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Via Email
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Re: Comments on Notice of Proposed Rulemaking to amend the Family and Medical Leave Act Regulations of the Office of Congressional Workplace Rights

Dear Ms. Grundmann:

The Office of House Employment Counsel ("OHEC") submits the following comments in response to the Notice of Proposed Rulemaking and Request for Comments from Interested Parties ("NPRM") published by the Executive Director of the Office of Congressional Workplace Rights ("OCWR") in the Congressional Record on November 16, 2020. As requested in the NPRM, these comments provide OHEC's views on the proposed amendments of the OCWR's Family and Medical Leave Act ("FMLA") Regulations implementing the new FMLA provisions of the Congressional Accountability Act ("CAA"), as amended by the Federal Employees Paid Leave Act ("FEPLA").[1]

Comments by Section Number

825.102

Eligible Employee. The definition of "eligible employee" appears to contain a typo and should refer to section "825.112," not "85.112."

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[1] The NPRM includes proposed regulations that were previously adopted by the OCWR, but never approved by Congress. OHEC's comments on those previously adopted regulations, which are hereby incorporated by reference, are available on the OCWR website at https://www.ocwr.gov/sites/default/files/OHEC%20Comments%20%282%29.pdf.

Placement. The definition of "placement" narrowly defines the term to mean "a *new* placement" that specifically excludes "*the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent.*" (Emphasis added). OHEC does not see anything in the text of either the FMLA or FEPLA to support this narrow definition, and we are concerned that narrowing "placement" in this manner is inconsistent with the OCWR's existing FMLA regulations. *See* section 825.125 (listing examples of situations when FMLA leave may be available in connection with a placement, but *not* excluding situations in which a child who has already been a member of the employee's household is adopted).

Indeed, it is realistic to anticipate many situations in which the adoption of a stepchild or foster child may necessitate an employee's use of FMLA leave, whether to attend legal proceedings, participate in counseling sessions, or simply to bond with the child given the employee's new parental status. As the OCWR's existing regulations make clear, the use of FMLA leave and the availability of PPL in such situations is entirely consistent with the FMLA's broad purpose of promoting family integrity. *See* section 825.101(a) ("The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.").

For these reasons, OHEC recommends that the definition of "placement" be revised as follows (with our recommended revisions indicated in track changes):

> *Placement* means ~~a new~~the placement of a son or daughter with an employee for adoption or foster care. ~~For example, t~~This ~~excludes~~ includes the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. When the term "placement" is used in connection with the use of leave under this subpart before placement has occurred, it refers to a planned or anticipated placement.

825.120(a)(7)

This new subsection provides that leave "because of the birth of a son or daughter" (which OHEC and House employing offices have traditionally called "Type A" leave) includes both leave to recover from childbirth and leave to care for a birth mother who is recovering from childbirth. This expansive definition of Type A leave is inconsistent with the OCWR's existing FMLA regulations, which describe leave for incapacity due to pregnancy as *medical* leave due to the employee's own serious health condition ("Type D" leave) and describe leave to care for a birth mother recovering from childbirth as *family* leave for a family member with a serious health condition ("Type C" leave). *See, e.g.*, sections 825.115(b) and 825.120(a)(4)-(5).[2]

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[2] OHEC's use of the terms "Type A," "Type C," and "Type D" leave corresponds to the subsections of the FMLA provision describing these types of FMLA leave. *See* 29 U.S.C. § 2612(a)(1)(A), (C), and (D).

OHEC does not see statutory basis in FEPLA for re-designating leave for these purposes as Type A leave, nor do we understand OCWR's rationale for doing so. Accordingly, we recommend that this new subsection be stricken in its entirety.

825.208(b)(1)(ii) and (d)(2)

In subsection(b)(1)(ii), there is a reference to "annual, vacation, personal, family, medical, or sick leave," but in subsection (d)(2) there is a reference to "annual leave or sick leave." OHEC recommends making this language consistent throughout the regulations and/or clarifying what distinctions, if any, are implied by the differing terminology. As a practical matter, OHEC notes for reference that most House employing offices provide "annual leave" (i.e., vacation leave) and "sick leave." Many offices also provide paid family and medical leave that compensates employees for what would otherwise be unpaid statutory FMLA leave. Some offices provide additional forms of leave, such as "personal leave," while other offices have instituted "paid time off" policies that make no distinction between the reasons for the leave. Because House employing offices generally have discretion on how to structure their leave policies, OHEC believes these subsections should acknowledge that employing offices may use different terminology to describe the types of leave referenced therein.

