Comments of
THE AMERICAN POSTAL WORKERS UNION, AFL-CIO
on the
Proposal by the Employment Standards Administration
To Revise Certain Regulations Implementing the
Family and Medical Leave Act
And
Final Regulations Regarding Military Family Leave

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The American Postal Workers Union, AFL-CIO (The APWU), hereby comments on the proposal of the Employment Standards Administration of the U.S. Department of Labor to revise certain regulations implementing the Family and Medical Leave Act of 1993 ("FMLA"), and on issues addressed in final regulations regarding military family leave.

The APWU has been the exclusive collective bargaining representative for employees of the United States Postal Service working in the Maintenance, Motor Vehicle Services, and Clerk Crafts, and in certain Support Services units, since the inception of collective bargaining in the Postal Service in 1970. The APWU presently represents approximately 300,000 postal employees. The Postal Service is covered by Title I of the FMLA, which is applicable to covered private sector employers and to certain federal entities such as the Postal Service and the Postal Rate Commission.

Each year, the Postal Service processes and delivers more than 212 Billion pieces of mail. [1] Postal facilities that sort mail and transport it for delivery operate 24 hours a day seven days a week. The importance and time sensitivity of handling the mail, combined with the large volume of mail and the need to process mail at all times of the day and night, make the coordination of family and work obligations a matter of critical importance for postal workers. Postal Workers are justifiably proud of the United States Postal Service and of the work they do for the American people. Too often, however, postal workers have been denied the right to be absent from work, or

[1] This equates to 700 million pieces per day, 29 million pieces per hour, 486,000 pieces per minute, and 8,000 pieces per second. http://www.usps.com/communications/newsroom/postalfacts.htm

disciplined due to the fact that they have necessarily been absent from work, to care for the medical needs of their family members or for their own medical needs arising from serious health conditions.

For these reasons, the APWU was a strong supporter of family and medical leave legislation. After the passage of the FMLA in 1993, the Postal Service and the APWU cooperated in the dissemination of information about the new law to postal workers and managers, and the APWU actively monitored efforts by the U.S. Postal Service to come into compliance with the law. Despite these efforts, many problems have remained, both because of a failure of some postal managers and supervisors to understand and accept the law, and because the Postal Service has not applied the law in all respects as it should be applied.

Thus, the APWU approaches the issue of proposed revisions to FMLA regulations from a basis of 15 years of experience in the application of the law. The proper and effective application of the FMLA is of critical importance to the employment security of postal workers and to the wellbeing of our families. We view with dismay, therefore, the proposal by the Department of Labor to revise FMLA Regulations in ways that would weaken and diminish the protections of the law. As we explain in some detail below, we oppose many of the proposed revisions which are contrary to the purpose and intent, and in some instances to the text, of the FMLA. We urge the Department of Labor to withdraw these proposed revisions and to take this opportunity instead to revise the regulations to better effectuate the important purposes of the law where experience has shown that revisions are needed for the more effective protection of working people.

For ease of reference, the comments that follow are arranged in ascending numerical order of the regulation under consideration.

825.110 Eligible Employee

We urge the Department to withdraw its proposal to create a new Section 825.110(b)(1) that would permit employers to exclude periods of service prior to a continuous break in service of more than five years when determining whether employees have met the requirement of 12 months of employment for FMLA eligibility. The law provides no authorization to exclude any previous service with the employer from the 12-month test. As the Department has observed in its discussion of the proposed new subsection (73 Fed. Reg. at 7882), the legislative history confirms the clear implication of the statutory language that the "[t]hese 12 months of employment need not have been consecutive." S. Rep. No. 103-3, at 23 (1993); H.R. Rep. No. 103-8, pt. 1, at 35 (1993).

The Department's decision to impose an arbitrary outer limit of five years break in service after which prior service may be disregarded for purposes of the 12 months of employment test strikes the wrong balance between the needs of employees for protection under the Act and the practical problems employers may encounter in ascertaining prior periods of service. In most cases, there will be no question whether or not a period of prior service would serve to qualify an employee for protection immediately upon reemployment. In those cases, where there is no question but the employee's break in service is more than five years, the proposed rule would cut off a statutory entitlement with no justification. Nothing in the law justifies a policy decision

by the Department that service prior to a break of more than five years is not worthy of credit toward the 12 month requirement. To the contrary, the Congress has determined that the 12 months of service need not be consecutive. Furthermore, the Department should revise **29 CFR 825.500(b)** to require employers to keep the records required to determine dates of prior service for five years instead of the current three year requirement. Maintenance of the simple records necessary to document dates of prior service will not be unduly burdensome for any employer, and the increasing use of electronic recordkeeping will minimized the burden on employers of keeping necessary records.

