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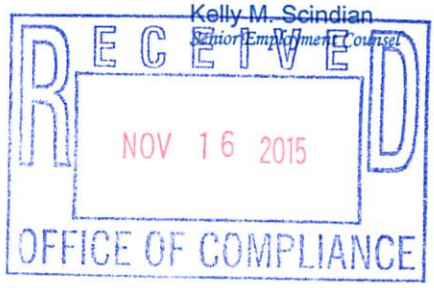


VIA HAND DELIVERY
Barbara Sapin, Esquire
Executive Director
Office of Compliance
110 Second Street, S.E. Room LA-200
Washington, D.C. 20540-1999

Re: Comments Regarding Proposed Rulemaking Regarding Modifications of Regulations Under the FMLA as Applied Under Section 202 of the Congressional Accountability Act

Dear Ms. Sapin:

Please accept these comments on behalf of the United States Capitol Police regarding the proposed rulemaking on modifications to the rights and protections under the Family and Medical Leave Act ("FMLA"). While the Notice of Proposed Rulemaking sets forth the basis for the proposed changes, we do not agree with the rationale provided in paragraph two under the heading "What Changes Do the Proposed Amendments Make?"

Specifically, we do not agree that "Congress failed to make clear its intent as to whether these additional rights apply to the legislative branch." We believe that Congress is presumed to know what it is doing when it makes changes to law and, as such, a change made in a substantive provision of the FMLA adopted under the CAA is necessarily a statutory change to the CAA. The same is not true for changes in proposed regulations under the FMLA which do not become effective under the CAA until the Board of Directors has proposed new rules and Congress through section 304 of the CAA has adopted them.

As a general matter, we note that both the Office of Compliance Board of Directors ("OOC Board") and the Capitol Police Board ("CPB") have concurrent jurisdiction regarding to FMLA regulations. While the OOC Board can promulgate regulations under 2 U.S.C. § 1312(d)(1), the CPB has authority under 2 U.S.C. § 1923 to prescribe leave regulations for the United States Capitol Police. It is suggested that the OOC Board work with the CPB to insure consistency in leave regulations governing the USCP.

Specific comments on proposed regulations are found below.

825.102 Definitions.

As a general matter, several of the definitions in Section 825.102 of the proposed regulations conflict with the statutory definitions of the FMLA found in 29 U.S.C. § 2611 and the CAA definitions found in 2 U.S.C. § 1312. Having different definitions causes confusion and, technically, the statutory definitions were approved by Congress when it passed the CAA and the FMLA. The following definitions are highlighted:

Eligible employee- the definitions of eligible employee in the proposed regulations is different than the statutory definition of "eligible employee" under 2 U.S.C. §1312(a)(2)(B).

Covered veteran- the definition in the proposed regulations is inconsistent with the definition in 2 U.S.C. §§ 2611(15) and (19); suggest deleting regulation definition.

Call to covered active duty- the regulatory definition expands the coverage of "covered active duty" and the regulation should not be used to expand coverage; suggest that if the Office of Compliance wants to expand coverage, it should seek a statutory correction to 2 U.S.C. 2611 or 2 U.S.C. §1312.

Covered service member- the regulatory definition is inconsistent with the definition in 2 U.S.C. § 2611(15); suggest deleting regulation definition.

Covered employee, employee, and employing office- the regulatory definition does not need to be included in the FMLA regulations as each of these definitions are covered already by the CAA in sections 2 U.S.C. §1301(3) through (10).

Employment benefits- the regulation is similar but not exactly the same as the statutory definition found in 2 U.S.C. § 2611(5); suggest deleting regulatory definition.

Health care provider- the definition has been changed to include "any other person determined by the *Department of Labor*" to be capable of providing health services. There are over 17,450 employees working at the Department of Labor and each person should not be a potential individual charged with an interpretation under this regulation; additionally, the regulation expands the definition beyond what Congress approved in 2 U.S.C. § 2611(6); suggest that the definition in 2 U.S.C. § 2611(6) be used.

Outpatient status- proposed regulation definition is different than statutory definition in 29 U.S.C. § 2611(16); suggest using statutory definition.

