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Submitted via www.regulations.gov

Ms. Mary Ziegler
Director of the Division of Regulations
Legislation and Interpretation
Wage and Hour Division
United States Department of Labor
Room S-3510
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comments in Response to the Department of Labor Notice of Proposed Rulemaking Regarding the Family and Medical Leave Act, RIN 1215-AB76, RIN 1235–AA03, 77 Fed. Reg. 8960 (February 15, 2012)

Dear Ms. Ziegler:

The Society for Human Resource Management submits these comments to the U.S. Department of Labor ("the Department" or "DOL") in response to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on February 15, 2012. *See* 77 Fed. Reg. 8960 (Feb. 15, 2012).

The Society for Human Resource Management ("the Society" or "SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM's membership consists of dedicated and knowledgeable HR professionals who are responsible for developing and administering human resource and benefit policies, including FMLA leave. On a daily basis, HR professionals must determine whether an employee is entitled to FMLA pursuant to the Act and its implementing regulations. Also, HR professionals must track an employee's FMLA leave and

determine how to maintain a satisfied and productive workforce during an employees' FMLA leave-related absences. The Society has supported the goals of the FMLA from its initial stages of development and wants to ensure that employees continue to receive the benefits and job security afforded by the Act. SHRM and its members played an active role in the 2008 revisions to the FMLA. SHRM is particularly concerned about proposed changes to the 2008 rules that are not required by statutory changes in the Airline Flight Crew Technical Corrections Act or the National Defense Authorization Act for Fiscal Year 2010.

SHRM believes the Department's proposed changes to tracking intermittent leave are misguided and should be withdrawn. Proposed changes to the "physical impossibility" clause are likewise ill-conceived and likely to cause confusion for both employers and employees. With regard to the military leave provisions, SHRM urges the Department to make minimal changes in light of the relatively short period of time these rules have been in existence. Where the Department shows changes are justified, SHRM stresses the need for simplicity and clarity in the rules.

This submission is divided into sections to address various regulations that the Department has proposed to change, amend, modify, and/or delete.

Section 825.126 - Leave because of a qualifying exigency.

DOL's proposal restructures the current section 825.126 and makes other changes. Reversing the current section, the proposal specifically first describes an employee's entitlement to qualifying exigency leave and then enumerates the specific circumstances pursuant to which an employee may take qualifying exigency leave.

In addition to reorganizing this section, DOL incorporates in its proposed section 825.126(a) the new statutory language in National Defense Authorization Act for Fiscal Year 2010 (NDAA) of "covered active duty" and its definition. The NDAA amended the FMLA to grant an eligible employee FMLA leave for a qualifying exigency arising from the fact that an employee's spouse, or a son, daughter, or parent is "on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces." 29 U.S.C. § 2612(a)(1)(E).

In the NDAA, Congress defined the term "covered active duty" for both a member of a regular component and a member of a reserve component of the Armed Forces and included a foreign deployment requirement in the definition. Thus, proposed section 825.126(a)(1) defines "covered active duty or call to covered active duty status" as "duty under a call or order to active duty (or notification of an impending call or order to covered active duty)" by a regular member of the Armed Forces during deployment to a foreign country. 77 Fed. Reg. 9010. Proposed subsection 825.126(a)(2) further defines the term for a member of a Reserve component as duty pursuant to "a call or order to active duty (or notification of an impending call or order to active duty) during the

deployment of the member…to a foreign country under a Federal call or order to active duty in support of a contingency operation..." Id. SHRM agrees with the Department that inclusion of language that the call or order to active duty should be in support of a "contingency operation" in the proposal will help clarify the entitlement of exigency leave for eligible family members even though NDAA did not include the term.

DOL's proposal also enumerates the existing eight (8) categories for which an eligible employee may take qualifying exigency leave in its proposed section 825.126(b). While DOL expressly noted that the eight (8) categories of exigency leave remained, it also requested comments on whether additional qualifying exigencies should be included, especially since the NDAA extended such leave entitlements to the qualifying family members of the regular Armed Forces. When DOL promulgated the current regulations on November 17, 2008, which became final on January 16, 2009, 73 Fed. Reg. 67934, it articulated this comprehensive list of eight (8) examples of qualifying exigencies for which leave could be taken. In doing so, DOL: (1) reasonably identified appropriate reasons directly related to a call to military service; (2) fairly articulated non-medical situations that Congress had intended exigency leave cover; and (3) adequately addressed the urgency or critical nature of these exigency leave entitlements. As this DOL further notes in its preamble, these exigencies include pre-deployment as well as post-deployment activities and are equitable in scope yet definite in their terms. SHRM is unaware of any potential unmet needs and, therefore, takes the position that the current formulation is sufficient.

