the RFI. As we noted, such a requirement imposes enormous and unnecessary burdens on employees in the absence of any evidence of a problem under the current prohibition. *See* 73 Fed. Reg. at 7922. In addition, there is nothing in the record that indicates that employers have encountered safety or other issues in the fifteen years that the regulations have prohibited fitness-for-duty certifications for intermittent leave. And, absent a clear definition of "reasonable safety concerns," this limitation on seeking a fitness-for-duty

[28] One commenter has suggested that the regulations permit "a return to work physical conducted by the employer's physician." 73 Fed. Reg. at 7921. The Department stated in the Preamble to the final rule that such an examination is "not prohibit[ed] . . . provided such examination is job related and consistent with business necessity in accordance with ADA guidelines," but cannot take place before the employee is restored to her job. According to the Department, such an examination could "take place the first day of the employee's return to work." 60 Fed. Reg. at 2226.

certification will become meaningless. Employers will be able to make up their own, shifting definitions of this term and applying it in arbitrary and inconsistent ways. Once again, the Department has responded to employer concerns that are anecdotal at best by rewarding them with enhanced attendance control measures.

Second, requiring a fitness-for-duty certification every 30 days is both unnecessary and unworkable. Where the employee's health condition has not changed, there can be no purpose served by requiring repeated certifications at such short intervals, other than imposing a burden on employees to discourage them from taking leave when they need it. In fact, the Department noted in the NPRM that at least one employer representative has suggested that certifications "'could be regulated to prevent abuse by the employer by limiting such statements to certain time frames, such as once a quarter.'" 73 Fed. Reg. at 7921.

The 30-day requirement is unworkable because employees generally take intermittent leave in periods that last for no more than a few days (and may even last for less than a full day). It is highly unlikely that an employee will be able to obtain a fitness-for-duty certification from the health care provider without giving more advance notice. And, in the case of chronic conditions, where the duration of the leave may be uncertain, the employee may not be able to request the certification until he or she knows that the condition (such as a migraine or asthma attack) has subsided. Under the proposed regulations, however, providing the certification is a "condition of restoring an employee" to work. *See* 73 Fed. Reg. at 7985 (proposed Section 825.310(a)). Thus, failure to obtain a certification as soon as the employee is able to return will only prolong the employee's unpaid absence. This hardship will have the inevitable result of discouraging employees from taking FMLA leave when they need it.

The Department recognizes "the potential burdens on employees who may need to provide both a recertification and a fitness-for-duty certificate within a short period of time." 73 Fed. Reg. at 7922. The employee may have to provide an annual certification as well. As comments to the RFI made clear, health care providers are increasingly charging their patients for completing a variety of forms, including FMLA certificates. The 30-day fitness-for-duty requirement will impose one more cost on employees who have already lost work time, and now have three different types of certifications they must submit in order to maintain their eligibility for FMLA leave *and* for return to work.

Conclusion

Moving forward with these proposals will provide employers with the means to curtail their employees' use of FMLA leave without the slightest evidence justifying such increased control. We urge the Department not to upset the careful balance struck in the statute and current regulations between the rights of employees to take FMLA leave and the needs of employers to run their business.