§ 825.115 Continuing Treatment

The Department's proposal to require treatment twice within a 30-day period in addition to a period of incapacity is an unjustified restriction on the statutory definition of serious health condition. The statute requires only continuing treatment by a health care provider. The suggestion that "extenuating circumstances" could result in the definition being satisfied by two treatments more than 30 days apart unnecessarily burdens a determination that should be straightforward. The current requirement (in § 825.114(a)(2)(i)), of a period of incapacity of more than three days plus either treatment two or more times for the condition causing the disability or treatment one time plus a regimen of ongoing treatment, should be left in place. The Department's suggestion that it might extend the 30-day requirement to the continuing treatment prong of the definition is unreasonable and cannot be justified by reference to the statutory definition. 29 U.S.C. § 2611(11).

The Department proposes to limit the definition of chronic serious health condition to those for which the employee receives treatment at least twice per year. Proposed § 825.115(c)(1). The Department offers no empirical evidence or even example to justify this limitation. The suggestion that it is necessary in order to prevent employers from imposing even more unreasonable and limiting requirements has no bearing on the validity of this arbitrary limitation. The medical condition of the employee with a chronic condition and the guidance of the employee's treating physician are the only appropriate determinants of how frequently treatment should be required for an employee with a chronic serious health condition.

§ 825.122(f) Documenting relationships.

The Department's proposal to delete the right of parents to confirm a family relationship with "a simple statement from the employee" (29 C.F.R. 825.113(d)) would create an ambiguity in the revised provision. It may be inferred by some employers that, regardless of the employee's right to establish the relationship through any one of several means, including a sworn statement from the employee, that the employer in any case has the right to examine "documentation such as a birth certificate… ." To avoid confusion, this phrase should be changed to state that the "employer is entitled to examine the documentation relied upon by the employee to establish the relationship."

§ 825.202 and 825.205 Treatment of overtime hours of work

The Department's proposed revisions discuss, but do not satisfactorily resolve, the question of how to treat overtime hours an employee on FMLA leave might have worked if the employee had not been on leave. The Department should codify in the

revised regulations the discussion found in the preamble to the present Section 825.203. If any employee is unable to work, overtime hours should not be charged against the employee's 12 weeks of leave unless overtime work was a part of the employee's regular schedule. If the overtime is voluntary or is assigned on an ad hoc or "as needed" basis, it should not be charged against the employee's FMLA leave entitlement. We disagree with the contention (73 FR at 7894) that the distinction between the types of overtime work is unduly confusing. A simple statement that the employee may not be charged for the overtime hours unless overtime hours were a part of the employee's regular schedule should be easily administered. We also disagree with the assertion (id.) that the focus should be on whether the employee would have been required to work the overtime hours. This would be the wrong standard for two reasons. Most importantly, the correct focus is on the employee's need for leave. FMLA that extends for 12 weeks will necessarily involve a medical condition the duration of which will be measured not by the number of hours in a workweek at the employee's workplace but by the medical condition of the employee, or a family member, and the time needed for that condition to be healed. The purposes of the Act will be served by providing a full 12 weeks of leave for the employee, or the family member, to recover their health. Unless the employee ordinarily works overtime as part of the employee's regular schedule, the employer's need for the employee will ordinarily be outweighed, and should under the Act be outweighed, by the employee's need for time to heal. The second reason the proposed focus is wrong is that it will compound rather than moderate the administrative complexity of the rule. Employers will be required to determine on a hypothetical basis, in the absence of the employee, whether

or not the employee would have been required to work overtime on a particular day. That would be a complex task at best and a subjective task at worst, and it would result in disputes over the proper calculation of the 12 week period.

§ 825.207 Substitution of paid leave

By permitting employers to impose conditions on the use of accrued paid vacation leave or personal leave concurrently with FMLA leave, the Department's proposed revisions incorrectly conflate the differing requirements of 29 U.S.C. § 2612(d)(2)(A) and (B). Congressional intent to permit employees to use earned paid vacation leave and personal leave is clear from the statutory distinction between vacation and personal leave, on the one hand, and paid sick leave or paid medical leave on the other. Section 2612(d)(2)(B) extends the benefit of accrued paid vacation or personal leave to situations where employees qualify for FMLA leave on the occasion of a birth, adoption, or placement of a child with the family, or for the care of a family member. The explicit proviso of Section 2612(d)(2)(B), permitting employers to apply any of the employer's usual conditions on the use of sick leave or medical leave (but not on the use of accrued vacation or personal leave) before paid sick or medical leave may be used concurrently with FMLA leave, speaks clearly to the distinction Congress made between accrued earned vacation leave or personal leave and sick or medical leave. The legislative history reinforces this clear statutory distinction by explaining that "an employee is entitled to the benefits of applicable paid leave, plus any remaining time made available by the act on an unpaid basis." H.R. Rep. No. 103-8, Pt. 1, at 38 (1993); *see also* S. Rep. No. 103-3, at 27-28 (1993). Absent the statutory proviso in Section 2612(d)(2)(B) permitting the application of employer policies limiting availability

