

Statement of Senator Judd Gregg on the Introduction of the Family Medical Leave Clarification Act

February 5, 2003

Mr. President, the Family and Medical Leave Act was intended to be used by families for critical periods such as after the birth or adoption of a child and leave to care for a child, spouse, or one's own "serious medical condition."

Since its passage, the Family and Medical Leave Act has had a significant impact on employers' leave practices and policies. According to the Commission on Family and Medical Leave, two-thirds of covered work sites have changed some aspect of their policies in order to comply with the Act.

Unfortunately, the Department of Labor's implementation of certain provisions of the Act has resulted in significant unintended administrative burden and costs on employers; resentment by co-workers when the Act is misapplied; invasions of privacy by requiring employers to ask deeply personal questions about employees and family members when employees plan to take FMLA leave; disruptions to the workplace due to increased unscheduled and unplanned absences; unnecessary record keeping; unworkable notice requirements; and conflicts with existing policies. These problems have been well documented in six separate congressional hearings, including one I chaired and a House hearing where I testified.

Problems with the FMLA implementation have been documented in the courts. The validity of 13 different Department of Labor regulations relating to the Act has been challenged in 64 reported court decisions. Included in this, of course, is the Supreme Court's invalidation of one of the Department's regulations in the 2002 case of *Ragsdale v. Wolverine Worldwide Inc.* And, yesterday's Washington Post reported that there have been some 1,300 federal cases dealing with various aspects of the law, according to the Department of Labor. I ask that a copy of this February 4, 2003 article, entitled "Businesses Sore About Medical Leave," be included in the record following my remarks.

The Department of Labor's vague and confusing implementing regulations and interpretations have resulted in the FMLA being misapplied, misunderstood and mistakenly ignored. Employers aren't sure if situations like pink eye, ingrown toenails and even the common cold will be considered by the regulators and the courts to be serious health conditions. Because of these concerns and well-documented problems with the Act, today I am introducing the Family and Medical Leave Clarification Act to make reasonable and much needed technical corrections to the Family and Medical Leave Act and restore it to its original congressional intent.

The need for FMLA technical corrections has been confirmed and strengthened by six congressional hearings and by the recent release of key surveys. Conclusive evidence of the need for corrections has now been established. The Congressional hearings demonstrated that the FMLA's definition of serious health condition is vague and overly broad due to the Department of Labor's interpretations. Additionally, the hearings documented that the intermittent leave provisions, notification, and certification problems are causing many serious workplace problems. In addition, some companies testified that Congress should consider allowing employers to permit employees to take either a paid leave package under an existing collective bargaining agreement or the 12 weeks of FMLA protected leave, whichever is greater.

I am concerned that a recent decrease in paid leave for employees has been attributed to the Administration's problematic FMLA interpretations. Some research shows a decline in voluntarily provided paid sick leave and vacation leave by the private sector. The 2000 Society for Human Resource Management Benefits Survey found that paid vacation was provided by 87 percent of companies in the year 2000 while the year before it was 94 percent. Paid sick leave was at 85 percent in 1999, and decreased to 74 percent the following year.

A recent survey conducted by former President Clinton's Department of Labor confirmed FMLA implementation problems. The Labor Department report found that the share of covered establishments reporting that it was somewhat or very easy to comply with the FMLA has

declined 21.5 percent from 1995 to 2000.

The recent release of the Society for Human Resource Management (SHRM) 2003 FMLA Survey strongly reinforces the need for FMLA technical corrections. Respondents to the SHRM survey stated that, on average, more than half – or 52% – of employees who take FMLA leave do not schedule the leave in advance. Consequently, managers often do not have the ability to plan for work disruptions. Yesterday’s Washington Post article reported that the biggest thing the Department of Labor hears about is the “chronic use of unforeseen, intermittent leave.” Respondents to the SHRM survey also reported that, in most cases, the burden of the workload from the employee on leave falls to employees who are not on leave. When asked whether they have had to grant FMLA requests they felt were not legitimate, 50 percent said they had. Additionally, more than one-third, or 34 percent, of respondents said they were aware of employee complaints over the past year regarding a co-worker’s questionable use of FMLA leave.

The issue of intermittent leave also continues to be extremely difficult. SHRM’s 2000 FMLA survey showed that three-quarters – or 76 percent – of respondents said they would find compliance easier if the Department of Labor allowed FMLA leave to be offered and tracked in half-day increments rather than by minutes.

