American Academy of Family Physicians

February 13, 2007

Richard M. Brennan
Senior Regulatory Officer, Wage & Hour Division,
Employment Standards Administration
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue, NW.
Washington, DC 20210

Re: Request for Information on the FMLA of 1993

Dear Mr. Brennan:

I am writing on behalf of the American Academy of Family Physicians (AAFP), which represents nearly 94,000 family physicians and medical students nationwide and is an employer subject to the Family and Medical Leave Act (FMLA) of 1993. Specifically, I am writing to offer our comments in response to the request for information on the FMLA of 1993 as published in the *Federal Register* on December 1, 2006.

Definition of Serious Health Condition

The definition of a serious health condition within the Act creates confusion not only for the administrators of the program and employers but also for physicians. Requiring a physician to certify that a gastrointestinal virus or upper respiratory infection is a serious health condition in an otherwise healthy individual is incongruous with medical training and experience. However, the patient is entitled under the Act as currently interpreted as long as he or she has consulted the physician, received a therapeutic treatment regimen, and is incapacitated for more than three consecutive calendar days. Increasing the time to at least five work days would help in eliminating some of these minor illnesses from coverage. Thus, the burden on physicians and employers would be reduced without significant impact upon employees with a serious medical situation.

The categories of "Serious Health Condition" are overly complicated and, in some cases, contradictory. For instance, category 6 - "Multiple Treatments (Non-Chronic Conditions)" goes on to list as examples chronic conditions like cancer and kidney disease. The categories of disease should be simplified to four categories:

- Acute care (5-45 days expected duration)
- Pregnancy
- Chronic care (ongoing, periodic or episodic treatment expected to extend beyond 45 days)
- Permanent disability (physician supervision of Alzheimer's disease or terminal illness)

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Definition of a Day

Currently the Act covers illnesses/conditions that incapacitate a person for more than three consecutive calendar days. In order to be more consistent with most short term disability programs provided by

employers and workers compensation coverage, we would recommend that that language be changed to require that the period of incapacitation be *at least five consecutive work days*. This eliminates the

confusion over holidays and weekends and is consistent with the five-day elimination period that most short term disability programs require.

Different Types of FMLA Leave

Intermittent leave is problematic for the certifying physician and employer. Employers have noted that with respect to the frequency of the episodes of incapacity, the physician might write ''unknown.'' Employers argue that this leaves them in the difficult position of guessing about the employee's regular attendance. However, the frequency of incapacity in chronic conditions such as migraine headaches is not predictable, making "unknown" the appropriate answer to the question.

Intermittent leave can be a difficult issue for many employers to manage, especially when it can be taken in such small increments of time. Taken one hour at a time, 12 weeks can become more than 420 work days impacted. If, instead, each day in which any leave was taken was counted as a day of FMLA leave, the number of days potentially impacted would be reduced to 60, which is still more than 20% of the work days in a year. We would recommend a change to make each date on which any leave was taken count as a day of FMLA leave. This would ease the burden of employers in tracking the FMLA intermittent leave taken by each employee.

Communications between Employers and Their Employees

Currently, the employer has the primary responsibility for recognizing that FMLA might cover an event. If the employee mentions to the employer that they need time off for a medical situation, even if they do not specifically ask for FMLA leave, this puts the employer on notice that they might need to use FMLA. Further, the regulations do not require that the employee notify any particular representative of the employer, so mentioning it to a first line supervisor might suffice as "notice" to the employer. We recommend that the regulations require that the employee notify the individual or unit within the employer that is responsible for FMLA administration (perhaps as designated by the employer's policy), before the employer is considered officially "notified" of the FMLA event

FMLA Leave Determinations and Medical Certifications

The form WH-380 is overly complicated and confusing in its format. In addition, many employers have chosen not to use the standard certification form. Physicians must complete a variety of forms based loosely on the WH-380.

A standard form should be limited to information necessary to certify a medical condition including:

- Employee and patient name(s)
- Simplified category of leave

- Treatment plan with start date and anticipated duration
- Limitations on work functions
- Signature, date, name and address of physician certifying leave
- Authorization to release information to family member , employer, or employer representative

An example of a form which might capture this information in a simple manner is attachment 1 to this letter.

In the Employer Commentary section on Medical Certification Procedures, employers noted that an employee's health care provider may certify an employee's chronic condition and list the duration as ''indefinite'' or ''lifetime.'' It is worth noting that 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.

Along the same lines, employers may require recertification every 30 days. This is a burden to physicians who must spend time completing the form to indicate that a chronic condition is still being managed. It would lessen this burden to allow recertification only for those conditions which are not categorized as chronic care or permanent disability.

We agree with comments that the Health Insurance Portability and Accountability Act (HIPAA) has created confusion about the disclosure of information on the FMLA form. As employers are not covered entities, disclosure directly to the employer is prohibited without an authorization by the patient. In a busy physician practice, it is often not possible to tell the patient when the physician will complete the form, and as such, the patient may request that the physician mail or fax the form directly to the employer upon completion. Further, the physician is often completing the form for a family member of a patient which might involve release of patient information to the family member. The specific information required by the FMLA certification form and lack of an authorization on the form releasing the information may lead to inadvertent HIPAA violations. We would recommend the addition of an authorization to release medical information to the certification form which would allow the patient to indicate their authorization to release information to a family member or directly to the employer.

We appreciate the opportunity to comment on matters related to the Family & Medical Leave Act of 1993.

Sincerely,

Larry S. Fields MD

Larry S. Fields, M.D., FAAFP
Board Chair

Attachment