National Business Group on Health®

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Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow

Employers Are Concerned about Inappropriate Use and Administrative Difficulties with Family and Medical Leave Act (FMLA)

Issue: The FMLA, enacted in 1993, guarantees that people who work for companies with more than 50 employees can take up to 12 weeks of job protected, unpaid leave per year under certain circumstances. These instances include caring for a newborn or newly adopted child, caring for seriously ill family members, or recovering from one's own serious health condition. FMLA can pose administrative burdens for employers (e.g. recordkeeping, coordination with other laws, etc.).

The DoL extended FMLA rights to same-sex spouses nationally, regardless of whether the states where they reside recognize same-sex marriages. The DoL also issued final regulations clarifying rules for calculating intermittent or reduced schedule FMLA leave and extending military caregiver leave.

Congress is also considering two paid FMLA expansion bills. One bill would impose a 0.2% excise tax paid by every employer plus 0.2% paid by every employee (0.4% total of annual wages) and 0.4% on all self-employment income to establish a new federal office that would provide payments for FMLA leave. Another bill would allow employers with 50 or more employees to receive a business-related tax credit for up to 25% of the amount of wages paid to their employees (a maximum of $3,000 per employee for the taxable year) during any period (not exceeding 12 weeks) when employees are on FMLA leave.

California, Connecticut, Washington, D.C., Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin have passed laws that either expanded the amount of family leave available or the people eligible for it. A number of states also permit victims of domestic violence to take job-protected leave.

California, New Jersey, New York and Rhode Island, offer paid family and medical leave. These states fund their programs through employee-paid payroll taxes and administer it through their disability programs. Additionally, San Francisco requires employers to wrap around California's paid family leave law requiring employers to pay the remaining portion of their wages for up to 6 weeks.

Position: The National Business Group on Health representing approximately 422, primarily large, employers (including 72 of the Fortune 100) who voluntarily provide generous health benefits and other health programs to over 55 million American employees, retirees, and their families recognizes the importance of family-friendly benefits and the need for unpaid leave for the birth or adoption of a child and for serious personal or family medical conditions. Our members offer generous benefit and leave programs. Employees generally have multiple options for leave—paid and unpaid. In many cases, employees may use accrued paid leave and FMLA simultaneously. The Business Group does not support mandated paid parental or FMLA leave.

The Business Group supports appropriate use of FMLA. However, many employers are experiencing dramatic increases in employee requests for FMLA leave, often for brief periods

and non-serious medical conditions, and substantial burdens administering FMLA. The Business Group supports the following clarifications and technical corrections to FMLA to help assure appropriate use and minimize the administrative burden and adverse impacts on employees' productivity.

The Business Group's FMLA concerns, in order of priority, include:

Clarifying the qualifying conditions for FMLA eligibility pertaining to employees' requests for leave due to their own health condition by adding an inability to work test to qualify for FMLA

- This clarification would alleviate the problem of inappropriate use of FMLA since it would help assure that employees requesting leave for their medical condition rather than to care for a family member would be required to provide a notice of their inability to work.

Clarifying the definition of qualifying conditions and exclusions eligible for FMLA by specifying additional conditions that would generally qualify and conditions that would not generally qualify for FMLA

- This clarification would reduce the use of FMLA leave for minor conditions in which treatment and recovery are brief. DoL should provide specific examples of conditions that would qualify for FMLA leave and those that would not. For example, DoL should exclude colds, minor headaches, flu, etc.

As a fallback to the two clarifications above, requiring mandatory inclusion of the diagnosis code or codes on the medical certification provided by the employee and attending physician to the employer

- This clarification would also help reduce inappropriate use of FMLA leave for brief and non-serious health conditions. Employers would guarantee the confidentiality of this information.

Establishing a minimum leave time of not less than a half-day

- This change would reduce the administrative burden, workplace disruption, and inappropriate use of FMLA. It would also address the common situation where employees are able to work their full scheduled shift, but claim FMLA protection at the last minute when required overtime is scheduled. It would also enable employers to treat exempt and non-exempt employees consistently under the pay policy of the Fair Labor Standards Act.

Permitting employers to require employees who request intermittent leave to choose between extended FMLA leave or a leave of absence if the employer cannot reasonably accommodate the request

- Current law does not require that employees schedule intermittent leave in a way that does not disrupt the employers' operations. In some cases, including employment that requires scheduling of employees well in advance, such as the transportation industry and assembly line manufacturing operations, employers cannot "reasonably accommodate" these requests. This change would accommodate both the employees' need for leave and minimize the disruption to the employers' operations and fellow employees.

Permitting employers to contact providers to confirm information provided by employees

- Currently employers do not schedule second opinion evaluations until after employees' health has recovered. Allowing employers a meaningful way to verify or clarify information, with the treating health care provider's office, while maintaining confidentiality as required by law, will reduce inappropriate use of FMLA leave.

Maintaining the employer option of permitting employees to use accrued paid leave and FMLA simultaneously

- This policy, which is the current law, protects employees' incomes during periods of serious illness and maximizes the flexibility in the design of employer leave policies.

Permitting employers to exclude employees taking FMLA qualifying absences from employee bonus and recognition programs for attendance

- Current regulatory interpretations stop employers from counting FMLA leave as an absence from work for the purpose of attendance recognition and bonus programs. The unintended consequence for employees is that many employers have dropped these programs because of the negative impact of recognizing employees who have not missed any work alongside employees who may have taken up to 12 weeks of FMLA leave. This change would help employers use these programs once again as a means of rewarding employees' attendance.

Clarification and Modification of the FMLA is Urgently Needed Because:

Employers Are Experiencing a Dramatic Increase in Requests for FMLA Leave, Often for Short Periods or Minor Conditions. Some Examples from NBGH Employers Are Listed Below

- Some employers report that up to 25% of their employees take FMLA leave each year.
- One employer stated that employees often use FMLA leave for headaches, sinusitis, colds, flu, tooth extractions and other minor illnesses for which recovery is brief.
- Another employer cited cases where employees' with denied requests subsequently file for FMLA leave for stress.
- In other cases, employees' requested FMLA leave without any medical condition, serious or minor. For example, an employee requests FMLA leave because their acupuncturist wants to observe their response to treatment for a long period.

The Administrative Requirements for FMLA Are Burdensome

- A minimum leave period of at least a half day would alleviate the paperwork and workplace disruption involved with requests for frequent, very short FMLA leave.
- Although employers may request a second medical opinion prior to granting FMLA leave, employees often schedule it too late for it to be of any use. Policymakers should amend the FMLA to permit employers to contact providers to confirm the presence of serious conditions (where recovery is not expected to be brief) without discussing details of the medical condition.

- Coordination with disability leave is complicated because guidelines for implementing FMLA leave are not as strict as disability leave. For example, while some conditions may qualify for FMLA, they do not qualify for disability leave. Clarifying the definition of qualifying serious medical conditions will facilitate coordination with disability leave.