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VIA http://www.regulations.gov
Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW.
Washington, DC 20210

Re: RIN 1215-AB35

Dear Mr. Brennan:

This comment is written on behalf of the City of New York in response to the United States Department of Labor's Wage and Hour Division's Request for Comments on proposed revisions to the regulations implementing the Family and Medical Leave Act of 1993. The City of New York is one of the largest public employers in the country, employing over a quarter million people in various positions, including those in public safety-sensitive positions. The City is committed to complying with federal, state and local laws and takes a great interest in the labor laws that are applicable to the City's workers, including the Family and Medical Leave Act of 1993 ("FMLA"). Accordingly, I welcome this opportunity to provide comments on certain proposed revisions to the regulations.

## *A. § 825.110*

Section 825.110 sets forth the standards employees must meet to be eligible for FMLA leave, i.e., an employee must have been employed by an employer for at least 12 months, have been employed for at least 1250 hours of service during the 12 months preceding the leave and be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite. The Department proposes a new §825.110(b)(1) to provide that "although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted." 73 Fed. Reg. at 7882

(February 11, 2008). Proposed new paragraph (b)(2) sets forth two exceptions which would allow the period of employment prior to a break in service longer than five years to be counted toward the 12 months of employment if the break in service was due to fulfillment of military obligations or due to education or child-rearing where a collective bargaining agreement indicates an intent to rehire employees in this situation.

The City of New York does not oppose these proposed revisions to §825.110, but suggests that a further clarification is necessary. As the purpose of these proposed revisions is to provide workers who left and re-entered the workforce, most commonly after caring for young children or otherfamily members, with FMLA protections, the City of New York urges that proposed §825.110(b)(1) be clarified that to avail him or herself of the five year look-back period, the employee should not have been employed by anyone else during the "break in service." As currently drafted, an employee who resigned from a position with an employer to accept a position with a different employer and works for the second employer for four years before returning to work for the first employer might be covered by the FMLA. The public policy reasons for the FMLA, and which underlie the proposed revisions to §825.110, are not furthered by providing such an employee with FMLA protections. Accordingly, the City of New York urges that "break in service" be defined as a period during which the employee was not employed by any employer, other than the U.S. military.

***B. §825.205***

The City of New York supports the view that where the circumstances of a particular job prevent an employee who uses intermittent leave or works a reduced leave schedule from commencing work after the work shift has begun, the entire shift should be designated as FMLA leave and counted against the employee's FMLA entitlement. The City's position is that such a revised regulation should not apply solely to positions where the employer is unable to accommodate a splitting of the shift because of "physical impossibility" as discussed at 73 Fed. Reg. 7894, but should also apply to positions requiring 24/7 coverage in which there must always be someone working. In such "fixed post" positions, the employer must call another employee in to work on his or her regular day off or keep an employee from an earlier shift on duty for another tour. In cases of unforeseen use of intermittent leave, it is unfair to and disruptive for the employee who was required to cover the shift for the absent employee (and may, therefore, have had to make alternate arrangements to cover his own family or other personal responsibilities), if the employee using intermittent leave comes in mid-shift.

The City of New York proposes that the regulation be revised to allow an employer to prohibit an employee in a fixed post position from using unscheduled intermittent leave for only part of a shift and to allow the employer to designate the entire shift as FMLA leave if another employee was called in on a day off or was required to work an overtime shift due to the absence.

Further, the City of New York strongly supports the Department's belief that in circumstances in which employees "would be required to work overtime hours were it not for being entitled to FMLA leave, then the hours the employee would have been required to (but did not) work may be counted against the employee's FMLA entitlement." 73 Fed. Reg. at 7894 (February 11, 2008). However, this view is not reflected in the proposed revised regulations. In

order to avoid any confusion or ambiguity, the City of New York urges the Department to include specific language with respect to this position in §825.205(b) or in §825.200(d).

### *C. 825.207*

The City of New York is strongly in favor of the proposed revision to § 825.207 which requires employees using paid leave concurrently with FMLA to abide by rules regarding usage of such paid leave, including call in requirements and limitations on the amount of paid leave used.