of paid sick and medical leave, the law would require that employers permit the use of sick and medical leave concurrently with FMLA leave when the employee elects to do so regardless of the employer's usual policy.

This reading of the law is consistent with well-established distinctions between earned vacation or personal leave and paid sick or medical leave in other contexts. It is common, for example for employers to distinguish in their personnel policies between earned vacation or personal leave and sick or medical leave. Vacation leave or personal leave is most often treated as an earned benefit that the employee is entitled to use; whereas sick or medical leave may not properly be used unless an employee is actually sick and in need of medical care or unable to work. Commonly, earned vacation or personal leave may be lost if not used, whereas sick or medical leave may be carried over. State and local laws often require that terminated employees be paid their accrued vacation or personal leave; but the same requirement is not imposed for sick or medical leave that was available but that has not been used. These distinctions are reflected in the policy choice made by Congress in Section 2612(d).

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

The Department should drop the proposed additional requirements in Section 825.302(a) that an employee provide notice "as soon as practicable." 73 FR 7980. The examples provided by the proposed regulation in Section 825.302(b) make no allowance for employees who, although they may be aware of a medical appointment, are not aware of the FMLA or of its employee notice requirements. It is reasonable to require an employer to be aware of its legal obligations. It is not reasonable to expect

an average employee to be aware of an employee's notice obligations under the law, even if they are posted and made available in an employee handbook. The assertion by the Department that such postings and handbook provisions provide "actual notice" to the average employee (§ 825.304; 73 FR 7982) is not correct. Likewise, the Department should withdraw its proposal to require that an employee who does not provide at least 30 days notice of foreseeable leave must "explain the reasons why such notice was not practicable upon a request from the employer for such information." 73 FR 7980. It would appear that these notice requirements, in combination with the broadened requirement that employees seeking FMLA leave comply with the employer's "usual and customary notice and procedural requirements for requesting leave" (73 FR 7980), may be intended to permit an employer to delay or deny FMLA leave if the employee does not comply with the employer's leave notice policy. Such a policy would inappropriately permit employees' FMLA leave entitlements to vary between employers. Absent from the proposed regulations is any requirement that the employer show that its actual need, under all the circumstances of the particular case, provides a counterbalance to the employee's need to meet a proffered medical schedule. It is not flexible or fair to consider the circumstances when imposing a notice as soon as practicable requirement on employees while permitting employers to delay or deny leave without a requirement that the delay or denial be justified by the employer's circumstances.

§ 825.305 Medical certification general

(a) Employers should be required to maintain all medical certifications in separate medical information files separate from personnel files and accessible only to

trained professionals employed by or representing the employer. The APWU's experience has shown that lay supervisors or other lay representatives of the employer will view and make inappropriate use of medical files if they are accessible, thus invading the privacy of employees.

(c) The seven-day period specified for the employee to cure any deficiency in a certification is unrealistically short and will create administrative confusion and cost. This period should be 15 calendar days as in the case of the initial certification.

(d) The authorization for the employer to require a new medical certification in each subsequent leave year should be deleted. This provision will cause employers to impose an administrative and cost burden on employees and on the administration of FMLA leave generally that will serve no useful purpose. Given the fact that employers may request recertification when such a request is justified, or each six months in any event, there is no justification for imposing this additional burden on the system.

§ 825.306 Content of medical certification

(a) and (b) It is inappropriate and an unnecessary invasion of employees' privacy for the regulations and revised Form WH-380 to provide for the communication of medical diagnosis and details about medications that have been prescribed. In most cases, certification forms will be handled by or be available to lay supervisors or personnel administrators. These lay people need only be informed that, in the medical opinion of the employee's medical provider, the employee or the employee's family member is disabled by a serious health condition, and the nature and likely duration of that disability.

(c) Employers should not, under the employer's paid leave policy, be permitted to require additional information beyond that permitted by the FMLA. This provision would create a broad gap in the privacy protection that should be provided to employees under the FMLA.

