WASHINGTON
LEGISLATIVE OFFICE

April 11, 2008

Richard M. Brennan, Senior Regulatory Officer
Wage and Hour Division, Employment Standards Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: RIN 1215-AB35

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Dear Mr. Brennan:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we thank you for the opportunity to provide comments on the United States Department of Labor's (DOL) notice of proposed rulemaking and request for comments dated February 11, 2008. The ACLU strongly concurs with the comprehensive comments submitted today by the National Partnership for Women and Families and the other signatories to their letter. We support and agree with their discussion of and recommendations regarding the proposed rules, especially with respect to those issues the ACLU raised in our response, dated February 16, 2007, to the DOL's Request for Information. We are also submitting this letter to echo and amplify the National Partnership's comments with respect to the proposed rules relating to medical privacy and waiver of judicial or agency review of settlement agreements.

THE IMPACT OF THE FMLA

The ACLU has long sought to ensure workers' economic security and has focused on the economic empowerment of women as a key to gender equality and women's full participation in civic society. The FMLA is a groundbreaking law that has allowed millions of Americans to take needed time off to care for their own or a family member's illness, or to care for a new baby, without putting their jobs at risk. Since its passage in 1993, the FMLA has provided critical assistance to approximately 100 million workers who have used it to take protected leave and maintain job security.

Though simple and straightforward on its face, this federal law struck a blow against entrenched and historical discrimination against women in the workplace. The record revealed, at the time of the law's passage, that too many employers relied on invalid gender stereotypes of who was better suited to care giving when administering leave policies. These assumptions often meant that women's employment opportunities were minimized and their role in the workplace marginalized. Passage of the FMLA attacked these outdated modes of thinking. Indeed, the United States Supreme Court has acknowledged that the aim of the FMLA was to protect the right to be free from gender-based discrimination in the

workplace.[1] It moved us ever closer to achieving equality of opportunity in employment by requiring gender-neutral family leave benefits in workplaces across the country and by recognizing that both men and women must balance family responsibilities with work.

Since 1993, the FMLA has been vitally important to families across America. By accommodating the parenting and other family responsibilities of both female and male workers, the FMLA has marked a significant step toward women's advancement in the workforce and men's ability to share in family life and responsibilities. It has reduced unemployment, neutralized discriminatory workplace practices that traditionally have burdened women, and provided a safety net for families in times of need.

Today, more than a decade after the FMLA's passage, the Department of Labor should ensure enforcement and expansion of the FMLA's protections and study the feasibility of innovative paid family and medical leave programs that would benefit more workers. Many of the Department's proposed comments raise concerns that it will narrow the FMLA's protections or its coverage for workers' health and family needs. We oppose changes that would limit the scope of the FMLA, and support regulations that will ensure that workers can take full advantage of meaningful FMLA protections.

KEY ISSUES OF CONCERN

A. Medical Privacy Concerns

The ACLU is concerned that some of the proposed changes to the requirements for employee notice and for medical certification pose considerable threats to individual privacy and will leave workers vulnerable to coercion by their employers, social stigma and employment discrimination. Lessening employee patient privacy by empowering employers may lead some employers to dismiss employees whom they deem costly to employ or insure due to the need of some of those employees to take FMLA leave. Such a perception could, unfortunately, arise if an employer is granted too much information about the health of its employee or the employee's family. The ability of an individual to exercise control over the collection and use of his or her sensitive medical information is central to personal integrity and human dignity, and need not be forfeited in an attempt to substantiate the need for FMLA leave.

We recognize that the impetus for these changes has come as a result of complaints by some employers regarding cases of alleged or perceived abuses of FMLA leave by employees. These reports, however, have generally been offered by employers who have never supported the law in the first place, and to our knowledge, these reports have not been supported by any empirical evidence in the manner of rigorous surveys or analysis. Moreover, the ACLU believes that any potential abuses can be addressed more effectively on a case-by-case basis, rather than through sweeping changes in the

[1] *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

regulations. Therefore, we urge the DOL to maximize protections for employee medical privacy, and not diminish those protections as we believe the pending rule would do.

Our specific concerns are outlined below.

