FOOD MARKETING INSTITUTE

April 11, 2008

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

Re: RIN 1215-AB35: The Family and Medical Leave Act of 1993; Proposed Rule

Dear Mr. Brennan,

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the Department of Labor's (DoL's) Notice of Proposed Rulemaking (NPRM) seeking comments on proposed amendments to the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). 73 Fed. Reg. 7876 (Feb. 11, 2008). The current regulations present a confusing maze for employers and employees alike and are in need of modification. We commend the Department for beginning the much needed process of reform; however, in several important respects the proposal falls short. We respectfully request that the modifications suggested below be incorporated in the final regulations adopted in this proceeding.

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.

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. At the same time our members face their own challenges in making sure that the shelves of our nation's grocery stores are adequately stocked with safe, quality food and grocery products and that store employees provide customers with the service that they need and expect.

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These staffing challenges should not be underestimated. For example, one member operating in just 5 states employs some 150,000 employees and reported that almost 15,000 leave/absence requests were submitted by employees for their own medical related absences in January 2008 alone. Given this magnitude of leave requests, it should be obvious that the regulatory scheme for FMLA leave should, to the maximum extent possible, provide for ease of implementation, impose obligations that are easy to monitor, and provide enough specificity to avoid confusion, and ultimately, litigation over the meaning of terms.

The current regulations fall short in this regard. Unfortunately, some of the changes proposed here will add to the already difficult and cumbersome communications and workflow process. In particular, we are concerned about the definition of "serious health condition," the notice requirements, the provisions concerning intermittent leave, and the interaction of these areas with each other. Our comments on these and other provisions of interest follow below and are organized by topic and section numbers set forth in the NPRM.

Section 825.110. Eligible Employee

The current rules require that an employee work for an employer for a period of 12 months before becoming eligible for FMLA leave, but the 12 months do not need to be consecutive and there is no limit to the time period for the break in service. The Department is proposing that if an employee's break in service is five years or less, the time worked may be counted toward the twelve month requirement for eligibility. Section 825.110(d). This is certainly an improvement over the current regulation, but a break in service of five years is still too long a time to count. A five year look back period will still be a significant burden for employers especially because FMLA and Fair Labor Standards Act regulations require that records be kept for only three years. We urge that the period be shortened to three years to conform with the law's recordkeeping requirements.

DoL is also proposing to modify section 825.110 (d) to make it clear that an employee who starts a leave period before having worked twelve months becomes eligible for FMLA leave upon reaching the twelve month date. Leave before that date is non-FMLA leave; leave after that date is FMLA leave. While we appreciate the clarification, we continue to believe that eligibility should not begin until the employee has actually *worked* for twelve months.

Section 825.113. Serious Health Condition

We were very disappointed that DoL has not addressed the definition of "serious health condition." The broad, vague and unhelpful definition of that term remains essentially unchanged in this section. As FMI and many other employer groups stated in their comments in response to DOL's request for information (RFI) last year on this subject (copy enclosed), the current standard is so broad and confusing as to be impossible to administer. In our view the term should be given a narrow construction, and clear guidance should be given to employers and employees as to conditions that are, and are not, covered. Unfortunately the proposed rule does not do that. In fact, it exacerbates the problem because of the new provisions in the sections discussed below concerning chronic conditions and continuing treatment.

Section 825.115. Continuing Treatment

Questions concerning the administration of FMLA leave for employees with chronic conditions are among the most problematic for employers. Proposed section 825.115 (c) defines a "chronic serious health condition" as, among other things, requiring two visits per year to a health care provider. We disagree with this proposal. It would seem reasonable to require at least four visits per year for a condition to be considered a serious chronic health condition. It would make more even more sense for the regulation to list covered chronic conditions.

In addition, proposed section 825.110 (a) (1) defines a "serious health condition" to include any condition for which the employee receives two or more treatments within a thirty day period (or longer if extenuating circumstances exist). This proposal places the employer in an untenable position. How will the employer know at the time of the initial absence if the employee will be going to a doctor twice within thirty days? How will the employer know if extenuating circumstance exist that would allow additional time? Since most (all?) providers are more than willing to see patients for a follow up visit, this could potentially turn every visit to a doctor into FMLA leave. This provision becomes even more burdensome when combined with the notice provisions discussed below. Multiply that paperwork burden for employers like those in our industry with thousands or hundreds of thousands of employees and the magnitude of the problem becomes obvious.

We do not believe this provision calling for two provider visits is needed at all. The other definitions in section 825.115 of serious conditions requiring continuing treatment include, among other things: an overnight stay at a medical care facility; a period of incapacity of more than three days and any subsequent treatment; treatment one time and continuing supervision by the provider; pregnancy or prenatal care; chronic conditions and long-term conditions; and conditions requiring multiple treatments. What conditions are there, not covered by the above, that would be captured by the two visits in thirty days provision?

