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2007

# Introduction

Workplace Flexibility 2010, Georgetown University Law Center

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## INTRODUCTION

On December 1, 2006, the Department of Labor (“DOL”) issued a Request for Information (“RFI”) seeking public comments on the Family and Medical Leave Act (“FMLA”).<sup>1</sup> The RFI was divided into three sections. Part I provided a summary and background of the FMLA, existing DOL regulations, legal challenges, and related issues. Part II described twelve specific topics about which the DOL sought comment. Part III discussed a 2000 Westat Report that estimated the number of employees and employers covered under the FMLA and the number of employees who used the FMLA. According to the DOL, over 15,000 comments were submitted in response to the RFI.<sup>2</sup>

The DOL summarized the comments that it received in response to the RFI in a report issued on June 27, 2007 titled, *Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information* (“DOL Report”).<sup>3</sup>

As part of its analysis of the extent to which workplace flexibility is available under current law, WF2010 undertook a detailed review of approximately 575 of the comments received in response to the RFI. Pursuant to this review, WF2010 prepared twelve *Comment Review Memoranda* corresponding to the topic areas referenced in Part II of the RFI. Each memorandum – Topics A through L - addresses a different substantive topic about which the RFI sought comments by:

- summarizing the relevant law governing the topic, the information sought by the DOL, the public comments submitted by employers, employees and

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<sup>1</sup> Dep’t of Labor Request for Info. on the Family and Med. Leave Act of 1993, 71 Fed. Reg. 69504-02 (Dec. 1, 2006). The FMLA gives the Secretary of Labor the responsibility to issue regulations for its implementation. 29 U.S.C. § 2654. The final DOL regulations were published on January 6, 1995. 29 C.F.R. Part 825 (1995). Technical corrections were subsequently published on February 3, 1995 (60 Fed. Reg. 6658-01) and March 30, 1995 (60 Fed. Reg. 16382-02). The regulations became effective on April 6, 1995. No changes have been made to the regulations by the DOL since then.

<sup>2</sup> News Release, Employment Standards Admin., Report on FMLA Request for Information Issued by U.S. Department of Labor (June. 27, 2007), <http://www.dol.gov/opa/media/press/esa/ESA20070909.htm>.

<sup>3</sup> The report was published on the DOL’s website on June 27, 2007, but did not appear in the Federal Register until the next day. See Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35550 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>. The DOL report “summarizes the issues raised in the comments received” in an effort to “further the discussion of these important issues.” Dep’t of Labor, *The Family and Medical Leave Act: A Report on the Request for Information* (2007), <http://www.dol.gov/esa/whd/fmla2007report.htm>; Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request For Information, 72 Fed. Reg. at 35556.

groups representing both employers and employees,<sup>4</sup> including recommended changes to the regulations or next steps for the DOL to take;<sup>5</sup>

- providing a chart that includes excerpts of any relevant statutory and regulatory provisions; and
- listing sources referred to in the comments to the RFI.

The *Comment Review Memoranda* about Topics A through L may be downloaded from WF2010's website, at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

The *DOL Report* addresses many of the issues about which the DOL originally sought comment in the RFI. For those wishing to cross-reference the issues discussed in the report with WF2010's *Comment Review Memoranda*, their correspondence is explained below.

- RFI Topic A -- Definition of an "Eligible Employee" -- is primarily discussed in Chapter X of the DOL Report.
- RFI Topic B -- Definition of "Serious Health Condition" -- is primarily discussed in Chapter III of the DOL Report.
- RFI Topic C -- Definition of a "Day" -- is not discussed in depth in the DOL Report.
- RFI Topic D -- Substitution of Paid Leave -- is primarily discussed in Chapter IX of the DOL Report.
- RFI Topic E -- Attendance Policies -- is partially discussed in Chapter IV of the DOL Report.
- RFI Topic F -- Different Types of FMLA Leave -- is primarily discussed in Chapters IV and XI of the DOL Report.
- RFI Topic G -- Light Duty -- is primarily discussed in Chapters VII and VIII of the DOL Report.
- RFI Topic H -- Essential Functions -- is primarily discussed in Chapters VII and VIII of the DOL Report.
- RFI Topic I -- Waiver of Rights-- is not discussed in depth in the DOL Report.

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<sup>4</sup> In the twelve memoranda, the term "employees" refers to both employees and employee organizations, unless otherwise noted. Likewise, the term "employers" refers to both employers and employer organizations, unless otherwise noted.

<sup>5</sup> WF2010's materials reflect all comments that were available on regulations.gov and via an internet search as of May 8, 2007. Some of the comments that WF2010 reviewed after retrieval via the internet have not yet been posted on *regulations.gov*.

- RFI Topic J -- Communications Between Employers and Their Employees -- is primarily discussed in Chapter V of the DOL Report.
- RFI Topic K -- FMLA Leave Determinations / Medical Certifications -- is primarily discussed in Chapter VI of the DOL Report.
- RFI Topic L -- Employee Turnover and Retention -- is primarily discussed in Chapter VI of the DOL Report.

WF2010 also drafted a *Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act* ("Digest"). The *Digest* contains a summary of all comments available as of May 8, 2007, including both those comments available on *regulations.gov* and on the internet. The *Digest* provides the following information about each comment: the commenter's name, viewpoint, topic(s) discussed, specific comments made, and any additional relevant information about the commenter or comment. For more information about a particular type of comment described in Memoranda A through L, please consult the *Digest*. The *Digest* may be downloaded from WF2010's website at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

We hope that the *Comment Review Memoranda* and the *Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act* will be useful to those seeking to understand the views expressed by both employers and employees in response to the RFI.