### *D. 825.215(c)(2)*

The City of New York is pleased with the clarification set forth in §825.215(c)(2) allowing an employer to disqualify an employee from bonus or awards programs based on achievement of goals if the employee failed to achieve the goal due to FMLA leave.

### **E.** *825.300(b) and (c)*

While the eligibility and designation notices required by proposed §825.300 may be appropriate when employees seek to use scheduled FMLA leave, they do not seem practical or useful when employees use unscheduled intermittent leave. Employees who have need of intermittent leave will have submitted a certification indicating such. It should be sufficient for the employer to provide such an employee with the eligibility notice required by §825.300(b) once a completed and acceptable certification has been provided. No purpose is served by requiring the employer to provide such an employee with an eligibility notice each time the employee uses intermittent leave.

The designation notice required by proposed 825.300 (c) places an undue burden on employers who may have many employees frequently using intermittent leave. As discussed in the City's February 2, 2007 comments in response to the Department's RFI, almost one-third or approximately 380 of the City's Police Communications Technicians ("PCT") who are exclusively assigned to the New York City Police Department's 911 Emergency Call Center have submitted certifications from medical providers entitling them to take intermittent leave. In 2006 approximately 27% of all medical leave taken by PCTs was intermittent FMLA leave. The City estimates that providing each PCT who takes intermittent leave with a designation notice each time the employee takes intermittent leave or every 30 days in connection with the use of FMLA leave will require at least one additional administrative staff member to be dedicated to the issuance of designation notices in order to include in the notice a calculation as to how much time will be counted against the employee's FMLA leave entitlement. The City suggests that rather than require employers to provide employees who use intermittent leave with the designation notices proposed in 825.300(c), employers be required to provide such employees with their FMLA leave balances upon request, but not more often than every 30 days.

**F.** ***825.301***

The Department specifically invited comment on whether employees who have previously provided notice of a qualifying serious health condition necessitating leave should be required to expressly assert their FMLA rights when they subsequently provide notice of dates of leave due to the condition. The City of New York supports such a notice requirement in that it will ease some of the administrative burden imposed by the FMLA that was noted by many of the employers who commented in response to the RFI. In addition, the City urges the Department to also require employees who have submitted FMLA certifications relating to intermittent leave for their own serious health conditions or for the care of a family members with serious health conditions to expressly assert their FMLA rights when providing notice of the need to take FMLA unscheduled intermittent leave.

**G.** ***825.303(c)***

The City supports the Department's view that employers should be able to discipline employees who fail to comply with the employer's call in procedures when using intermittent leave and urge the Department to specifically include such a statement in the regulations.

**H.** ***825.310(g)***

The City urges the Department to reconsider the prohibition in §825.310(g) against requiring a fitness to return for duty certification in connection with each absence taken on an intermittent basis or more frequently than every 30 days if there are reasonable safety concerns. As explained in the City's February 2, 2007 comments, with respect to employees in safety-sensitive positions[1] Fitness for Duty Certifications should be permitted as often as an employer deems necessary in connection with intermittent leave usage or in connection with a change in medication regimen. An employer should not be prohibited from ascertaining whether there has been a change in an employee's condition that may pose a risk to public safety if he or she is, for example, responsible for driving a two-ton truck on public roadways or piloting a ferry boat. Similarly, an employer should be permitted to require a fitness for duty certification to determine whether a change in medication impacts on the employee's ability to safely perform his or her duties. Restrictions on an employer's ability to seek such certifications from employees in safety-sensitive positions are against the public interest.

[1] Examples of public safety-sensitive positions include police officers, firefighters, correction officers, school safety agents, 911 call operators and dispatchers, traffic enforcement agents, ferry captains and other transportation employees, sanitation workers, juvenile justice counselors, sheriffs and deputy sheriffs and all employees in positions requiring Commercial Driver's Licenses ("CDL").

The City of New York hopes that these comments will be helpful in the consideration of proposed regulations. We are available to comment further, upon request.

Very truly yours,

/s/

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