825.208(c)(4) and 825.502(c)(1)

These subsections use the exact same language to provide that, if an employee requests to use annual or sick leave without invoking statutory FMLA leave (presumably in a circumstance where the employee's leave would otherwise qualify as FMLA leave), the employing office may apply its normal rules in approving or disapproving the use of leave. We presume that this rule means, for example, that in such cases an employing office may require the submission of medical documentation for sick leave if that is the office's normal practice (and if doing so would violate no other legal obligations).

OHEC further notes that this scenario of an employee declining to invoke their right to use FMLA leave raises at least two potential legal issues. First, although OHEC agrees that an employee may decline to invoke FMLA rights for various reasons, the regulations should expressly clarify that in such case the leave is not FMLA leave. *Cf.* section 825.313(b) (providing that, if an employee fails to produce a medical certification to support FMLA leave related to a serious health condition, "the leave is not FMLA leave").

Second, OHEC anticipates a situation in which an employee may initially decline to invoke FMLA/PPL for leave related to a birth or placement, but then later decide to do so for subsequent leave related to the same birth or placement. For example, a birth mother may initially take sick leave following childbirth and then subsequently invoke FMLA in order to obtain PPL. In that example, OHEC believes that the employing office would have discretion to retroactively designate the initial period of leave as FMLA leave/PPL under existing regulations. *See, e.g.*, 825.127(e)(4), 825.300(d); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In other words, an employee may not initially decline to request FMLA leave/PPL in

order to effectively extend a period of FMLA/PPL beyond 12 weeks in a 12-month FMLA period *unless* both the employee and the employing office agree to this arrangement.

To avoid confusion in such situations, OHEC believes that an employing office's ability to retroactively designate FMLA leave/PPL should be expressly affirmed. Therefore, OHEC recommends that subsections 825,208(c)(4) and 825.502(c)(1) be revised as follows (with our recommended revisions indicated in track changes):

> An employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. If the employee's request for annual leave or sick leave is granted and the employee subsequently invokes family and medical leave with respect to the same birth or placement, the employing office may retroactively designate the initial period of annual leave or sick leave as FMLA leave and, upon agreement of the employing office and the employee, retroactively substitute paid parental leave for the initial annual leave or sick leave.

825.208(d)(1)

This subsection discusses the retroactive substation of PPL for unpaid FMLA leave. OHEC has confirmed that, under existing House regulations, employing offices are currently permitted to provide retroactive pay to employees when required to do so for legal reasons, including by the FMLA. Because House regulations are subject to change, however, OHEC recommends that this subsection be revised as follows (with our recommended revisions indicated in track changes):

> An employee must notify the employing office of the employee's election to substitute paid leave for leave without pay under this section prior to the date such paid leave commences (i.e., no retroactive substitution), except as provided in paragraphs (d)(2) through (d)(4) of this section and provided such retroactive substitution does not violate any applicable law or regulation.

825.500(c).

This subsection purports to make "[t]he head of an employing office" responsible for the proper administration of PPL. In most House employing offices, however, leave and compensation responsibilities have been delegated by the "head" of the employing office to a designee (e.g., a chief of staff in the case of a Member, a human resources manager in the case of a House Officer, etc.). Moreover, in the case of House committees, leave and compensation responsibilities may be divided between managers appointed by the Chair (who supervise employees that work for the Majority) and managers appointed by the Ranking Member (who supervise employees that work the Minority). To account for these practical realities, OHEC

recommends that the reference to "the head" of an employing office be deleted as follows (with our recommended revisions indicated in track changes):

> ~~The head of a~~An employing office having employees covered by this subpart is responsible for the proper administration of this subpart, including the responsibility of informing employees of their entitlements and obligations.

800.502(b)(2) and 800.506(b).