Of these existing categories, the Department has requested comments on the question of whether the seven (7) calendar day period for which an eligible employee may take leave for short-term deployment in proposed section 825.126(b)(1) is appropriate. This exigency leave entitlement is intended to permit an employee "[t]o address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty." 29 C.F.R. §825.126(a)(1)(i). As noted above, SHRM is of the opinion that the seven (7) calendar days or less allotment of leave for the qualifying exigency of short-notice deployment is appropriate and should remain fixed at seven (7) calendar days. Since DOL has not indicated any basis why the current 7-day standard is inadequate, SHRM urges DOL not to change the current 7-day leave increment in proposed section 825.126(b)(1).

In addition, proposed section 825.126(b)(6) increases the leave increment for the qualifying exigency of rest and recuperation leave. SHRM commends DOL for aligning this type of exigency leave with the "Rest and Recuperation" leave programs (e.g., USCENTCOM R&R Leave) of the Defense Department. 77 Fed. Reg. 8966. In order to do so, DOL proposes to extend the maximum duration from up to five (5) days to up to 15 days. The Department requests comments on this proposed expansion and on whether 15 days is adequate in all cases.

In its 2008 final rule, DOL recognized that opportunities would be limited for military members to spend time with their families while on active duty and included a rest and recuperation leave to strengthen family relationships within military families. Since military members on active duty temporarily are afforded short-term leave, DOL reasoned that up to 5 days of leave was sufficient. While SHRM understands the rationale for the expansion of the leave increment based upon the DOD Rest and Recuperation leave program, it suggests that 15 days is more than sufficient and that the leave be limited to only the actual rest and recuperation time at home or some other destination where the military member will take the rest and recuperation leave. Thus, SHRM suggests that the proposed language of section 825.216(b)(6) be revised to clarify DOL's intent as follows:

"(ii) Eligible employees may take leave up to a maximum of fifteen (15) days that is coterminous with the Rest and Recuperation leave provided to the military member for each instance of Rest and Recuperation leave."

Lastly, the Department adds language in proposed section 825.126(b)(7) on exigency of post-deployment activities clarifying that such exigency leave would apply to a qualifying employee's attendance at a military member's funeral service. SHRM endorses this clarification. According to SHRM survey data, over 90% of all employers currently provide some form of paid bereavement leave. The use of exigency leave for qualifying employees to attend military member's funeral services ensures coverage for those who require leave for this purpose.

Section 825.127 – Leave to care for a covered servicemember with a serious injury or illness.

In proposed section 825.127, DOL revises the current regulation to account for the substantive changes in the military caregiver leave entitlement contained in the NDAA by defining what qualifies as a serious illness or injury for both current service members and recent veterans. In defining a serious injury or illness of a veteran in section 825.127(c)(2), DOL proposes a two-tiered definition that includes three (3) options for meeting the second test of the definition. In particular, a serious injury or illness in the case of a veteran can be satisfied if either it was incurred in the line of duty on active duty in the Armed Forces, or it existed prior to active duty but was aggravated in the line of duty on active duty, and it manifested itself before or after becoming a veteran and then meets one (1) criteria out of three (3) possible options. These include: (1) the continuation of an injury or illness that was incurred when the veteran was a servicemember and the injury or illness rendered them unable to perform the duties of their grade, office, rank or rating; (2) a mental or physical condition for which the U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) is 50% or more; or (3) a mental or physical condition which "substantially impairs" a veteran's "ability to secure or follow a substantially gainful occupation by reason of a service-connected disability or disabilities, or would do so absent treatment." 77 Fed. Reg. 9012.

In the preamble, the Department requested comments on several aspects of its proposed section 825.127, including its formulation of a serious injury or illness for a veteran. While SHRM fully supports the FMLA leave entitlements for members of the Armed Forces, including the National Guard and Reserves and veterans, the language proposed section 825.127(c)(2) is a vague and ambiguous test for determining whether a veteran has a qualifying illness or injury. The Department's proposal simply provides little, if any, objective guidance for employees or employers.

