International Association of Machinists and Aerospace Workers

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OFFICE OF THE INTERNATIONAL PRESIDENT

February 15, 2007

Richard M. Brennan, Senior Regulatory Officer
Wage and Hour Division, Employment Standards Administration
U.S. Department of Labor, Room S-3502
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Dear Mr. Brennan,

The International Association of Machinists and Aerospace Workers ("IAM"), represents nearly three quarters of a million working and retired Americans in industries such as manufacturing, transportation, aerospace, woodworking, the federal government and more. We have long supported the Family and Medical Leave Act ("FMLA") and write today to express our continued support of this important legislation. **The IAM strongly opposes changes that would curtail existing rights under the FMLA, and we support regulations that will ensure workers can take full advantage of their FMLA protections.**

The FMLA has been largely successful at helping IAM-represented employees take care of their family's and their own health while at the same time ensuring they can remain productive employees. Unfortunately, as helpful as the FMLA has been, it has not gone far enough. IAM members often have a difficult time securing leave from their employers. Employers impose complicated paperwork requirements that even the doctors do not understand, frustrating the entire purpose behind the Act. Often times employers make FMLA rules so complicated and convoluted that our members cannot figure out what needs to be done to get leave or whether they are entitled to any leave. We need the Department of Labor to help protect the rights of all workers and to expand the regulations to ensure our nation's families are fully protected.

In addition to the concerns addressed below, the IAM has also joined with Transportation Communications International Union, the Transport Workers Union and the United Transportation Union to address a serious FMLA issue involving our rail members. That issue is in litigation (see, Brotherhood of Maintenance of Way Employees v. CSX Trasp. Inc., No. 03 C 9419, 2005 WL 3597700 (N.D. Ill. Dec. 28, 2005)) and is currently pending in the Seventh Circuit Court of Appeals. The IAM, as an affiliate of the AFL-CIO, also joins in their comments filed with the Department of Labor, as well as the comments submitted by Working America.

Key Issues of Concern

Leave Flexibility

The current regulations addressing leave flexibility, including regulations on intermittent leave, appropriately balance workers' need for flexibility and employers' interest in having adequate staff to cover their workplace needs. Leave flexibility not only benefits workers; it also benefits employers by maximizing workers' ability to meet workplace demands in the face of family and health challenges.

Intermittent leave insures that employees who are able to can work in between their struggles with their or their family member's serious medical condition. Often employees with chronic conditions like ulcerative colitis, diabetes, migraines, or seizures, are unaware when their flare ups will occur. These employees may need a few hours or a few days when the flare up takes place but then are able to return as a productive member of the work force. Even employees who need to endure certain medical treatments, like dialysis or chemotherapy, are able to work for days or weeks at a time, but may be required to be off work on an intermittent basis. Many serious health conditions do not require an extended continuous absence from work and the FMLA and its regulations were designed with this in mind. Intermittent leave is a staple to ensuring the Act works as intended by protecting the employee's need for a short period of leave while ensuring that employers retain the benefits of that experienced employee.

Further, intermittent leave should continue to be eligible for periods of less than a day or even less than a half day. Often employees need to be excused from work only for an hour or even less to receive medical treatment or as a result of a serious medical condition. If an employee is able to be a productive member of the company's workforce for 7 or 7.5 hours in the day, it is counter-productive to all involved to require that employee to take a half day leave. The Company loses 3-3.5 hours that employee could have been working and similarly the employee loses time he/she could be earning income.

In addition, the current regulations allowing for the substitution of paid leave for FMLA leave are essential to workers' ability to exercise their rights under the law. Permitting workers to use their accrued paid leave as wage replacement during FMLA leave makes it possible for them to afford to take time off to address critical family and medical issues. If anything, these regulations need to be strengthened.

Communication Between Employers and Employees

The Department of Labor should require employers to take steps to provide workers with adequate information regarding their rights and responsibilities under the FMLA. Particularly, employees should be expressly notified of their right to take intermittent leave. Given that the Supreme Court has recognized that the failure to give an employee notice of her right to take intermittent leave could deny, restrain or interfere with FMLA rights, the DOL should include such notice as a requirement. This has proven a

real problem for some of our members. We are aware of at least one case in Federal Court regarding this matter. An employee who suffers from a condition that is still being diagnosed, but doctors believe it is either lupus, a connective tissue disorder or rheumatoid arthritis, arrived late to work due to her condition on a number of occasions. This employee was completely unaware that she could take FMLA leave on an intermittent basis. She thought if she took any FMLA leave, she would have to stop working altogether, something her illness did not necessitate and something she could not afford to do. Rather than advising her of her right to take intermittent leave on these occasions, as is clearly contemplated by the FMLA, the employer terminated her for excessive tardiness. The case is presently pending in U.S. District Court of Maine. Brown v. Eastern Maine Medical Center, CA 06-60-DBH.