These sections set forth rules for the availability of PPL in cases where there are multiple uses of FMLA leave during a 12-month period. Specifically, section 800.502(b)(2) covers situations where an employee has taken FMLA leave for a reason unrelated to a birth or placement and then subsequently becomes eligible for PPL because of a birth or placement. Section 800.506(b) covers situations where there are multiple births or placements. In both cases, OCWR's proposed rules would limit an employee's ability to take the full 12-weeks of paid PPL during the 12-month FMLA period associated with latest birth or placement. While we agree that an employee would be restricted from using the full 12 weeks of PPL during the overlap period between the two 12-month FMLA periods, we believe that any remaining balance of PPL available to the employee can be used once the initial 12-month FMLA period ends. Indeed, this approach is consistent with the express language of the CAA, as amended by FEPLA, which entitles employees to *12 weeks* of PPL and does *not* mention any limitations on this entitlement. *See* 2 U.S.C. § 1312(d)(2)(A) (incorporating by reference 5 U.S.C. § 6382(d)(2)(B)(i), which provides 12 administrative workweeks of PPL per 12-month FMLA period associated with each birth or placement).

Accordingly, OHEC recommends that these subsections be revised as follows (with our revisions indicated in track changes)[3]:

> 800.502(b)(2)
>
> Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period under 825.200(a), any use of unpaid FMLA leave not associated with paid parental leave may affect when an employee is able~~'s ability~~ to use the full 12 weeks of paid parental leave to which the employee is entitled. . ~~Notwithstanding paragraph (b)(1) of this section, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available unpaid FMLA leave granted under the birth or placement provisions in 825.112(a)(1); or (2) during the 12-month period referred to in section 102(a)(1) of the FMLA (29 U.S.C. 2612(a)(1)) to which it relates.~~ The specific amount ~~availability~~ of paid parental leave available will depend on when the employee uses various types of unpaid FMLA leave relative to any 12-month period established under 825.200(b). For example, if an employee uses FMLA leave related to a serious health condition on June 1 and has a child born on October 1 of the same year,

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[3] If the OCWR adopts the following suggestions, other provisions of the Proposed Regulations may need to be modified accordingly.

each event would generate entitlement to 12 weeks of unpaid FMLA leave during the separate 12-month periods beginning on the date of the serious health condition event and on the date of the birth event, respectively. Those two 12-month periods would be June 1-May 31 and October 1-September 30. The overlap period for these two 12-month periods would be October 1-May 31. If the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the serious health condition event and the 12-week limit associated with the birth event. In this example, the employee would be unable to use the full 12 weeks of paid parental leave because 12 weeks of unpaid FMLA leave would not available due to the serious health condition event. However, the employee would be entitled to use the remaining balance of paid parental leave during the period beginning on June 1 and ending on September 30.

800.506(b)

If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, the provisions of this subpart shall be independently administered for each birth or placement event. Any paid parental leave substituted for unpaid FMLA leave during the 12-month period beginning on the date of a child's birth or placement shall count towards the 12-week limit on paid parental leave described in 825.502(b) applicable in connection with the birth or placement involved. The substitution of paid parental leave may count toward multiple 12-week limits to the extent that there are multiple ongoing 12-month periods beginning on the date of an applicable birth or placement, each of which encompasses the day on which the leave is used. Therefore, whenever paid parental leave is substituted during periods of time when separate 12-month periods (each beginning on a date of birth or placement) overlap, the paid parental leave will count toward each affected period's 12-week limit. For example, if an employee has a child born on June 1 and another child placed for adoption on October 1 of the same year, each event would generate entitlement to substitute up to 12 weeks of paid parental leave during the separate 12-month periods beginning on the date of the birth and on the date of the placement, respectively. Those two 12-month periods would be June 1-May 31 and October 1-September 30. The overlap period for these two 12-month periods would be October 1-May 31. If the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the birth event and the 12-week limit associated with the placement event. In this example, the employee would be unable to use the full 12 weeks of paid parental leave associated with the placement event because 12 weeks of unpaid FMLA leave would not be available due to the birth event. However, the employee would be entitled to use the remaining balance of paid parental leave associated with the placement event during the period beginning on June 1 and ending on September 30.

825.507

This section purports to require employing offices to maintain records of an employee's usage of PPL. While OHEC agrees that this is a best practice, we do not see any statutory language in FEPLA giving the OCWR the authority to require that such records be maintained. Accordingly, we recommend that this entire section be stricken.

We appreciate the opportunity to provide comments on the proposed amendments of the OCWR's FMLA Regulations. Please let me know if you have any questions or if OHEC can provide any further information.

Sincerely

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cc: Mark S. Hayes
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