Serious health condition-sentences two and three are confusing. Sentence two provides that cosmetic treatments are not serious health conditions unless inpatient hospital care is required or "unless complications develop." The clause "unless complications develop" is unclear and should be deleted and replaced with "unless the complication leads to a serious health condition." Sentence three is unclear as to what is meant by "provided all the other

conditions of this regulation are met." It is not clear what "all the other conditions of this regulation" is referencing.

Serious injury or illness- the proposed regulation uses definition terms such as "current member" of the Armed forces when the correct definition under "covered servicemember" is "a member of the Armed Forces" and "covered veteran" when the definition under "covered servicemember" is a veteran"; suggest using the definition terms as specifically stated in 2 U.S.C. § 2611(18).

Spouse- definition is inconsistent with statutory definition and DOL FMLA regulation; statutory definition means "husband or wife, as the case may be." The DOL definition better defines "spouse" to include a more complete definition to include "marriage as defined or recognized under state law" and should include "or federal law" to include Supreme Court decision in *Obergefell v. Hodges*.

825.104 Covered employing offices.

Suggest regulation is not needed as Congress has already defined covered employing offices under 2 U.S.C. §1312(a)(2)(A). Section 825.104(c) expands the definition Congress passed in 2 U.S.C. § 1312(a)(2)(A) and, therefore, the Office of Compliance expansion or restriction of the statutory definition is *ultra vires*.

825.110 Eligible employees.

Suggest regulation is inconsistent with 2 U.S.C. § 1312(A)(2)(B) which statutorily defines "eligible employees." The Office of Compliance expansion or restriction of the statutory definition is *ultra vires* and, accordingly, the regulations should not be adopted.

825.112 Qualifying reasons for leave.

825.112(5) is not clear. Under 29 U.S.C. § 2612, "any qualifying exigency (as the Secretary shall, by regulation, determine)" places a limitation on "any qualifying exigency." The proposed regulation does not place any limitation and is vague as to what is "any qualifying exigency." Suggest that the Office of Compliance clearly define what is meant by "any qualifying exigency."

825.114 Inpatient Care.

Proposed regulation covers overnight stays in hospital, hospice, or residential medical care facility and any subsequent treatment of inpatient care which can be verified by a third party, however, the regulation also includes "period of incapacity" defined as "inability to work" without any independent medical verification. Suggest adding after "period of incapacity as defined in § 825.113(b)" the following "as verified by a medical certification in accordance with §825.305."

825.125 and 825.127 Needed to care for a covered servicemember; Leave to care for a covered servicemember.

See comments above under 825.102 for definitions.

825.202 Intermittent leave or reduced leave schedule.
825.203 Scheduling of intermittent or reduced schedule leave.

As written, this regulation does not provide guidance to scheduling an employee's work assignment. Unlike offices that have employees behind desks, the USCP has officers at designated posts for coverage. An employee who has approval to take intermittent leave has no restrictions placed on them as to providing adequate notice for scheduling requirements. An employing office then has no options other than to release the employee.

As written, the proposed regulation does not provide adequate guidance to employing offices. For example although 825.202(b) permits for intermittent leave where there is a "medical necessity," the regulation also discusses taking leave "to provide care or psychological comfort to a covered family member with a serious health condition." Thus, it places an employing office in the untenable position of determining whether there is a justification for care for a family member or not. It will be helpful to provide guidance and parameters for use of FMLA intermittent leave that assists both the employee and the employing office.

In a law enforcement organization, officers are required to cover posts and work additional duty as necessary. However, there have been circumstances where an officer does not desire to work additional duty and states they need to take leave "to provide comfort to a family member with a serious health condition." As written, the regulation does not provide guidance as to how an employing office can address the situation where the employee has not given any notification and a decision must immediately be made as to whether to close the post because of the employee's unexpected absence. Proposed regulation 825.203 dealing with scheduling intermittent leave does not assist in explaining each of the circumstances outlined in proposed regulation 825.202. Rather, proposed regulation 825.203 addresses only those circumstances of scheduling intermittent leave "when medically necessary" or "because of a qualifying exigency." That proposed regulation also leaves it up to the employee to "make a "reasonable effort" to "schedule the treatment." Suggest that 825.203 be rewritten to address each of the circumstances proposed in regulation 825.202 and to provide objective specific notice requirements an employee must provide to an employing office. It is also suggested that proposed regulation 825.203 be written to take into consideration each of the factors enumerated in proposed regulation 825.303 and, particularly, 825.303(c) dealing with "Complying with Employing Office Policy." In the alternative and, at a minimum, proposed regulation 825.203 should have an applicable time period of twenty-four (24) hours' notice, absent exceptional circumstances, to avoid situations where an employee attempts to use intermittent leave to avoid working

additional duty and then placing supervisors in the unnecessary position of questioning the need for the leave and staffing the post.

