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On behalf of the
Society for Human Resource Management

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Subcommittee on Children and Families hearing on
"Writing the Next Chapter of the Family and Medical Leave Act – Building on a Fifteen Year History of Support for Workers"
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Introduction

Chairman Dodd, Ranking Member Alexander and distinguished members of the Subcommittee, my name is Katheryn Elliott and I am the Assistant Director of Employee Relations at Central Michigan University in Mt. Pleasant, Michigan. I commend the subcommittee for holding this hearing on the Family and Medical Leave Act (FMLA) and I appreciate the opportunity to provide testimony to you today.

By way of background, I have a master's degree in Human Resource Administration and I am a certified senior professional in human resources with over 13 years experience in human resource management. My experience includes work in government as well as the public and private sectors. As the assistant director of employee relations, it is my job to ensure employer compliance with state and federal laws, employee union contracts, and internal policies. Within this framework, a significant part of my job involves helping to manage employee medical leaves of absence.

It is my privilege to appear today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest professional association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

It is important for you to know that do I not sit before you today as merely an HR professional, but as an employee who has personally benefited from the Act's provisions on several occasions. As a single mother of three young children (twin boys, age 7 and a 4 year old daughter),

I have twice used the FMLA to take 12 week absences following the birth of my children. Spending the first 3 months of their lives with my children was an opportunity and a blessing that I will always be grateful for and I would not have had were it not for the job protection provisions of the FMLA. My need for FMLA continues today but for different reasons. One of my sons has a congenital eye condition which requires me to take full days off work to take him to his treating ophthalmologist over two hours from our home. My mother also suffers from serious medical conditions that require me to take time off from work. The benefits afforded under the FMLA allow me to take time off as necessary for the care of my loved ones without any accompanying stress or anxiety about my absence from the workplace.

Given my personal familiarity with the FMLA, my perspective on the issues before us today is based on real experience, tempered with an appreciation for the needs and concerns of employers – many of whom, especially in my home state of Michigan, are struggling financially - and above all a deep respect for the process which you undertake today. Thank you for giving me an opportunity to share my personal and professional experiences with you.

In addition, SHRM is uniquely positioned to provide insight on workplace leave policies. The Society's membership is comprised of HR professionals who are responsible for administering their employers' benefit policies, including paid time-off programs as well as FMLA leave. On a daily basis, HR professionals must determine whether an employee is entitled to FMLA, track an employee's FMLA leave, and determine how to maintain a satisfied and productive workforce during the employee's FMLA leave-related absences.

FMLA Overview

Both employers and employees benefit from workplaces that foster and support an appropriate balance between work and family demands, and the Family and Medical Leave Act

was premised on this principle. And while I believe that HR professionals work diligently to assist employees in striking this balance, after 15 years of experience administering FMLA leaves, I am confident this important statute is in need of targeted modifications to ensure that it serves the best interests of both employees and employers.

Family Leave Working as Congress Intended

Undoubtedly, the Family and Medical Leave Act has helped millions of employees and their families since it's enactment in 1993, and as an HR professional, I have personally witnessed employees reap the important benefits afforded under this law. For the most part, the family leave portion of the FMLA—which provides up to 12 weeks of unpaid leave for the birth or adoption of a child—has worked as Congress intended, resulting in few challenges for either employers or employees. As evidenced in the 2007 SHRM Survey *FMLA and Its Impact on Organizations*, only 13 percent of respondents reported challenges in administering FMLA leave for the birth or adoption of a child.

Medical Leave Challenges

Key aspects of the regulations governing the medical leave provisions, however, have drifted far from the original intent of the Act, creating challenges for both employers and employees. In fact, 47 percent of SHRM members responding to the 2007 SHRM FMLA Survey reported that they have experienced challenges in granting leave for an employee's serious health condition as a result of a chronic condition (ongoing injuries, ongoing illnesses, and/or non-life threatening conditions). HR professionals have struggled to interpret various provisions of the FMLA, including the definition of a serious health condition, intermittent leave, and medical certifications.

