Your Neighborhood Supermarkets

February 16, 2007

Mr. Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
US Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210
whdcomments@dol.gov

Re: Request for Information on the Family and Medical Leave Act of 1993; RIN 1215-AB35

Dear Mr. Brennan,

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the Department of Labor's (DoL's) request for information to assist the Department in its review of the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). 71 Fed. Reg. 69504 (Dec. 1, 2006). The current regulations, particularly as interpreted by the judicial branch, present a confusing maze for employers and employees alike. We commend the Department for beginning the much needed process of regulatory reform and respectfully request that the comments below be considered fully as you proceed in your efforts.

FMI conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 50 countries.

Headquarters:
2345 Crystal Drive, Suite 800 T 202-452-8444 www.fmi.org
Arlington, VA 22202-4801 F 202-429-4519 fmi@fmi.org

I. **Summary**

The member companies of the Food Marketing Institute collectively employ more than 3.4 million employees. Our members understand the challenges employees face balancing the competing needs of work and family. However, we are concerned that the implementation of the FMLA has gone far beyond its original intended purpose. Moreover, given the confusing maze of regulations, some of which have been set aside in whole or in part by court decisions in some jurisdictions, employers are struggling with the application of this law on a daily basis. Clearly, the time is ripe for regulatory reform and we commend the Department for moving forward in this area.

As discussed more fully below, poorly defined standards for "serious health condition" and intermittent leave are the areas that present the greatest concern. The lax and some times conflicting standards in these areas make them ripe for employee abuse and place employers in the untenable position of having to guess at DoL interpretations or providing leave well beyond the statutory mandate. We urge the Department to conduct rulemaking to address these problems immediately.

II. **Issues To Be Addressed**

A. Serious Health Condition

The "serious health condition" standard, which DoL has attempted to explain in Section 825.114 and subsequent opinion letters, is one of the most significant sources of concern and difficulty for employers in the food retail and distribution industries. Given the Department's admitted struggles with the definition and the multiple conflicting interpretations in the Department's pronouncements as well as the courts', employers are placed in the untenable position of having to guess how the Department or a court would view a particular leave situation or else to designate all absences for a medical condition to be FMLA-protected. 71 Fed. Reg. 69506. Neither of these is acceptable and DoL has an obligation to develop clear standards for the benefit of both employers and employees.

Members advise that the standard is so broad and confusing at this point that they are being asked to provide FMLA-protected leave for all manner of minor or vague ailments. Indeed, one large member advises that "back problems" are the "serious health condition" most commonly reported by employees. Vaguely defined medical conditions and "chronic" health conditions generally provide the greatest concern because they are the most difficult to manage in a way that is fair to all employees and consistent with all of the mandates placed on employers. As one member wrote:

Somehow we need a method by which an employee's condition can be reviewed against a stricter definition of a serious health condition and yet protect our employee's right to privacy. Today, nearly every condition somehow makes its way to the definition of a serious health condition.

DoL should establish clear and strict standards for "serious health conditions" and provide clear guidance to the medical community.

B. Unforeseen, Intermittent Leave

Unforeseen, intermittent leave is also a significant cause of concern and difficulty for our members. Coupled with the loose standard of "serious health condition" discussed above, our members have observed significant problems created in the work force because of intermittent leave, as well as serious employee abuse. Accommodating intermittent leave can be burdensome for employers because of the significant administrative costs that can be incurred for systems and processes just to manage employee leave. The resulting fallout is increasing frustration for those frontline employees whose schedules are constantly being reshuffled and who are forced to work short-handed.

For our members' union-represented employees, a single intermittent leave occurrence can start a series of scheduling and assignment changes that, in some cases, can put them in conflict with the seniority provisions of their collective bargaining agreements. In a union environment where overtime is dictated by seniority, employers can be forced to compromise their collective bargaining agreements in order to honor their FMLA obligations.

For some employees, the ability to use intermittent leave on-demand and without meaningful challenge has become a tool to schedule their own work weeks. In one situation, an employee requested leave for every Sunday for four months. The human resources supervisor challenged the need for this pattern of intermittent leave and requested a recertification stating the need for the employee to take leave on Sundays; the recertification supported the employee's request. As it was a recertification, the employer was prohibited from obtaining a second opinion.

Employees have been observed to use intermittent leave to convert full-time positions into part-time ones with full-time benefits or to ensure that they never work more than 40 hours per week or more than 4 days per week. With the current loose recertification process, employees can utilize intermittent FMLA leave for years without surpassing their allotment. One member reported that intermittent leave averages were as high as 120 hours per year for every person at a particular job site.

Members have observed employees taking unscheduled time off on Fridays, before or after holidays, or during events such as the Superbowl, World Series, or opening of hunting or fishing seasons and asking employers to consider such time intermittent FMLA leave. In that case, the employer's only recourse is to obtain a second opinion on the condition, which may be time-consuming, expensive, and, ultimately, inconclusive.