Under 825.202(d), qualifying exigency should be specifically defined as discussed in 825.112, above.

825.207 Substitution of paid leave.

Under proposed regulation 825.207(b), the phrase, "will remain entitled to all the paid leave which is earned or accrued" is not clear when an employee takes unpaid leave. Many employing office policies do not permit paid leave to be earned or accrued when an employee takes unpaid leave. Accordingly, it is suggested that the following language be added to 825.207(a):

> If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will accrue leave in accordance with the employing offices stated policies.

Under proposed regulation 825.207(f), the payment of compensatory time is not clear. While under the FLSA, employing offices pay compensatory time or require the employee to use the time, employing offices also provide compensatory time that is not FLSA compensatory time. Therefore, to be clear, proposed regulation 825.207(f) should state "FLSA" prior to each reference to FLSA compensatory time.

Section 825.220 Protections for employees who request leave or otherwise assert FMLA rights.

Proposed regulation 825.220(a) is confusing and not consistent with 29 U.S.C. 2615 of the FMLA as adopted by the CAA. Specifically, it is not clear whether the provision affords a covered employee greater rights than is provided under 29 U.S.C. § 2615 made applicable by the CAA. Moreover, proposed regulation 825.220(a)(1), (2), and (3) merely restate what is already provided in law under 29 U.S.C § 2615 made applicable under the CAA. In order to avoid confusion, it is suggested that propped regulation 825.220(a)(1), (2), and (3) be deleted as unnecessary and duplicative of what is already provided in law. Moreover, proposed regulation 825.220(2) adds more than what the law provides by including "complaining about" as a separate cause of action not found in the CAA.

Proposed regulation 825.220(b) should be deleted as it is inconsistent with section 225(d)(1) of the CAA. 2 U.S.C. § 1361(d)(1). Proposed regulation 825.220(b) seeks to make applicable additional causes of action under "these regulations" that Congress did not adopt in the FMLA made applicable by the CAA. Accordingly, the proposed regulations cannot expand the scope of rights provided as a matter of law under the FMLA and the CAA. Moreover, sentence two of the proposed regulation is inconsistent with law and seeks to expand the coverage provided under the CAA in section 202(b). 2 U.S.C. § 1312(b). Sentence four likewise expands the rights of a covered employee. The FMLA speaks of interference not

"manipulation." Moreover, the examples provided could be justified by a legitimate business reason which is not explained in the examples. For each of these reasons, proposed regulation 825.220(b) should be deleted entirely.

Proposed regulation 825.220(d), sentences four and five are unclear. An employee's acceptance of a light duty assignment or right to restoration beyond the twelve (12) month FMLA leave year may be terms that the parties agree to in accordance with a valid and approved FMLA settlement agreement under the CAA. Accordingly, these terms should not be restricted in considering prospective rights in a settlement of an FMLA claim.

Proposed regulation 825.220(e) does not make sense under the CAA. Only covered employees and employees defined under section 101(3) and (4) of the CAA are covered. 2 U.S.C. §§ 1301 (3) and (4). Thus, it is unclear what "individuals" are being referenced in proposed regulation 825.220(e). It is suggested that proposed regulation 825.220(e) be deleted.

Section 825.307 Authentication and clarification.

