

the FMLA on small entities by imposing a minimum leave requirement, and suggested a four-hour minimum would both enable an employee to work a half-day and permit the employer to ease administrative burdens in complying with the FMLA regulations. Permitting an employer to impose a four-hour minimum absence requirement would unnecessarily and impermissibly erode an employee's FMLA leave entitlement for reasons not contemplated under FMLA (see also the discussion of § 825.203, above). Section 102(b)(1) of the FMLA provides that " * * * [t]he taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled * * * beyond the amount of leave actually taken." An employee may only take FMLA leave for reasons that qualify under the Act, and may not be charged more leave than is necessary to address the need for FMLA leave. Time that an employee is directed by the employer to be absent (and not requested or required by the employee) in excess of what the employee requires for an FMLA purpose would not qualify as FMLA leave and, therefore, may not be charged against the employee's FMLA leave entitlement.

"*Small Business Handbook*: SBA also suggested that DOL consider providing a handbook detailing compliance requirements for small entities, *i.e.*, comparisons of State and Federal family and medical leave benefits and a summary of employee notification requirements, to ease administrative burdens on small entities. As noted above, we prepared and distributed comparisons of State and Federal family and medical leave laws, indicating which law provided the greater employee rights or benefits for compliance purposes, and distributed Fact Sheets and Compliance Guides which summarized compliance requirements.

In conclusion, the Department believes that the available data and studies on the cost impact of the FMLA generally support the Department's conclusion that the implementing regulations will likely not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The regulatory revisions suggested by the SBA to ease compliance requirements for small entities are inconsistent with the statute or its legislative history and cannot be adopted by regulation.

XI. Executive Order 12866

The Department prepared an analysis of the anticipated cost impact of the FMLA rules to meet the regulatory impact analysis (cost/benefit) requirements of former Executive Order 12291 on Federal Regulations. The Department's analysis was principally based on previous analyses of the cost impact of prior versions of FMLA legislation pending before the U.S. Congress which were conducted by the U.S. General Accounting Office (GAO). The GAO's latest report on FMLA legislation, updated to reflect the 1993 enactment, estimated the cost to employers of maintaining health insurance coverage for workers on unpaid family and medical leave at \$674 million per year (GAO/HRD-93-14R; February 1, 1993). The GAO's estimates assumed that employers would experience no measurable costs under the law beyond those of maintaining group health insurance during periods of permitted absences, based on a survey of selected firms in the Detroit, Michigan and Charleston, South Carolina areas. It was the GAO's view that its estimates likely overstated actual costs to employers for leave granted under the new law because the GAO could not adjust for the mitigating influence of pre-existing leave policies already provided by employers either voluntarily or to comply with other mandates such as State or local laws or collective bargaining agreements (34 States, the District of Columbia, and Puerto Rico provide for some type of job-protected leave guarantee by law).

While several commenters expressed a general view that FMLA would have an adverse impact on business, or summarized previous studies that tried to measure the economic impact of FMLA, only one comment was received concerning DOL's impact analysis included in the preamble to the Interim Final Rule (the Department specifically requested comments on the estimates of the impact of the FMLA and the implementing regulations). The Los Angeles County Metropolitan Transportation Authority disagreed with GAO's estimates of cost to employers of complying with various FMLA provisions. This commenter believed the cost estimates are significantly understated because they do not take into account the productivity losses while employees are out on leave, and the costs of hiring and training temporary replacement workers. The Department pointed out in the preamble to the Interim Final Rule (58 FR 31811; June 4, 1993) that quantifying the impact of the FMLA is highly

dependent on numerous assumptions which are severely constrained by limitations in available data. The regulatory impact analysis noted the existence of differing views on this issue, citing specifically the Minority Views contained in the House Report (H.R. Rept. 103-8, 103d Cong., 1st Sess., p. 60), which characterized the GAO estimates as understated either because assumptions were inconsistent with the legislative provisions or with the conclusions of other studies. The preamble to the Interim Final Rule noted in particular the issues of productivity losses and training costs for temporary replacements cited in studies by the former American Society for Personnel Administrators (now the Society for Human Resource Management) and the SBA. Furthermore, studies prepared subsequent to the June 1993 Interim Final FMLA rules suggest that our initial assessment of GAO's estimates as being reasonable remains valid.

The Senate Committee on Labor and Human Resources noted from testimony by the Commissioner of the Oregon Bureau of Labor and Industries that employers in the State of Oregon, when confronted with implementing similar requirements at the State level, reported little or no difficulty in implementing the law, and none had reduced other existing benefits to comply with the new statutory family leave requirements (Report of the Committee on Labor and Human Resources (S.5), Report 103-3, January 27, 1993, p. 14).

Further, according to a three-year study conducted in Minnesota, Oregon, Rhode Island, and Wisconsin by the Families and Work Institute, sizable majorities of covered employers reported that the State laws were neither costly nor burdensome to implement (*Ibid.*). This study suggested that the availability of unpaid leave required by the new State laws had no impact on the length of leave taken by working mothers and only a slight impact on the length of leaves taken by fathers. The survey found that most companies, even the smallest, already offered considerable amounts of leave to working mothers. Small companies granted leave as often as larger companies. Even among companies with fewer than 10 employees, 79 percent indicated they guaranteed the jobs of women who took leave. The survey found that, *prior to passage of the State laws*, 83 percent of all employers surveyed provided job-guaranteed leave to biological mothers for childbirth, and 67 percent of those maintained health benefits during the maternity leave. Sixty percent of all