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December 2, 2008

The Honorable Edward M. Kennedy
Chairman
The Honorable Michael B. Enzi
Ranking Minority Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable George Miller
Chairman
The Honorable Howard P. "Buck" McKeon
Ranking Minority Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Wage and Hour Division: The Family and Medical Leave Act of 1993*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor (Labor), Wage and Hour Division, entitled "The Family and Medical Leave Act of 1993" (FMLA) (RIN: 1215-AB35). We received the rule on November 18, 2008. It was published in the *Federal Register* as a final rule on November 17, 2008. 73 Fed. Reg. 67,934.

The final rule amends the regulations implementing the FMLA, Pub. L. No. 103-3, 107 Stat. 6 (Feb. 5, 1993), the law that provides eligible employees who work for covered employers the right to take job-protected, unpaid leave for absences for the following circumstances: the birth of the employee's son or daughter; to care for the newborn child; placement of a son or daughter with the employee for adoption or foster care; care for a son, daughter, spouse, or parent with a serious health condition; or the employee's own serious health condition. The final rule also addresses new military family leave entitlements included in amendments to the FMLA enacted as part of the National Defense Authorization Act for FY 2008, Pub. L. No. 110-181, § 585(a), 122 Stat 3, 128 (Jan. 28, 2008). The amendments provide additional job-protected leave rights to eligible employees of covered employers who provide care for covered service members with a serious injury or illness and because of qualifying exigencies arising out of the fact that a covered military member is on active duty or has been notified of an impending call or order to active

duty in support of a contingency operation. The final rule is effective on January 16, 2009.

Enclosed is our assessment of Labor's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that Labor complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
WAGE AND HOUR DIVISION
ENTITLED
"THE FAMILY AND MEDICAL LEAVE ACT OF 1993"
(RIN: 1215-AB35)

(i) Cost-benefit analysis

Labor performed a cost-benefit analysis of the final rule. Labor estimates that the revisions to the FMLA regulations will result in a total first year net cost of \$327.7 million and annual reoccurring costs of \$244.4 million for both workers and employers. For employers, the largest cost is the \$257.3 million in recurring costs related to the new military leave provisions. For workers, the largest cost is the \$19.8 million in recurring costs associated with the additional fitness-for-duty certifications that may be required if a worker has used intermittent leave and a reasonable safety concern exists. Labor anticipates that substantial but unquantifiable benefits will accrue from the final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

Labor certified that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act, and, therefore, did not prepare a regulatory flexibility analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

Labor did not include a discussion of the Unfunded Mandates Reform Act in the final rule.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The final rule was issued using the notice and comment procedures found at 5 U.S.C. § 553. Labor published a Notice of Proposed Rulemaking in the *Federal Register* on February 11, 2008. 73 Fed. Reg. 7876. Labor received 4,689 comment submissions from a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others. Labor responded to the comments in the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

Labor did not identify new information collections in the final rule subject to the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule is promulgated pursuant to the authority in the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (Feb. 5, 1993), as amended by the National Defense Authorization Act for FY 2008, Pub. L. No. 110-181, § 585(a), 122 Stat. 3, 128 (Jan. 28, 2008).

Executive Order No. 12,866

The final rule was reviewed by the Office of Management and Budget and found to be an “economically significant” regulatory action under the Order.

Executive Order No. 13,132 (Federalism)

Labor concluded that the final rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Labor therefore concluded that the final rule does not have federalism implications.