Proposed regulation 825.307 is not clear regarding clarification and authentication. Proposed regulation 825.307(a) requires an employer to first speak with the employee regarding clarification *before* it may directly contact the health care provider. This may be problematic for two reasons. First, there exists a potential communication gap between the information needed by the employing office and the information that is communicated to the health care provider which can be overcome by direct communication with the health care provider about the clarification information. Second, if the employer suspects that the employee filled out the form and the health care provider simply signed it, it is improper to allow an employee who has possibly furnished a fraudulent certification to have an opportunity to "cure" this defect. It is suggested that the opportunity to "cure" set forth in 825.305(c) be deleted as it makes little sense to have the employee serve as the go-between to address these issues.

Proposed regulation 825.307(a), is vague in authorizing the employer to contact the health care provider on clarification questions (but not, apparently, on questions of authenticity). If the employee does not provide such authorization and "does not otherwise clarify the certification" the employer may deny FMLA leave. It is suggested that the regulation permit the employee to provide advanced authorization to the employing office so that the employing office can contact the healthcare provider for clarification or authentication purposes. The proposed regulation creates more confusion than guidance to employing offices and employees regarding the authenticity and clarification of FMLA requests.

Section 825.308 Recertifications.

Proposed regulation 825.308(e), like the current regulation, permits the employer to provide the healthcare provider with "a record of the employee's absence pattern" at the time of recertification. Suggest that regulation be made clear that the employing office may provide this information directly to the health care provider.

Section 825.312 Fitness for duty certification.

Fitness for duty certification is necessary to insure that a police officer can perform the essential functions of the position and return to work at any point in their career. Proposed regulation 825.312(b) limits the ability of the USCP to seek fitness for duty certifications at any time it deems necessary. It would be negligent supervision to preclude a fitness for duty examination of a police officer carrying a gun because the FMLA regulations limit the ability to conduct the fitness for duty at certain times. It is strongly suggested that language be placed in proposed regulation 825.312(i) that permits the USCP to conduct fitness for duty certifications at any time it deems a police officer may not be able to perform the essential functions of the position and it is not considered retaliation for the USCP to send an employee for a fitness for duty certification at any time it believes an issue exists with the essential functions of the position.

Proposed regulation 825.312(e) allows an employer to "delay" an employee's return to work from FMLA leave if the employee has not provided, upon the employer's proper request, a fitness for duty certification. The regulation does not address what leave status an employing office may carry an employee who has not provided the certification requested. It is suggested that the regulation permit an employing office to carry an employee in an absent without approved leave (AWOL) status or the employee may use approved annual leave until the certification is provided. It is also suggested that the regulation provide a time limit for the employee to act on the fitness for duty certification, that is, within 15 days of requesting the certification.

Section 825.313 Failure to provide certification.

To be consistent with proposed regulation 825.312, proposed regulation 825.312(e) should provide some length of time for an employee to provide the fitness-for-duty certification. Proposed regulation 825.313(d) expressly provides that "unless the employee provides . . . a fitness-for-duty certification . . . *at the time FMLA leave is concluded,* the employee may be terminated" (emphasis added). By building in a grace period as suggested in proposed regulation 825.312, the step between expiration of FMLA and termination will be bridged.

Section 825.400 Enforcement of FMLA rights, as made applicable by the CAA.

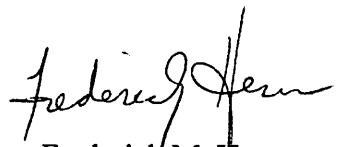
It is suggested that proposed regulation 825.400 be deleted in its entirety. The CAA specifically addresses the steps necessary to commence a proceeding and the proper procedures to be followed. Accordingly, the proposed regulation is duplicative of what is already provided as a matter of law by the CAA. Additionally, proposed regulation 825.400(c) is not appropriate in this section as those procedures do not govern "enforcement of FMLA rights." Moreover, those procedures made applicable to FMLA specifically are not spelled out in the regulations to understand their consequences to FMLA. Additionally, citation to a web site does not assist in

determining what procedures may have been approved by Congress with regard to the FMLA. Accordingly, it is suggested that proposed regulation 825.400(c) be deleted.

Section 825.700 Interaction with employing office's policies.

Proposed regulation 825.700(a) limits an employing office's ability to change its policies. If the employing office previously provided a policy with greater employment benefits to an employee and can no longer afford it, the regulation impermissibly requires that employing office to continue with that employment benefit program. The proposed regulation should not limit management's right to determine its policies.

Respectfully,



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