HR professionals have two primary concerns with the Act's regulations: the definitions of "serious health condition" and "intermittent leave." For example, with regard to the definition of serious health condition, the Department of Labor (DOL) issued a statement in April 1995 advising that conditions such as the common cold, the flu, and non-migraine headaches are *not* serious health conditions. The following year, however, the DOL issued a statement saying that each of these conditions could be considered a "serious health condition." Practically any ailment lasting three calendar days and including a doctor's visit, now qualifies as a serious medical condition (due to DOL regulations and opinion letters). Although Congress intended medical leave under the FMLA to be taken only for serious health conditions, SHRM members regularly report that individuals use this leave to avoid coming to work even when they are not experiencing a serious health condition.

Furthermore, HR professionals encounter numerous challenges in administering unscheduled, intermittent leave. It is often difficult to track this type of leave usage, particularly when the employee takes FMLA leave in small increments. Unscheduled, intermittent leave also poses significant staffing problems for employers. When an employee takes leave of this nature, organizations must cover the absent employee's workload by reallocating the work to other employees or leaving the work unfinished. For example, 88 percent of HR professionals responding to the 2007 SHRM FMLA Survey Report indicated that during an employee's FMLA leave, their location attends to the employee's workload by assigning work temporarily to other employees. In most cases, it is not cost-effective to use temporary staff because the period to train a temporary employee is sometimes longer than the leave itself. Furthermore, employers typically do not receive sufficient advance notice regarding an employee's need for FMLA leave, thereby making it difficult to obtain temporary help on short notice.

In addition to staffing problems, "intermittent leave" (as defined in the FMLA regulations) has resulted in numerous issues related to the management of absenteeism in the workplace. The most common challenge HR professionals encounter in administering medical leave, for example, is instances in which an employee is certified for a chronic condition and the health care professional has indicated on the FMLA certification form that intermittent leave is needed for the employee to seek treatments for the condition. This certification in effect grants an employee open-ended leave, allowing leave to be taken in unpredictable, unscheduled, small increments of time. The ability of employees to take unscheduled intermittent leave in the smallest time units that the employer uses, often one-tenth of an hour or six minutes, means that employees can rely on this provision to cover habitual tardiness. While serious health conditions may well require leave to be taken on an intermittent basis, limited tools are available to employers in order to determine when the leave is in fact legitimate. As a result, 39 percent of HR professionals responding to the 2007 SHRM FMLA Survey Report indicated that they granted FMLA leave for requests that they perceived to be illegitimate.

Central Michigan University, just like any other covered employer, has its share of challenges administering intermittent leave requests. I would estimate that of the hours we devote annually to FMLA administration for our nearly 1,300 eligible staff members, approximately 80-90 percent of our time is spent managing intermittent leave. Of that, approximately 80 percent of our efforts annually are spent managing 2 to 4 cases in which absence patterns, employee behavior, and vague medical documentation would have us (cautiously) draw the conclusion that we are dealing with employee misuse of the FMLA.

Three recent cases demonstrate just how difficult administration of the Act can be in cases of intermittent leave.

Case 1: Office professional employee employed in the University's Library

The University Library operates an inter-library loan service. This is a critical service for students as well as faculty. It supports research and learning by allowing faculty and student access to materials not part of our own holdings. The exacting nature of the work, coupled with very tight staffing and a very spare budget, provides virtually no opportunity to plan for extra or temporary help in the office. In 2004 and 2005 a clerk in this office was certified for FMLA intermittent leave for asthma and migraine headache. The medical certification placed no parameters on frequency or duration of leave. The determination of when leave was needed was left to the employee. The employee proceeded to exercise her intermittent leave rights on an "irregularly regular" basis. In 2005 alone, she was absent 76 times under intermittent FMLA – and that was an improvement over the prior year's absence frequency.