Employers also should be required to promptly inform workers when they are using their FMLA leave, and to provide copies of FMLA leave balances. Employers should be prohibited from requiring employees to keep track of their own FMLA leave. One employer with employees we represent warns employees that the employees themselves are responsible for ensuring the employees have adequate FMLA time to cover their absence and if the employee counted wrong, or misunderstood what the employer was counting as FMLA time, the employee could be terminated. This is particularly troublesome since so many employers make it so difficult for employees to be approved for FMLA leave, the employee may easily be confused as to which days are counted as FMLA leave and which are not.

Further, the employer needs to notify the employees, not just of their entitlement to FMLA leave, but of any rules regarding re-certification. We represent an employee who was certified for FMLA leave for her migraine headaches. When a new calendar year started, the employer required employees to become re-certified. However, this employee was unaware of this requirement and therefore failed to re-certify. Thus, when she took what she thought was FMLA leave, she was charged with leave occurrences.

The current FMLA regulations properly prohibit employers from counting FMLA leave against an employee in employee benefit programs, including attendance awards. The regulations appropriately recognize that workers should not be penalized for exercising their FMLA rights. Nevertheless, employers are still attempting to penalize employees for using FMLA leave. The DOL needs to strengthen the regulations protecting employees use of FMLA leave. For example, one employer advises IAM-represented employees that they are not eligible for "perfect attendance incentive passes" if they are on a reduced hour schedule, even if it is FMLA certified. These employees are also prohibited from working overtime while on a reduced hours schedule and their accrued vacation is affected. Thus, these employees are very much penalized for their use of FMLA leave on an intermittent basis.

Medical Certification

The IAM opposes any changes to the medical certification regulations that would impose additional unnecessary obstacles for workers seeking FMLA leave. The regulations

properly recognize that employers' judgment regarding an employee's health condition should not be substituted for the professional medical opinion of the employee's health care provider. The IAM also opposes any regulatory changes that would allow employers to directly contact a worker's health care provider, which unnecessarily violates the worker's right to keep medical information confidential.

If anything, the medical certification paperwork requirements should be streamlined. These requirements are too easily and too often manipulated by employers to effectively deprive workers of their right to FMLA leave. We have many members who have their doctors fill out the paper work only to be told that it is not properly filled out. The employee fixes that problem and then the Company tells them there is another problem with the paper work. This occurs over and over until finally the doctor or the employee, or both give up. For example, one doctor indicated that an IAM-represented employee may need intermittent leave for a chronic illness and the Employer rejected it for not providing a time period that the leave may be needed. The doctor revised the form to state the employee may need such leave up to 30 times per month. The company rejected this and insisted the doctor identify the exact number of days needed, something that is obviously impossible with chronic, recurring illnesses.

Additionally, our members find that the requirement to recertify every 30 days is incredibly burdensome. Some doctors refuse to fill out the exact same paperwork every 30 days, particularly for life-long chronic conditions like colitis or migraines. Additionally, it is very expensive for employees to get re-certifications. Some employees, particularly in rural areas, have to travel long distances to even see their doctor. It is ironic that often these employees actually have to miss more work time just to get the recertification.

Our members also experience difficulty with employers defining their own terms on the form. One IAM employer has decided to interpret the word "time" to mean each incident a person is out for the qualifying condition. Thus, if a doctor has certified that the individual may be out up to 3 times a month, the employer reads that in the most restrictive way possible. If the employee exceeds 3 times a month, those days will not qualify as FMLA leave, even though it was for the same serious medical condition. So, in the example of the employee with approval for 3 times a month, if an employee comes in an hour late due to her condition that is one "time." If, after a couple hours work she realizes she really can't make it and goes home 2 hours early, that is considered a second "time." If she called in the next week and needs to take 2 days in a row off for her serious health condition, the employer would count the first day as her third "time" and the second day would not count as FMLA leave and she could be penalized for that. Clearly such restrictive interpretations run counter to the purposes of the FMLA.

Conclusion

Many of these illegal practices have been brought to the attention of the Department of Labor. In many instances the DOL has agreed that these practices violate the existing law; however, the DOL has elected not to pursue these matters. Stronger regulations would make it easier for both the DOL and the individual employees to enforce

this important law. The IAM further supports legislation that would provide those taking leave to receive income during their leave, such as paid family and medical leave legislation, or the Healthy Families Act, which would provide a minimum number of paid sick days per year for each worker to recover from her or his own illness or care for a sick family member.

Thank you for the opportunity to comment on the importance of the Family and Medical Leave Act on behalf of the IAM's represented workers.

Sincerely,

R. Thomas Buffenbarger

R. Thomas Buffenbarger
INTERNATIONAL PRESIDENT

RTB/pt