In connection with this formulation, DOL requested comments on whether a fourth articulation based upon the VA's Program of Comprehensive Assistance for Family Caregivers (VAPCAFC) should also be included. While the VASRD and VAPCAFC is outside the expertise of SHRM, we recommend that DOL revisit this proposed definition in light of the statutory mandate, and provide as much clarity, guidance, simplicity and specificity as it can so that employees can properly utilize this expanded military caregiver leave and employers can honor such requests as required by the FMLA.

Finally, SHRM concurs with DOL's position that employee entitlement to military caregiver leave to care for a veteran is not legally effective until the Department concludes its rulemaking obligations required in NDAA and defines a qualifying serious injury or illness for a veteran. 77 Fed. Reg. 8962. Not only is this a correct legal interpretation, but it also is a fair and equitable application of the law and Congressional intent.

Section 825.205 – Increments of FMLA leave for intermittent or reduced schedule leave.

The Department proposes multiple changes to section 825.205 that address the increment of FMLA leave when taken on an intermittent or reduced schedule basis. Some of these proposed changes are intended to implement the provisions of the Airline Flight Crew Technical Corrections Act (AFCTCA) while others propose to change the current leave provisions of section 825.205.

The purpose of section 825.205 is to define how increments of intermittent or reduced schedule leave are counted or are measured to comply with the statute so that an employee's entitlement is not reduced by more leave than is actually taken. Employers have long struggled with the impact of unscheduled intermittent leave on the workplace.

The Department received thousands of comments to its Request for Information (RFI) asking to hear from stakeholders on their experiences with the FMLA. As noted in DOL's report on the public comments to the RFI, employers overwhelmingly identified unscheduled intermittent leave as a key challenge of FMLA implementation. Fed. Reg. Vol. 72, No. 124 (June 28, 2007). In its comments to the 2008 NPRM, SHRM strongly

urged DOL to increase the minimum increment of intermittent or reduced schedule leave that is unforeseeable or unscheduled or for which an employee provides no advance notice. Recognizing that allowing employees to use FMLA in small increments undermined employer tardiness policies, SHRM provided the Department with a number of suggested approaches to increasing the minimum increment.

In the proposed rule, DOL re-inserts language into proposed paragraph (a)(1) to the effect that an employee cannot be required to take more leave than is necessary to address the circumstances precipitating the need for FMLA leave. Comparable language was in section 825.203(d) of the 1995 regulations and relocated to section 825.204(e) of the 2008 regulations. Given that DOL is not proposing to revise current section 825.204(e), SHRM believes that this proposed addition is redundant, and in conflict with this subsection which addresses measuring increments of intermittent or reduced schedule leave. Inclusion of this language could be viewed as an attempt to emasculate the current regulation and it will create confusion and misunderstanding for employees and employers. SHRM recommends DOL drop this addition in the final rule because current section 825.204(e) adequately addresses this point.

The 2008 final rule wisely eliminated the former regulatory requirement that employers had to account for FMLA leave in the minimum increment their payroll system was capable of tracking FMLA, in many instances as little as six (6) minute increments. Instead the 2008 regulation, in force today, adopted a clear standard that requires an employer to account for intermittent or reduced schedule leave by "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour…" 29 CFR 825.205(a)(1).

DOL now proposes to eliminate the language in current section 825.205(a)(2) authorizing employers to vary the increment of intermittent or reduced schedule leave for different times of the day or shift. While the Department refers to its enforcement experience and confusion over this provision, SHRM's experience is that due to the short period of time that employers have had this option available to them, they are still evaluating its applicability in individual workplaces. As noted before, the impact of the use of unscheduled intermittent leave on the workplace is well-documented. *See* SHRM 2008 NPRM and 2006 RFI comments. At the same time, SHRM acknowledges the need of employees with chronic health conditions to use FMLA leave on an intermittent or reduced schedule basis, including on an unscheduled basis. The provision in the current rule which the Department proposes to eliminate affords employers a small measure of flexibility in trying to manage their workforces by implementing policies which allow for 1-hour increment use of FMLA in order to improve predictability in staffing, address potential misuse of intermittent FMLA leave and employer attendance policies, and ease the administrative burden of accounting for small increments of leave time.