§ 825.307 Authentication and clarification of medical information

(a) The Department should adhere to the requirements of the current regulations that require an employee's permission for any representative of the employer to contact the employee's health care provider, and that limit substantive contacts to those made by a medical professional representing the employer. The APWU has, over the past 15 years, observed many instances, even under the current regulations, in which lay supervisors or other lay representatives of the employer have made illegal, intrusive and inappropriate contact with employees' health care providers. These contacts invade the privacy of employees and serve little or no legitimate purpose because the employer's representatives are not medical professionals and are not, therefore, trained and able to ask appropriate and useful clarifying questions.

(d) Employees should not be required to request copies of second and third medical opinions; employers should be required to provide copies to employees as a matter of routine. Submission to examination by any medical professional is intrusive and very personal to the employee. In every instance, the employee is entitled to the benefit of any medical opinion that results from the examination.

§825.308 Recertification

The Department's regulations should not permit requests for recertification every 30 days in the case of chronic conditions in which the employee's certification has specified that the condition is a chronic, ongoing, condition that will continue for more than 30 days. In these instances, recertification requests should be permitted only if changed circumstances or new information justifies the request. Experience has shown that some employer's representatives will routinely request recertification as often as permitted with the purpose and effect of harassing the employee and imposing an unnecessary burden on the employee.

COMMENTS ON PROPOSED REGULATIONS REGARDING MILITARY FAMILY LEAVE

Section 101 Definitions

"Covered Servicemember." We agree with the Department's "initial view" that "any treatment, recuperation, or therapy provided to a service member for a serious injury or illness, and not just that provided by the armed forces, should be covered." In every case, the determination of coverage should be based on the facts of that case. For the same reason, there should be no requirement of temporal proximity between the injury or illness and the treatment, recuperation, or therapy for which care is required. The Department may rely on an affirmative determination by the Department of Defense as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious injury or illness, but a negative determination, or no determination, by the Department of Defense should not be conclusive. The servicemember should be

provided an opportunity to provide medical evidence from a private medical provider to establish that the treatment is covered.

"Next of kin." The Department should issue a regulation that provides that any person meeting the criteria listed by the Department of Defense (DOD), in any one of its eight categories of next of kin, is qualified as "next of kin" for purposes of the FMLA regardless of the existence or presence of a person who also qualifies as next of kin under one of the eight categories listed by DOD. The qualification to serve as next of kin for purposes of the FMLA should not depend on whether a nearer blood relative is "unable or unwilling to provide care." Any person within the listed eight categories who is able and willing to provide care should be eligible to obtain leave for that purpose. There are reasons for the DOD to attempt to prioritize kin and to seek the nearest blood relative for DOD purposes that have no bearing on the issue of care under the FMLA. The FMLA is a remedial statute intended to ensure that family members are available to attend to the needs of ill or injured servicemembers. Given that purpose, no hierarchical limitation should be imposed.

"Serious injury or illness." Just as in the case of determining whether someone is a "covered servicemember," the definition should require an examination of the facts of each case. If the DOD or Department of Veterans' Affairs (DOVA) certifies a serious injury or illness, that should be conclusive. However, the failure of the DOD or DOVA to certify a particular case should not be conclusive. In each case the servicemember should be permitted to submit medical evidence concerning the injury or illness and its effects, including on the effect of rendering the servicemember unfit to perform the duties of the member's former office, grade and rank if they are no longer in the service.

Section 102(a) Leave Entitlement

We disagree with the Department's "initial view" that leave for qualifying exigencies should be limited to non-medical related exigencies." The key to qualification should be the nexus between the need and the absence due to military service. Some medical situations may be just as urgent as the "economic issues" referenced by Representative Altmire's statement but might not qualify for leave under the FMLA provisions related to serious medical conditions. We support the establishment of a list of qualifying exigencies, which would be useful to promote understanding and for ease of administration; but the list should be illustrative, not exclusive.

The single 12-month period for taking military family leave should be determined separately from and calculated independent of the 12-month period used for determining FMLA leave. The two periods may coincide, but they need not coincide, and they should begin and run independently when the timing of the exigencies that trigger their running do not coincide. As in the case of family medical leave, the 26 weeks of leave should not be treated as a one-time entitlement. The remedial purposes of military family leave dictate that the entitlement to leave be ongoing, albeit limited to 26 weeks in any one 12-month period. In the case of multiple qualifying circumstances affecting a single employee, a situation we would hope would be extremely rare, the Department may determine that, under specified circumstances, it would be necessary to make provision for the hardship that might be imposed on an employer asked to provide more than one 26-week period of military family leave in a single 12-month period.

The Department's regulations on Military Family Leave should be issued as interim final regulations, to take effect immediately but subject to further comment and revision.

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