Intermittent leave can also be used as a tactic to avoid discipline related to employer attendance problems. For example, employees in the advanced steps of a disciplinary process

based on attendance, may claim that episodic events caused the employee to be late each and every time the employee is tardy.

Thus, the combination of the lax standard currently in place for "serious health condition" and the virtually unmanageable standard in place for intermittent leave place some of the greatest hardships on employers in the food distribution and retail industries.

C. Leave Increments

Under the current regulations, employees are permitted to take FMLA leave in the smallest increments used by the employer's payroll system. This presents unnecessary challenges on two fronts. First, as recognized by DoL, it allows employees to avoid compliance with accepted practices of timeliness in the workplace. Second, it creates an unmanageable standard for employers. FMLA leave should be chargeable in specific time period blocks, such as four hours, rather than the smallest increment allowed in the payroll system. Otherwise, tracking is virtually impossible.

D. Employee Eligibility Standards

The workforce employed by our members is diverse and applying the current employee eligibility standards poses particular problems for them. For example, the "brief interruption in service" standard is difficult to implement in a fair and equitable manner. Accordingly, we urge the Department to promulgate clear definitions.

For example, the Department could define a "brief interruption in service" as a period that lasts no more than 30 days. Similarly, DoL could amend its regulations to state that an employee who voluntarily quits his or her employment or who was discharged for misconduct has "severed all ties" with the employer.

With respect to eligibility determinations for employees who have begun a leave prior to satisfying the 12 month and 1250 hour requirements, the statute is clear. As DoL notes in the request for information, Section 825.110(a) restates the statutory requirement that an employee needs to work for an employer for 12 months, work for 1,250 hours in the 12 months prior to taking leave, and work for an employer with 50 or more employees within 75 miles of the worksite in order to be eligible for leave. The statute mandates that all three tests be met in order for the leave to qualify as protected under the FMLA. Accordingly, an employee cannot be considered to be on protected FMLA leave unless they have satisfied all of the requirements *before* leave commences. An employee who has taken leave before satisfying the statutory requirements should not be considered on protected leave until s/he returns to the workforce, and then, only if the employee's status does not change before the next eligible period of protected leave occurs.

E. Definition of a "Day"

Our members agree with DoL's current regulations that state that scheduled holidays should count against the employee's 12 weeks of FMLA leave when the employee is out for a full week. Particularly in the supermarket industry where stores are open to serve customers nearly 365 days per year, holidays are usually work days and, therefore, do not present any meaningful difference to employers (and fellow employees on whom the job coverage typically falls).

F. "Waiver of Rights"

Employees should have the right to settle their past FMLA claims, however, a clear statute of limitations should also be recognized. After a specific period of time, such as three years, FMLA claims should no longer be recognized.

G. Medical Certifications

Section 825.307 only permits employers to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider. This requirement presents costly and unnecessary regulatory burdens for employers. DoL should amend its regulations to allow employers to contact medical providers directly for specific job-related reasons, such as sending the employee's job description to the medical provider to ask the provider to establish whether the employee can perform the essential functions of the position.

Section 825.310(g) restricts an employer's ability to request a fitness for duty statement for a worker who is absent intermittently. Not only does this present a burden on the employer, it has the potential to create an unsafe workplace, particularly in areas like distribution centers in which heavy equipment is operated. Employers should be allowed to obtain fitness for duty statements for intermittently absent employees as often as is necessary to satisfy the employer's duties. The type of leave an employee takes should not preclude the employer's ability to maintain a safe working environment for all employees.

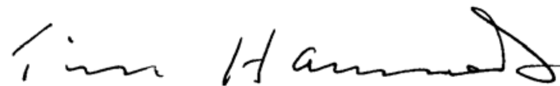
In addition, and as discussed more fully above with respect to intermittent leave, this restriction just increases the potential for intermittent leave to be abused by employees. Although a repeated medical certification may or may not resolve the situation, employers should not be restricted from choosing this option if the situation warrants it.

With respect to the efficacy of second opinions, one member also noted that, in many locations, medical professionals are part of a small medical community of peers. As a practical matter then, one medical professional may be reluctant to challenge a diagnosis given by or course of treatment recommended by another. In this member's experience, second opinions rarely result in a change to the employee's ability to work their regular schedule.

III. <u>Conclusion</u>

In conclusion, although our members generally support the goal of helping employees to balance work and legitimate family/medical needs, our members have become increasingly frustrated with the confusion caused by the regulations and the clear abuses perpetrated by some employees. The current FMLA regulations are in serious need of reform and we appreciate the Department's efforts in this regard. We urge you to consider our members concerns carefully and to respond to them fully as you proceed.

Sincerely,



Tim Hammonds
President and CEO