



On January 16, 2008, the Bush Administration's changes to current Family and Medical Leave Act (FMLA) regulations will go into effect. These changes were not prompted by data or other evidence showing a need for them; in fact, there was overwhelming evidence supporting the current FMLA regulations. Instead, the Bush Administration responded to complaints by a self-selected group of employers, some of whom have consistently opposed the existence of the law itself.

The changes to the regulations will make it more difficult for workers to use FMLA leave and make it easier for employers to deny leave or force workers to use their leave unnecessarily. The regulations also will diminish workers' medical privacy. These regulatory changes must be reversed immediately. We ask that the new Administration make an early public statement indicating that it has grave concerns about many of these changes and will be reviewing them with an eye toward taking appropriate measures. Furthermore, we urge the Department of Labor to move quickly to publish a new rule for notice and comment.

The Bush Administration FMLA rule also contains regulations that implement the 2008 expansion of the FMLA for military families to care for a wounded servicemember or to address qualifying exigencies arising out of deployment of a family member. For the most part, the regulations for military families are well-thought out and useful; thus, these regulations should remain intact.

It is well-established that the FMLA and its current regulations are working very well for nearly all employers and employees. As the Department of Labor itself stated last year:

The Department is pleased to observe that, in the vast majority of cases, the FMLA is working as intended. For example, the FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to care for family members with serious health conditions. The FMLA also appears to work well when employees require block or foreseeable intermittent leave because of their own truly serious health condition. Absent the protections of the FMLA, many of these workers might not otherwise be permitted to be absent from their jobs when they need to be.
U.S. Dep't of Labor, *The Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information 2007 Update* (June 2007) ("DOL 2007 Report") 72 Fed. Reg. 35550, 35552.

It is noteworthy that the Bush Administration DOL *never established that any changes to the current regulations in the rule were needed.*¹ DOL has one empirical study on the FMLA, a

¹ The only exceptions are the changes to address the Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.* 535 U.S. 81 (2002). Given the Supreme Court's decision, we do not object to the portions of the rule that implement *Ragsdale*.

comprehensive survey done in 2000. According to that survey, almost two-thirds of covered employers found that complying with the FMLA was very or somewhat easy. David Cantor et. al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update* 6-8 (2000) (“DOL 2000 Report”). The same survey showed that the FMLA had either a positive or no effect on business productivity, profitability, or growth, and had either a positive or neutral effect on employee productivity, turnover, career advancement, or morale. *Id.* at 6-11. And according to the 2000 Report, 81.2% of employers found that intermittent leave (the type of leave DOL claims gives employers the most trouble) had a positive or neutral effect on productivity, and 93.7% found that it had a positive or neutral effect on profitability. *Id.* at 6-12.

Unable to make an empirical case for changing the FMLA, the Bush Administration DOL collected anecdotal evidence regarding the effect of the FMLA through its 2006 Request for Information (RIF) procedure. Here again, the results were overwhelmingly positive to the FMLA. According to DOL, the RIF responses showed the following:

(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.

Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35550, 35551 (June 28, 2007) (emphasis added).

Again, despite any concrete evidence of problems with the FMLA, and despite overwhelming evidence in support of the current regulations, the Bush Administration moved forward with a number of significant, and problematic, changes.

Some examples of the most problematic regulations that we would like to see reversed or changed include:

- **Requiring workers to take more FMLA leave than necessary**

Under the new regulations, certain workers using intermittent leave will be forced to use more FMLA leave than they need. For example, workers who are unable to rejoin their shift, such as workers on trains or planes that have left when the workers return from FMLA leave, or workers in a clean room that has been shut, will have to use FMLA leave for the entire shift. Similarly, if a worker wants to use paid leave while on FMLA leave, and the employer requires that paid leave be used in 8 hour blocks, the worker will have to use 8 hours of FMLA leave, even if she only needs two. Both of these changes will mean that workers will run out of FMLA leave more rapidly than necessary. Furthermore, by forcing workers to take extra FMLA leave unnecessarily, these changes may violate the statute itself.

- Restrictions on use of paid leave while on FMLA leave**

Under the current FMLA, employees can use their paid vacation and personal time while on leave, so that the unpaid leave becomes paid leave. Under the new regulations, employees will not be able to use paid vacation and personal time while on FMLA leave unless they meet the employer's requirements regarding the use of paid leave. Many employers require advance notice for vacation, have rules based on seniority, prohibit the use of vacation during certain times of year, or have rules that require vacation time be used in 4 hour or 8 hour blocks. Employees whose vacation or personal time is governed by such rules may therefore be precluded from using their paid leave while on FMLA leave unless they meet the employer's requirements. Inability to substitute paid leave while on unpaid FMLA leave will cause financial hardship for many workers. And again, this change does not seem to comport with the statute, which places no limit on a worker's ability to use paid vacation or personal leave while on FMLA leave.
- Increasing employers' control over eligibility determinations**

The new regulations give employers the opportunity to use their own rules and judgment to disqualify employees from FMLA eligibility. For example, the new regulations require workers requesting unforeseeable leave to follow the employer's rules as to when that request must be made. Under this regulation, workers who meet all the statutory requirements for eligibility for leave may find their leave denied simply because they fail to meet an employer-made rule that was not contemplated by the statute. For example, an employer with a requirement that employees must call in one hour before the shift starts could deny leave to a worker who meets every statutory requirement in the FMLA but does not meet the employer's call-in standard. Furthermore, the new medical form allows the employer, rather than a health care provider, to determine if the definition of serious health condition has been met because the form no longer provides the health care provider with the opportunity to indicate which definition of serious health condition is applicable. Rather, the form now asks for certain information and lets the employer conclude whether the illness rises to the level of a serious health condition.
- Invading workers' medical privacy**

The new regulations allow employers to directly contact the employee's or the employee's family members' health care provider to obtain clarification on matters in the medical certification. Furthermore, the new medical form suggests that information such as symptoms and a diagnosis may be included in the health care provider's response. Both of these changes will increase the employer's ability to learn unnecessary information regarding a worker's health condition and diminish employee's medical privacy.
- Increasing medical certifications and visits**

The new regulations increase the number of times an employer can require medical recertification, allow an employer to require "fitness for duty" certifications from those who use intermittent leave, and place time requirements on when certain medical visits must occur in order to qualify a serious health condition. All of these changes will increase the cost of FMLA leave for employees and the burden on health care providers.

Given the current economic climate, workers need the protections afforded by the FMLA more than ever. The FMLA is essential to job security, and in a time of rising unemployment, we should be working to expand its reach rather than allowing it to be contracted through these regulations. We urge you to make reversing these regulations a high priority of the new administration.