In other words this proposal is unnecessary and potentially causes many more problems than it is worth. It makes much more sense to require that the provider visits be made during the

period of incapacity. Accommodation could be made for exceptional circumstances where the employee is unable to see a provider within the applicable period.

Sections 825.202-205. Intermittent Leave

DOL notes in the preamble to the proposed rule that, it "No issue received more substantive commentary to the RFI than employee use of unscheduled intermittent leave." 73 Fed. Reg. at 7893. As FMI said in our response to the RFI:

> 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….
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> 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.
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> 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.
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> 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.
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> 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.

We are disappointed that the proposed rule fails to increase the minimum increment of intermittent leave allowed. Under the current and proposed 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.

We do commend DOL for the language in proposed section 825.203 clarifying that employees who need intermittent leave for planned medical treatment must make a reasonable effort to schedule the leave so that the leave does not unduly disrupt the employer's business. In addition, we suggest that the language in section 825.204 giving the employer authority to transfer employees to alternative, equivalent positions when the employee needs foreseeable intermittent leave for planned treatment be expanded to include that authority to transfer an employee who takes intermittent leave in any circumstances.

Section 825.200. Treatment of Holidays

We agree with DOL's decision to retain the provision that a holiday counts as FMLA leave when it falls within a week that leave is taken. This is a reasonable provision and 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).

Section 825.215. Incentive Awards

We also support the proposed changes concerning incentive awards. Under the proposed regulations employers could disqualify employees from receiving perfect attendance awards or safety bonuses if the employee does not meet the requirements for those incentives due to FMLA leave. All employees will appreciate the equity of these changes.

Section 825.220. Waiver of Rights

FMI supports the changes to section 825.220 (d) that clarify DoL's position and recognize the right of employers and employees to voluntarily release and settle FMLA claims retrospectively without having to first obtain DoL or Court permission. This would include an employee's acceptance of light duty while recovering from a serious health condition.

Sections 825.300-303. Notice and Designation of FMLA Leave

Proposed section 825.300 (a) requires employers to provide general notice to employees concerning FMLA provisions and the procedures for filing complaints of violations of the Act. We support the proposed provision allowing the electronic posting of this information.

In addition to the general notice, employers must provide eligibility notice to employees. Many of the eligibility notice requirements on their face appear reasonable, but in combination they are quite complex, creating a paperwork Rube Goldberg scheme and an administrative nightmare. For example, the employer must furnish the employee with an initial eligibility notice within five business days (up from two days in the current rule) of the employee's leave request *or within five days of the date on which the employer learns data that supports a possibility that the leave may be FMLA protected*. Given the broad definition (or lack thereof) of serious health condition discussed above, notice essentially is required for every medical related absence.

An employer must inform the employee if he or she is eligible or not, and if the employee is not eligible the employer must state the reasons for ineligibility (e.g., not working 1250 hours, leave used up, etc.). If an employee is eligible for FMLA leave, an employer must inform the employee of the amount of FMLA leave the employee has, and the amount that will be designated as FMLA leave. Notice must also be given of the employer's specific requirements for employee certification, recertification, notice of return, procedures for payment of health coverage premiums, and whether it requires a certification of fitness for return to duty. If a medical certification is required, the proper form must be attached. If a certification of fitness for return to duty is required, the employee's essential job duties must be attached. In addition, the employer must inform the employee of the consequences of failing to meet any employer requirements. Additional notices must subsequently be given telling the employer how much leave is counted as FMLA, providing thirty day updates on FMLA usage, and another notice explaining why the medical certification is deficient if that is the case.

These requirements individually may seem reasonable, but cumulatively, they create a quagmire of paperwork that will be mostly disregarded by employees. Multiply this quagmire by 15,000 leave requests in a single month and the result is an overwhelmingly burdensome process. Employers will need to analyze every medical leave request to determine whether FMLA leave is warranted or not. These forms and the information to be included on the forms will then need to be individualized for each request. In the food retailing industry employee work schedules often fluctuate from week to week. Moreover, many of these leave requests are for intermittent FMLA leave, often taken in hourly increments. The task of calculating intermittent leave for employees

with fluctuating work weeks alone is a difficult one. The process of tracking all this leave, matching it with work schedules and ensuring that appropriate notices are sent in a timely fashion with accurate information provided is extremely daunting

We think the system could be much simpler to the benefit of both employers and employees. The general notice requirements should give employees the information to know that FMLA leave is available and the requirements for eligibility. When an employee asks for leave to be designated as FMLA leave, the employer should be required to inform the employee of their eligibility and whether or not the leave has been so designated (and if not, why not). The employer should be required to inform the employee of the amount of leave designated and to keep the employee informed in a reasonable fashion of the amount of FMLA leave that remains available. We urge that the notice requirements be simplified in these important respects.