Each of these absences was unscheduled and unanticipated. Each absence left the office with no way to plan for temporary coverage. Her supervisor was occasionally able to shift time away from her other duties to deal with the must urgent customer service problems – but that's no way to run a business. Customer service for faculty, students, and other members of the inter-library loan consortium suffered – and there was little the office could do about it. The office reported that some consortium members were considering cancelling their library exchange relationship with our University because of the erratic service and delays in responding to exchange orders.

From January 2005 through the end of October, this employee worked a full 40 hour week only 7 times. After her FMLA leave balance exhausted at the end of October, she did not miss another scheduled day during the balance of the calendar year. Her absences resumed in 2006 when her FMLA leave balance was restored.

Case 2: Custodial employee employed in the University's Building Services Department

The University employs 91 custodians to provide environmental support services on campus. These custodians are represented by a collective bargaining agent. One custodian has had an ongoing absenteeism problem that has been exacerbated by his use of FMLA intermittent leave. At various times he has been certified for FMLA leave for miscellaneous lower back problems, upper respiratory problems, and more recently for "panic attack/anxiety disorders." Each of these certifications has given control of the timing and duration of intermittent leave to the employee. He decides when he is going to be out and for how long. In 2004, this employee had 48 intermittent leave episodes. In 2005, the frequency jumped to 104 episodes. In 2006, the frequency dropped to 34 episodes, but the duration of each episode increased. Although this employee's position was rated at 1.0 FTE, his absences resulted in a 4 year cumulative average effective FTE of just over 55 percent. In those years, with one exception, he worked just enough hours to qualify him for FMLA in the next calendar year. In one of those years, he did not qualify for FMLA because he had not worked the requisite 1,250 hours in the prior 12 months. His absences were reduced to almost none until early April of that year, when he was able to qualify for FMLA, having at that point met the "hours worked" requirement. Beginning with his FMLA qualification in April, he resumed his "normal" absence pattern.

While the Building Services Department has more flexibility in the use of temporary employees as compared to the Interlibrary Loan Office, the use of temporary staff in a collectively bargained environment generates a tremendous recordkeeping burden on the employer. Temporary staff has to be tracked on a daily basis, and their movement and assignment reported to the local union for monitoring purposes. This is time consuming and costly. In addition, while this

employee is on FMLA leave, the University is covering not only his wages, but also the wages of his temporary replacements.

Case 3: Office professional employee in Facilities Management Business Operations

This is an emerging case to demonstrate what employers can see develop and how we are virtually helpless to address our concerns.

This professional employee began her employment with the University in April of 2006. In her first year of employment, her supervisor counseled her for excessive absence due to illness. On October 31, 2007, her supervisor met with her to point out that her absences in the 12 month period from October 1, 2006 through September 30, 2007 were in excess of 80 hours. The employee was asked if she was familiar with the FMLA and advised that if she felt she had an FMLA qualifying condition she should submit medical documentation to support this. Her response was:

1) That the first doctor she saw would not place her on FMLA, and

2) That she had found another doctor who she would meet with the following week to see if he would place her on FMLA. Barring that she and her supervisor would need to "revisit the issue and come up with another solution."

On November 6, 2007, this employee submitted FMLA paperwork indicating that she suffered from migraines which might limit her ability to work up to twice monthly for a period of 2 to 24 hours each occasion. In the days that remained before the University shut down for year end, (12/21/07) this employee missed 5 full work days for her FMLA condition. Two of those days fell on Mondays and two on Thursdays.

In January, per departmental policy, the employee was required to recertify her FMLA qualifying condition. Her certification, received January 7, 2008, almost two months to the day from her original certification, and issued by the same treating physician, stated that this employee was <u>improving</u>, but might be unable to work as many as 9 times a month for periods of 2 to 24

hours each occasion. As of February 11, 2008, this employee has missed 6 full work days for her FMLA condition. Three of these occurrences fell on Mondays and three fell on Thursdays.