Rather than eliminate the current language, SHRM urges DOL to retain the current language of section 825.205(a) and clarify any perceived confusion about the increment which the Department has encountered. DOL should clarify this provision by incorporating the relevant example illustrating this provision from the 2008 preamble as it has done in making other proposed changes to this section. *See* 77 Fed. Reg. 8974. Specifically, DOL wrote its 2008 NPRM that "while employers may choose to use a smaller increment to account for FMLA leave than they use to account for other forms of leave, they may not use a larger increment for FMLA leave. Thus, if an employer uses different increments to account for different types of leave (e.g., accounting for sick leave in 30-minute increments and vacation leave in one-hour increments), the employer could not account for FMLA leave in an increment larger than the smallest increment used to account for any other type of leave (i.e., 30 minutes). Additionally, under no circumstances can an employer account for FMLA leave in increments of greater than one hour, even if such increments are used to account for non-FMLA leave." 73 Fed. Reg. 67976. In short, SHRM urges the Department to clarify rather than eliminate one of the few regulations that provides employers with some limited flexibility to manage its workforce when unscheduled intermittent leave is utilized.

DOL also raises serious, yet unwarranted, reservations about the physical impossibility provision contained in current section 825.205(a)(2). The provision currently states:

"Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed 'clean room' during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. 825.205(a)(2)."

As the Department notes, this provision was added in the 2008 final rule after the Department evaluated comments both pro and con, which it had requested. As the Department noted in 2008, one major motivating consideration for including this provision in the current regulations was to protect employees against the risk of disciplinary action in situations where a unique worksite or work environment resulted in an employee's absence from work that exceeded the employee's need for a short FMLA-protected absence. In its notice of proposed rulemaking, this Department expressed concern "that this provision may be being applied more broadly than intended" and has proposed additional language for this section. 77 Fed. Reg. 8975. Notwithstanding the Department's unwarranted and unsubstantiated concern and its flawed attempt to allay its concern by recommending additional language for this section, the Department then stated that it "is considering deleting the physical impossibility provision in its entirety." *Id.* SHRM urges the Department both to retain the existing version of this regulation and not to include the additional language it proposed for section 825.205(a)(2).

Just like the provision in section 825.205(a)(1) allowing employers to use varying increments of leave at certain times of the day or shift, the physical impossibility provision has not been in existence long enough to develop a meaningful track record having been first included in the FMLA regulations effective January 16, 2009. Owing to its brief existence, SHRM is unaware of any misuse of this provision and certainly would not support any interpretation of the FMLA regulations to reduce an employee's FMLA entitlement. In fact, it seems ironic that DOL now is contemplating the elimination of a provision which is designed to protect employees when taking leave from work for FMLA qualifying reasons. SHRM contends that this physical impossibility provision is indeed limited and would apply in narrow circumstances, just as the Department envisioned in 2009.

DOL, alternatively, proposed two (2) additional changes to this section - one is to add language that no equivalent position be available to an employee involved in a physical impossibility scenario and the other is to place limitations on what constitutes a period of physical impossibility. SHRM contends that requiring there be no equivalent position available for an employee, is both unnecessary and likely to cause confusion for employees and employers. DOL's proposed language creates the impression that an employer could transfer an employee, involved in a physical impossibility scenario, to an equivalent position. Section 825.204 addresses the limitations on circumstances in which an employer may place an employee in an alternative position. In addition, the 2008 regulations concluded that the FMLA does not allow an employer to transfer an employee to an alternative position with equivalent pay and benefits when an employee uses unscheduled or unforeseen intermittent leave. While SHRM does not believe that this DOL is even remotely suggesting otherwise, the inclusion of its proposed language could have unintended consequences with negative ramifications for employers and employees.

The second proposed addition to section 825.205(a)(2) of DOL similarly suffers the same risk and adds little if any clarification. The current regulation is clear that the period of time an employee is absent due to FMLA leave - the increment of intermittent or reduced leave – plus the period of time "the employee is forced to be absent" from their job because it is physically impossible for the employee to return to their job constitutes the amount of time that may be designated as FMLA in this very limited context. For these reasons, SHRM believes the current language of 825.205(a) should not change.

Eliminating Notice and Comment for FMLA Forms

As part of its NPRM, DOL proposes to delete the Appendices to 29 C.F.R. Part 825 which contain the various certification and notice forms. Removal of these forms from the regulations would eliminate any requirement to submit revised forms to a notice and comment procedure. DOL intends to continue to make these optional forms, as well as the poster, available to the public through local offices, the national office and the

website of the Wage and Hour Division. In connection with its proposal to remove these forms from Part 825, DOL proposes to eliminate references to the appendices in the following sections of Subpart C entitled "Employee and Employer Rights and Obligations Under the Act":

§ 825.300 - Employee notice requirements. Appendices C, D and E.