1. Medical Certification (Sections 825.305, 825.306 and 825.307)

Under current law, an employer may require that an employee's leave be supported by a certification issued by a health care provider of the employee or the employee's ill family member that substantiates the existence of a serious health condition for purposes of FMLA. An employer can deny FMLA leave in cases where an employee does not furnish such information.

Content of Medical Certification

Currently § 825.306 addresses how much information an employer may obtain in the medical certification process. DOL proposes to expand the information that an employer can request in order to substantiate the existence of a "serious health condition" to include information on symptoms, hospitalization, doctors visits, whether medication has been prescribed, referrals for evaluation or treatment, or any other regimen of continuing treatment (§ 825.306(a)(2)). In addition, the health care provider may provide diagnosis information (§ 825.306(a)(3)). Proposed § 825.306(a)(1) also requires that the pertinent specialization of the health care provider be provided. The ACLU opposes these changes.

Medical certification should be designed to supply the employer with only that information necessary to determine if the serious health condition in question meets the definitions supplied by DOL. Specific information on symptoms and diagnosis are not necessary in most cases to make this determination. Sometimes a specific diagnosis cannot even be made, yet FMLA leave should nevertheless be allowed. More importantly, many medical conditions carry with them social stigma. The release of this highly private information to an employer or co-workers invites possible abuse in the form of employment discrimination, particularly where the condition at hand is chronic, degenerative, or genetic, such that it might affect other members of the employee's family who are covered under the employee's benefits policy.

The requirement that the specialization of the health care provider be included in certification should be removed. There is no requirement that an individual requesting FMLA leave see a specialist, nor is this information necessary for determining the severity of a health condition. Including this information might reveal information about the medical condition of the employee to the employer.

Allowing Direct Contact Between Employer and Employee's Health Care Provider

Currently, an employer can contact an employee's health care provider for purposes of clarification and authentication of the medical certification, but only where (i) the

employer has been given express permission from the employee; and (ii) the contact is made by a health care provider representing the employer.

DOL proposes to allow the employer to contact the employee's health care provider directly. In addition, DOL proposes to remove the requirement of employee consent to authenticate the certification. The ACLU opposes each of these changes.

Proponents of direct contact argue that requiring the employer to use a health care provider results in significant costs and administrative burden. The fact that some employers feel inconvenienced or burdened to have to go through a health care provider is insufficient cause for undermining this essential privacy protection. Once on the phone, nothing prevents an inquisitive employer from asking detailed questions about the health status of an employee. Allowing employers to contact health providers directly could have a chilling effect on workers requesting and taking FMLA leave. Those with conditions that carry significant stigmas would be particularly hesitant to request leave if they believed their supervisors or co-workers would learn about their condition. In addition, employers are simply not qualified to pose questions for clarification purposes. DOL acknowledged as much in developing its final rules in 1995. Thus, the arm's length interaction required by the current rules serves an important function to shield the employee's medical privacy and to prevent abuse. The current system should be maintained.

The ACLU also believes that the current requirement for consent prior to authentication is not a sufficient barrier to authentication to justify its elimination. While the intent of authentication is presumably not to garner additional health information about the employee, the possibility that additional health information may be disclosed will always exist. Allowing the employer access to the health care provider without consent under this scenario establishes a dangerous precedent and is subject to abuse. An employer might use his/her authority to authenticate a medical certification as an excuse to try to access more information about an employee without his/her knowledge.

With respect to both proposed regulatory changes, the ACLU foresees employers substituting their own professionally unqualified beliefs about recovery time, or the appropriate course of treatment. We are concerned that these determinations could lead to attempts to coerce an employee to end his or her FMLA leave prematurely. Thus, allowing direct contact between an employer and the employee's health care provider could undermine the basic rationale supporting the original passage of the FMLA.

Insufficient and Incomplete Certifications

DOL also proposes that employees be given a chance to correct defects in insufficient or incomplete certifications, and requires that employers provide explanations to employees in writing. The ACLU supports this change, but requests that DOL make it clear that an employer cannot require any information beyond that which is required under the FMLA and, in particular, cannot require additional information about an employee's health.

