Opening Statement of Senator Orrin G. Hatch
Committee on Health, Education, Labor, and Pensions
Sub-Committee on Children and Families
"Writing the Next Chapter of the Family and Medical Leave Act -- Building on a Fifteen Year History of Support for Workers"
February 13, 2008

Thank you, Mr. Chairman for convening this hearing on the Family Medical Leave Act. I want to add my welcome each of our witnesses today, and look forward to hearing your testimony.

Mr. Chairman, I think we can all agree with last weeks Wall Street Journal editorial that said, "Few laws are so universally acclaimed as the 1993 Family and Medical Leave Act." It's an excellent example of how we as a nation have adapted to the demands of our changing workforce.

Another timely example is the Senate's recent action to expand the FMLA to cover the needs of families who need leave to care for our sick and wounded servicemen and women. This was the first-ever expansion of the FMLA – the product of a bipartisan commission, and bipartisan action in the Congress. Together, we recognized that the needs of military families have changed in the past few years, and we took action to help them.

I am pleased to see that the Executive Branch is moving forward with implementing regulations on the so-called wounded warriors additions to FMLA. In its proposed rule package published on Monday, the Department of Labor asked for public comments on a variety of issues related to the implementation of the new statutory provisions that President Bush signed into law on January 28th. The Department is to be commended for recognizing that military families and their employers are anxiously awaiting these rules – while also taking the necessary steps to ensure that its forthcoming final rules will be the correct ones. Nothing causes so much confusion within a regulated community than an agency's constant tweaking and changing of its rules. If we want these new provisions to work well for our military families and for the people who issue their paychecks, then we need to let the Department gather and consider comments from the public before they go ahead with final regulations. This will take time, and I urge the Department to make publishing a final rule its top priority.

As for the other items in the proposed rule package, what we have before us is the result of a deliberative process, one that included a thorough examination of the current regulations, an extensive effort for input from a wide range of stakeholders, and intensive consultations with the Congress. Mr. Chairman, I ask for unanimous consent that a copy of the proposed rule be included in the hearing record.

A critical component of this deliberative process was the Department's report last year about how the FMLA and its related regulations were functioning in the workplace. It includes a chapter of anecdotes from people whose lives were made better because the FMLA exists. With the FMLA they were able to cope with their own or a family medical crisis, while enjoying the security that comes from knowing that your health insurance is continuing, and your job awaits you when you return. For employers, it appears FMLA is generally working well, especially

where employees were taking leave to care for a newborn child, or other planned absences. However, some employers and others expressed frustration at the challenges of running time-sensitive workplaces while trying to comply with the FMLA rules.

This report is comprehensive guide to how the FMLA is working in the real world, and it is so important that I ask for unanimous consent to have the report placed into the hearing record.

Mr. Chairman, the courts too have had their say on interpreting the FMLA. Of these court cases, the most notable was the Supreme Court's 2002 decision in *Ragsdale vs. Wolverine Worldwide* that the Department overstepped its bounds by putting forth regulations that required employers in certain situations to provide more leave than what the statute allows. The Supreme Court viewed this as a "categorical penalty" on employers and found that it was inconsistent with the plain language of the statute to require an employer to provide more than the 12-week maximum of FMLA leave. With this proposed rule, the Department's regulations would be revised to reflect the Ragsdale decision, as well as resolve other issues arising from lower court decisions.

Returning to the Labor Department's report for a moment, one issue made clear is that there is friction in the workplace over aspects of the FMLA that relate to unscheduled intermittent leave. Intermittent leave refers to an employee, who has a medical certification to take FMLA leave, and they do take the leave, but they don't tell their employer until after the fact, sometimes two days after the fact. In this age of cell phones, blackberries and the like this seems incredible to me.

This lack of notice is a special concern for me, for example once you get beyond Salt Lake City, Utah is mostly rural and rural hospitals, police, ambulance, and fire departments operate with small staffs. If someone doesn't show up for work, with no notice, important safety concerns can arise. I was pleased to see that the Department is taking a step in the right direction by proposing a rule that would encourage workers to follow their employer's call-in procedures if they want to use FMLA leave.

I was also pleased to see that the Department proposes to recognize physician assistants as health care providers in the context of providing "continuing treatment" for those taking FMLA leave. This will be very beneficial to my constituents in rural Utah, where all too often people have to travel a significant distance to visit a physician, while a physician's assistant is located right in their own small town.

The Labor Department has proposed useful measures to update its regulations, but I won't go into a detailed discussion about them, as I'm sure Assistant Secretary Lipnic will expound upon the major points. But I note that despite these proposed changes, important issues remain. For example, refining the definition of a 'serious health condition' continues to be a contentious issue, one, which I note, we did not undertake to do when the 1993 legislation was drafted.

In conclusion, I note that much has happened in the past 15 years since we first passed FMLA and happily this includes wide agreement of the benefits of the act. As the FMLA has become part of our social landscape, covered workers and their employers have recognized the importance of balancing work and family obligations. I want to thank the Labor Department for

its extensive work on its FMLA regulations, and for its consultations with my staff as you considered your regulatory options. In my opinion, the Department has a well-considered, sensible proposal, one that is certainly needed to reflect the lessons learned since 1993.

Thank you Mr. Chairman.