In addition to the employer's concern about the substantial increase in possible time off, there is a clear pattern of absences on Mondays and Thursdays. We, as her employer are left in a difficult situation. Second opinions are difficult if not impossible to obtain under the FMLA, and we find ourselves in the uncomfortable position of not wanting to second guess the documentation of a medical professional (and there certainly is no means by which we could), and yet we see a pattern of absence which seems unusual. Our only option, given the current regulations, is to notify the treating physician of the pattern of absences and ask if the pattern is consistent with the diagnosis, but again we must rely on the physician to address the matter with their patient. If the physician, for whatever reason, makes no change to the original documentation, the department must simply accept the absences and wait for a new recertification year. This position manages a call center of the University, which must be staffed at all times. In this employee's absence other staff must be pulled away from their accounting and payroll tasks (all extremely time sensitive) to cover the departmental phones.

The aforementioned case points to another concern that can very often complicate the administration of leaves under the Act. Regularly, medical documentation is vague or open ended, making it difficult for departments to know what absenteeism patter to expect from an employee and giving him/her unlimited discretion to claim an FMLA absence, but without an attendant responsibility to provide clear and thorough documentation.

15 Years Later – FMLA Clarifications Necessary

The challenges outlined above have been well-documented over the last several years most notably in numerous congressional hearings, agency stakeholder meetings and through submissions to the DOL Request for Information on the FMLA regulations. SHRM supports the goals of the FMLA and wants to ensure that employees continue to receive the benefits and job security afforded by the Act. However, given the significant challenges HR professionals continue to experience with FMLA administration, SHRM respectfully suggests that policymakers take steps to address the underlying problems both employers and employees encounter with the FMLA.

As you know, last year the DOL completed a thorough review of the effectiveness of the FMLA regulations in which the Department received over 15,000 comments from employers, employees and other interested organizations. The June 2007 DOL Report on the FMLA noted that in many instances, when it comes to the "family" portion of FMLA, the regulations are basically working as Congress intended with few concerns for employers or employees. However, the report also highlighted that in other areas, particularly in the "medical" leave portions of the regulations, differing opinion letters, federal court rules and regulator guidance have clouded and sometimes undermined key provisions of the FMLA. As outlined above, these findings accurately reflect the cumulative experiences of HR professionals who have been administering FMLA leave for the last 15 years.

SHRM was pleased to learn that earlier this week the Department of Labor issued proposed rules to update the Family and Medical Leave Act regulations. Although SHRM is still reviewing the details of this substantive rule, it appears that a number of the Department's proposed changes would in fact improve FMLA administration in the workplace. While our evaluation of the proposal continues, it does appear that the proposed rule stops short of significantly improving the definition of a serious health condition. Despite this shortcoming, SHRM believes this regulatory

action is an important step toward restoring the balance intended by Congress between employers' needs for employees and employees' need for time to attend to important family and medical issues. After all, the original purpose of the FMLA, as envisioned by Congress, will never be fully realized until both the employee and employer communities feel comfortable in their determination that an employee is rightly entitled to FMLA leave.

FMLA Expansions

While SHRM shares Congress' interest in providing families additional work flexibility, we are concerned about proposals to expand the Family and Medical Leave Act given the problems administering current FMLA leave. As outlined above, there is already a lengthy record of problems with administering leave under the Act due to confusing and inconsistent regulations While well intentioned, proposals that build on a flawed FMLA framework will only exacerbate the significant challenges both employers and employees currently encounter. SHRM respectfully requests that Congress fix the documented shortfalls of the FMLA before considering additional leave benefits under this important workplace statute.

Conclusion

SHRM applauds the Subcommittee's examination of the Family and Medical Leave Act to gage whether this leave law is meeting the needs of both employees and employers and appreciates the opportunity to provide testimony on this important leave statute. As noted earlier, HR professionals and their organizations are committed to both the proper application of the FMLA in the workplace as well as assisting their employees in balancing their work and family demands. The Society looks forward to working with the Subcommittee to craft practical workplace flexibility policies that meet the needs of employees, families, and employers.