I am very concerned that both the SHRM and the Labor Department surveys show that FMLA implementation is becoming more difficult, not easier, ten years after it has been in place. I am hopeful that the Family and Medical Leave Clarification Act will advance in the 108th Congress on a bipartisan basis to address this problem.

The FMLA Clarification Act has the strong support of the Society for Human Resource Management, the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Society of Healthcare Human Resources Professionals, and close to 300 other leading companies and associations that make up the Family and Medical Leave Act Technical Corrections Coalition. This broad-based coalition shares my belief that both employers and

employees would benefit from making certain technical corrections to the FMLA – corrections that are needed to restore congressional intent and to reduce administrative and compliance problems experienced by employers who are making a good faith effort to comply with the Act.

The bill I am introducing today does several important things:

First, it repeals the Department of Labor's current regulations for “serious health condition” and includes language from the Democrats' own original Committee Report on what types of medical conditions, such as heart attacks, strokes, spinal injuries, etc., were intended to be covered. In passing the FMLA, Congress stated that the term “serious health condition” is not intended to cover short-term conditions, for which treatment and recovery are very brief, recognizing that “it is expected that such condition will fall within the most modest sick leave policies.”

On the other hand, the Department of Labor's current regulations are extremely confusing and expansive, defining the term “serious health condition” as including, among other things, any absence of more than 3 days in which the employee sees any health care provider and receives any type of continuing treatment, including a second doctor's visit, or a prescription, or a referral to a physical therapist. Such a broad definition potentially mandates FMLA leave where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve. The regulations also define as a “serious health condition” any absence for a chronic health problem, such as arthritis, asthma, diabetes, etc., even if the employee does not see a doctor for that absence and is absent for less than three days.

Second, the bill amends the Act's provisions relating to intermittent leave to allow employers to require that intermittent leave be taken in minimum blocks of 4 hours. This would minimize the misuse of FMLA by employees who use FMLA as an excuse for regular tardiness and routine justification for early departures.

Third, the bill shifts to the employee the responsibility to request that leave be designated as FMLA leave, and requires the employee to provide written application within 5 working days of providing notice to the employer for foreseeable leave.

With respect to unforeseeable leave, the bill requires the employee to provide, at a minimum, oral notification of the need for the leave not later than the date the leave commences unless the employee is physically or mentally incapable of providing notice or submitting the application. Under that circumstance the employee is provided such additional time as necessary to provide notice.

Shifting the burden to the employee to request that leave be designated as FMLA leave eliminates the need for the employer to question the employee and pry into the employee's and the employee's family's private matters, as required under current law, and helps eliminate personal liability for employer supervisors who should not be expected to be experts in the vague and complex regulations which even attorneys have a difficult time understanding.

Under current law, it is the employer's responsibility in all circumstances to designate leave, paid or unpaid, as FMLA-qualifying. Failure to do so in a timely manner or to inform an employee that a specific event does not qualify as FMLA leave may result in that unqualified leave becoming qualified leave under FMLA. This scenario has actually been upheld in Court and has placed an enormous burden on employers to respond within 48 hours of an employee's leave request. In addition, the courts have held that there is personal liability for employers under the FMLA and that an individual manager may be sued and held individually liable for acts taken based upon or relating to the FMLA. For example, in the 1995 case of *Freemon v. Foley*, in the Northern District of Illinois, the court stated, "We believe the FMLA extends to all those who controlled 'in whole or in part' [plaintiff's] ability to take leave of absence and return to her position."

Fourth, with respect to leave because of the employee's own serious health condition, the

bill permits an employer to require the employee to choose between taking unpaid leave provided by the FMLA or paid absence under an employer's collective bargaining agreement or other sick leave, sick pay, or disability plan, program, or policy of the employer. This change provides incentive for employers to continue their generous sick leave policies while providing a disincentive to employers considering getting rid of such employee-friendly plans, including those negotiated by the employer and the employee's union representative. Paid leave would be subject to the employer's normal work rules and procedures for taking such leave, including work rules and procedures dealing with attendance requirements.

The FMLA Clarification Act is a reasonable response to the concerns that have been raised about the Act. It leaves in place the fundamental protections of the law while attempting to make changes necessary to restore FMLA to its original intent and to respond to the very legitimate concerns that have been raised. I urge my colleagues to restore the FMLA to its original Congressional intent.

I ask that the text of the bill be printed in the RECORD.