§ 825.306 - Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member. Appendix B.

§ 825.309 - Certification for leave taken because of qualifying exigency. Appendix G.

§ 825.310 – Certification for leave taken to care for a covered servicemember (military caregiver). Appendix H.

§ 825.800 – Definitions. Appendices.

SHRM does not support DOL's proposal to eliminate the FMLA forms from the current FMLA regulations. These forms have been refined and improved by usage and experience over time and the notice and comment process has contributed greatly to these improvements. It would be a mistake now to remove these forms from the regulatory notice and comment process. SHRM believes that the information conveyed in these forms and the discussions that they encourage are responsible for effective administration of the FMLA and benefits both employees and employers. It would be contrary to this Administration's commitment to transparency and open government to remove these forms from the regulations, notwithstanding its claim that the Paperwork Reduction Act's limited review process would facilitate these goals.

Section 825.309 – Certification requirements for leave taken because of a qualifying exigency.

DOL has proposed minor changes to current section 825.309, many of which are necessary to comport the regulation with the changes to the FMLA enacted in the NDAA. In addition, the Department solicited comments on whether there is sufficient information in active duty orders of members of the Regular and Reserve components of the Armed Forces to determine whether the call to covered active duty involves deployment to a foreign country. DOL also requested information on whether employees have had difficulty in obtaining copies of active duty orders or other military documentation evidencing their family member's covered service. While SHRM members are involved in this certification process for qualifying exigencies, it cannot say that employees have encountered unusual difficulties in securing copies of active duty orders or other military documents to justify changes to section 825.309(a) other than those proposed to account for the changes required by the NDAA.

DOL's proposed regulation adds another type of information that an employer may require an employee to certify in order to support leave for a qualifying exigency. Specifically, where an employee seeks qualifying exigency Rest and Recuperation leave per section 825.126(b)(6), DOL proposes to enable an employer to request a copy of the Rest and Recuperation order or other military documentation which indicates that the military has been granted Rest and Recuperation leave and provides the dates for such leave. SHRM endorses this addition to the regulation so that the duration of the employee's qualifying exigency leave can mirror, but not exceed, that enjoyed by the military member. *See* discussion of section 825.126 herein.

Finally, DOL has requested comments on the impact of the provision in the current section 825.309(d) that allows an employer to verify the existence of a meeting or appointment and the nature of such meeting where an employee qualifying exigency leave involves meeting with a third party. In particular, the Department has asked whether this provision has raised any privacy concerns or resulted in the denial of qualifying exigency leave because an employer was unable to verify such a leave request. It further asked whether employers have had difficulties in verifying such requests, why and whether it resulted in the denial of such a qualifying exigency leave. As mentioned in other sections addressing the military provisons, given that this process has only been effective for just over two years, SHRM cannot point to any trends or other information which would justify any change to this subsection.

Other

In its proposed section 825.122, DOL adds a definition of a "covered servicemember" as a new subsection (a) to address the definition of this term in the NDAA which included certain veterans whose eligible family members would be allowed to take military caregiver leave. While the Department's proposal closely mirrors the language of the NDAA in defining a veteran who would qualify as a "covered servicemember", it omits the requirement that a covered servicemember who is a veteran also "was a member of the Armed Forces (including a member of the National Guard or Reserves)…" 29 U.S.C. § 2611(15)(B). SHRM recommends that DOL revise its proposed section 825.122(a) to include this omission. Additionally, this definition of a "covered veteran" is also found in proposed section 825.127(b)(2) and SHRM recommends that it too be revised accordingly.

DOL proposes to modify section 825.500 to address recordkeeping changes resulting from the passage of the Genetic Information Non-Discrimination Act (GINA) and AFCTCA. Also, DOL proposes to designate the definitions section as section 825.102 instead of its current section number of 825.800 and move it to the beginning of Part 825. In the proposed section 825.102, there are new items in the definitions section to define terms used in connection with regulatory proposed changes resulting from passage of NDAA and AFCTCA, although there are few additional definitions and/or

revisions to other existing terms. SHRM applauds the Department for including these changes and concurs with these proposals.

Conclusion

SHRM appreciates the opportunity to comment on these proposed rule changes. Should the Department decide to conduct any stakeholder meetings upon review of this comment and those of others, SHRM would welcome the opportunity to participate.

Sincerely,

Michael P. Aitken
Vice President, Government Affairs

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