We agree with proposed section 825.301 (d) allowing retroactive designation of FMLA leave. This conforms to recent court decisions and common sense. The language allowing such designation only as long as the designation does not harm the employee needs further explanation. DOL does recognize that in most case employees will not be able to show such harm and we concur.

Sections 825.305 and 306. Medical Certifications

Generally, we support the proposed changes in section 825.305 to the rules for obtaining a medical certification that leave qualifies under the FMLA. In particular, we support the requirement of recertification if the leave extends beyond one year. We do not object to the requirement that the employer advise the employee in writing that the certification is deficient and why. However, the requirement that the employer advise the employee as to what is necessary to make the the certification complete and sufficient could be problematic. Certainly, technical deficiencies should be noted, but if the certification is rejected because of vagueness the employee should be told that, but it should not be up to the employer to advise the provider how to correct that deficiency.

Proposed section 825.306 specifies the content of the certification form and information to be included in the certification. We strongly support the changes to this section which now makes it clearer that the provider must provide sufficient information to show that the employee can not perform essential job duties, as well as the specific job functions that the employee is unable to perform. Providers will have to specifically state that intermittent leave is medically necessary. Other improvements to the regulation include clarification that employers can follow Americans with Disabilities Act (ADA) guidelines in requesting information if appropriate, and that employees who do not sign a Health Insurance Portability and Accountability Act (HIPAA) release still have an obligation to provide sufficient medical documentation to support the need for leave. These are important clarifications. Thus, we urge the Department to amend the proposal to require that providers "must" provide specified medical facts, rather than simply “may” provide this information.

Section 825.307 and 308. Authentification and Second Opinions and Recertification

We support the proposed changes to section 825.307 concerning the authentification, clarification and second opinion process. In particular, we support the proposal to clarify, that the employee risks denial of leave if he or she refuses permission for authentification or clarification of certification. Similarly, we support the proposal to remove the requirement that contact with the employee's provider only take place through the employer's provider.

While the changes to the recertification process in proposed section 825.308 are an improvement, DOL should allow recertification every 30 or 60 days, rather than every six months. The proposal could also be improved by allowing employers to obtain second and third opinions upon recertification

Section 825.310. Fitness for Duty

Proposed changes to section 825.310 improve to some extent the process for determining fitness for duty. The proposal properly allows fitness for duty exams and certification in connection with intermittent leave when safety concerns exist. Clearly, however, the limitation of fitness for duty testing to once every thirty days jeopardizes workplace safety. For example, suppose an employee with a chronic FMLA qualifying condition resulting in seizures returns to work with a completed fitness for duty form, and then suffers another seizure while operating a forklift within 30 days of returning to work. Under the proposal the employer would be prohibited from obtaining a fitness for duty exam before allowing the employee to return to work in accordance with ADA standards. We do not believe DOL could intend this result and the proposal should be modified accordingly.

Military Leave

Section 585(a) of H.R.4986, the National Defense Authorization Act for FY 2009 amends the FMLA to provide leave to eligible employees to care for covered service members and resulting from any "qualifying exigency" arising out of the fact that a covered family member is on active duty or has been notified of a call to active duty status in support of a contingency operation. These provisions are not effective until DoL issues implementing regulations defining "qualifying exigencies." As part of this rulemaking, DoL has requested comments on the issues associated with the military leave provisions and expects to proceed directly to issue final rules based on the responses received in this rulemaking.

We understand and support the legislative intent behind these provisions. However, the implementing regulations need to be as clear as possible and, provide for a system that is easy to implement by both employers and employees. Without a proposal in front of us it is difficult to comment. We do believe that regulations must define all the crucial terms with specificity. For example, the terms "active duty" and "contingency operation" are best defined by the Department of Defense, but the regulations should provide a concise and clear definition that employers and employees can understand.

Of course, the definition chosen for "qualifying exigency" is critically important. Certainly the leave should be limited to needs *directly* caused by the military service itself. Military leave is not intended to give service members greater rights beyond those of other employees. A list of qualify exigencies would be very helpful. A good argument can be made that this leave should be limited to non-medical situations as FMLA leave is already available for serious health conditions.

Further, the regulations should clarify the interaction of military leave and regular FMLA and he method of calculation of leave time. Employers should be allowed to use their normal FMLA leave year in calculating eligible leave time.

Conclusion

Thank you for the opportunity to express our views on this important regulation. Our members are committed to making FMLA leave work, but they have been frustrated by the confusing regulations and abuses that have arisen. We believe the proposal addresses some of the issues satisfactorily, but in other respects they fail to eliminate, and at times increase, confusion. We urge DOL to modify the proposed regulations as described above.

Sincerely,

/S/

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