Impact of Proposed Rules on the Privacy Interests of People Living with HIV

We are particularly concerned about the impact these new rules, with their inadequate privacy safeguards, would have on people living with HIV (PLWH). It is indisputable that stigma and discrimination still follow PLWH. DOL's proposed new rules will dramatically increase the likelihood that an employee's HIV status and the details of his or her care will be revealed in a manner not of his or her choosing and will lead to stigma and discrimination within the workplace.

Since the onset of the U.S. HIV epidemic in 1981, stigma and discrimination have detrimentally affected PLWH in every aspect of their lives – including employment, education, housing, insurance, and health care. This has resulted in harms including the erosion of social support networks, eviction from homes, loss of work, denial of healthcare, social isolation, depression and violence.

The stigma that still attaches to HIV can be attributed to many sources -- homophobia, sexual prejudice, societal condemnation of drug use -- and is fueled by ignorance about the basic modes of HIV transmission, unfounded fears of contagion, moral judgment and personal prejudice against the groups most affected by the epidemic. Studies have shown that those who consider a person with HIV to be morally responsible for his or her HIV infection are more likely to harbor feelings of anger, blame and disgust towards PLWH and/or to support coercive and discriminatory HIV policies.[2]

The prevalence of this form of discrimination in the workplace is already a problem that DOL's new proposed rules could exacerbate. From 2002 to 2006, HIV-related employment discrimination claims have been filed with the U.S. Equal Employment Opportunity Commission (EEOC) at an average rate of about one per day.[3] This is only a small decline from the number of claims filed during 1994 to 2001, which saw an average rate of 1.3 claims per day.[4]

Since DOL's new rules do not adequately safeguard the privacy of PLWH, the risks of disclosure are great and the consequences severe. Not only could the fear of that disclosure lead many PLWH to forego or delay family and medical leave but, most troubling, it could have a profound psychological impact on people with HIV. Studies demonstrate that HIV stigma is a significant source of psychological damage and

[2] Herek, G. et al., "Stigma, Social Risk, and Health Policy: Public Attitudes Toward HIV Surveillance Policies and the Social Construction of Illness," *Health Psychology*, 22(5), 533-540 (2003); Herek, G. *et al*., "HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999," *American Journal of Public Health*, 92(3), 371-377 (2002); Herek, G. & Capitanio, J., "AIDS Stigma and Sexual Prejudice," *American Behavioral Scientist,* 42(7), 1126-1143 (1999).

[3] Based on "ADA Charges Filed with EEOC and State and Local FEP Agencies Where the Alleged Basis Was HIV," obtained from EEOC by Lambda Legal on Dec. 15, 2006 (on file with Lambda Legal).

[4] "ADA Charges Filed with EEOC" (on file with Lambda Legal); Studdert, D., "Charges of Human Immunodeficiency Virus Discrimination in the Workplace: The Americans with Disabilities Act in Action," *American Journal of Epidemiology,* 156(3), 219-229 (2002).

depression, which is correlated to increased delay in seeking medical care, treatment non-adherence, disease progression, suicidal ideation, and mortality for PLWH.[5]

2. Employee Notification Requirements (Sections 825.302 and 805.303)

DOL is proposing a series of changes to the employee notification requirements. The ACLU believes that these changes are unnecessary and will make it significantly more difficult for workers to access FMLA leave.

The DOL seeks to heighten the quantum of information that employees must provide when giving notice to employers that they will be taking both foreseeable and unforeseeable leave. These changes are likely to be invasive of employee medical privacy, and likely to set up a myriad of situations that are ripe for abuse and undermine the intent of Congress in enacting the FMLA.

Numerous problems are likely to arise should the DOL modify the content of notice requirements for these sections. Every additional data point that an employee must supply to signal the need for FMLA leave will heighten the likelihood that the actual medical condition requiring leave will be ascertained by the employer. Basic privacy principles suggest limiting, not expanding, the data elements that an employee must supply. Of course, in a digital age, every bit of data provided by the employee is likely to be entered into a database maintained by the employer. Experience teaches us that no database is secure from the snooping eyes of inquisitive supervisors or fellow co-workers.

Further, requiring additional information in an "informal" setting, while perhaps practical, leaves an employee's medical privacy unprotected. By not prescribing the contours and requirements of the informal conversation, the DOL is inviting employers to delve into areas that should be protected - the personal and private information of the employee. For example, rules would require that the notice to the employer state the "anticipated duration of the absence" in the case of unforeseeable leave. This would seem to conflict with the very notion of "unforeseeable" leave, which by its nature is unanticipated. These changes, therefore, set up notice requirements that are ripe for abuse.

The ACLU recommends that DOL strike its proposed changes to the Content of Notice requirements for both foreseeable and unforeseeable leave.

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[5] Heckman, T.G. *et al*., "Emotional Distress in Nonmetropolitan Persons Living with HIV Disease Enrolled in a Telephone-Delivered, Coping Improvement Group Intervention," *Health Psychology*, 23(1), 94-100 (2004) (discussing studies with these findings); see also Chesney & Smith, Critical Delays in HIV Testing and Care: The Potential Role of Stigma, 42(7) American Behavioral Scientist, 1158-1170 (1999) (delay in seeking medical care); Vanable, P.A. *et al*., "Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment among HIV-Positive Men and Women," *AIDS and Behavior,* 10(5), 473-482 (2006) (treatment non-adherence); Leserman, et al., Impact of Stressful Life Events, Depression, Social Support, Coping, and Cortisol on Progression to AIDS, 157(8) American Journal of Psychiatry, 1221-1228 (2000) (disease progression).

B. Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights (Section 825.220).

Under this rule, DOL is proposing that employees may waive their FMLA rights in a severance or settlement package without court or DOL approval of that waiver. Currently, courts are split on this point. The ACLU opposes DOL's proposed change because additional due process safeguards are vital to informed and fair waivers of employment rights.

As a basic labor protection, the FMLA is based on the Fair Labor Standards Act (FLSA). Under the FLSA, waivers of claims must be reviewed by a court or DOL. The ACLU believes the same rule should hold true for the FMLA. Showing the importance of judicial review in protecting workers' rights, the Fourth Circuit recently stated in *Taylor v. Progress Energy*:

> As with the FLSA, private settlements of FMLA claims undermine Congress's objectives of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute. Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards.[6]

When DOL published the FMLA regulations in 1995, it had the opportunity to set up a system that allowed waiver without review; it specifically did not. Furthermore, the examples in the 1995 preamble to the regulations indicate that DOL anticipated that FMLA claims would not be waived without approval from a court or DOL. In fact, DOL noted that employer groups recommended adoption of explicit allowance of waivers and releases in connection with settlement of FMLA claims as part of a severance package.[7] However, DOL explicitly stated that it had "given careful consideration to the comments received on this section and has concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA and is also the case under other labor standards such as the FLSA."[8]

DOL has not explained why the rationale it put forward in 1995 has changed, nor why reversing course on such a fundamental safeguard would be in the public interest. To our knowledge, DOL not studied whether the addition of a waiver provision would help employees or the public.

Finally, DOL's attempt to treat the FMLA like other civil rights statutes where review can be waived fails to recognize that the FMLA is unlike civil rights statutes in a

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[6] *Taylor v. Progress Energy, Inc*. 493 F.3d 454, 460 (4th Cir. 2007), p*etition for cert. filed,* 76 U.S.L.W. 3226 (Oct 22, 2007) (No. 07-539).

[7] DOL Family Medical Leave Act of 1993 Final Rule, 60 Fed. Reg. 2,218 (Jan. 6, 1995)**.**

[8] *Id. at 2,218-2,219.*

fundamental way. Under the FMLA, there is no requirement that a worker file a charge with an agency, and, therefore, there is no possibility of an agency going forward once an employee has settled her claim. Thus, if the individual signs away her rights to review, there is no way to enforce the FMLA rights in the name of the public, allowing some employers to escape liability.

CONCLUSION

The enactment of the FMLA has been a major step toward valuing families and shared care giving responsibilities, but it is only a first step. Millions of Americans do not have access to the FMLA's protections, and millions more cannot afford to take advantage of them. Rather than curtailing the protections workers currently have under the FMLA, the Department of Labor should enforce and expand the FMLA to make it more accessible and more affordable to all working families.

We appreciate the opportunity to comment on the importance of the FMLA and hope that any new regulations implemented by the Department of Labor are consistent with constitutional principles and workers' civil rights.

Sincerely,

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