September 14, 2020

Submitted online via: www.regulations.gov

Joan Harrigan-Farrelly
Deputy Director of Operations
Women's Bureau, U.S. Department of Labor
Room S-3002
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Request for Information: Paid Leave, 85 FR 43264 (July 16, 2020), RIN 1290-ZA03

Dear Deputy Director Harrigan-Farrelly:

On behalf of the Restaurant Law Center (the "Law Center") and the National Restaurant Association (the "Association"), we appreciate the opportunity to submit our comments on the Request for Information (the "RFI") issued by the Women's Bureau, U.S. Department of Labor, and published in the Federal Register on July 16, 2020, seeking information from the public regarding paid leave.

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15.6 million people—approximately 11 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. Despite the size of our industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses.

Jointly, the Law Center and the Association provide regulatory agencies and the courts with the industry's perspective on issues that have the potential to significantly impact the foodservice industry. On their behalf we are responding to your request for information on paid leave. For purposes of the request for information, paid leave is to be limited to the following circumstances:

- The birth of a child and need to care for the newborn child within one year following the birth;
- The placement, with the employee, of a child for adoption or foster care and to care for the newly placed child within one year following placement;
- To care for the employee's spouse, child, or parent who has a serious health condition; or,
- A serious health condition that makes the employee unable to perform the essential functions of his or her job.

Current Benefits of the Family Medical Leave Act

Before we address our concerns with mandating additional paid leave on our industry, at a time when a large percentage of restaurants already have existing paid vacation, paid sick, or paid time off policies, we would like to address the benefits the Family Medical Leave Act ("FMLA") affords both workers and employers. In addition, the feedback we have received is that the FMLA seems to be working well for those taking FMLA for the birth of a child and need to care for the newborn child within one year following the birth as well as for those dealing with the placement of a child for adoption or foster care and to care for the newly placed child within one year following placement. As explained below, most of the concerns with the unpaid FMLA

come from the lack of clarity on what is a "serious" condition as well as perceived abuse of intermittent leave, not regarding leave for pregnancy or parenting.

As to FMLA for pregnancy or parenting, employees and employers seem to be able to plan and adjust straightforwardly. Current federal law gives most employees the right to take up to 12 weeks off work per year for pregnancy disability and/or caring for a new child. While the FMLA leave is unpaid, employees can use accrued paid leave, which would include vacation or other type of paid time off, concurrently with FMLA leave to get paid for at least some of that time.

In addition, a great advantage of FMLA leave is that the employee would continue to be covered by subsidized group health benefits. Finally, when the FMLA leave ends, the employee has the right to return to her/his former position, with restoration of all her/his pay, benefits, and other job perks. Again, we understand that this leave is unpaid, but its many benefits to both employers and employees should not be discounted.

Specific Areas of Concern in our Industry

Our experience is that most restaurants and other employers in the hospitality industry want to do the most for their workforce and offer benefits not only because of worker retention issues, but because they believe it is the right thing to do. However, their good intentions must always be balanced against the need to run a business with small profit margins and a schedule that does not follow the typical 9 to 5 office work environment. Thus, there are additional compliance challenges to our industry with the current FMLA structure that an additional paid leave mandate would make even more severe.

Several concerns are often raised by restaurants specifically on the issue of additional paid leave mandates. While not an exclusive list, the most common issues that we wish to highlight here include:

1. The costs associated with paid leave;
2. The definition of a "serious" health condition is vague;
3. Intermittent and unscheduled leave provisions encourage some to abuse it;
4. Approvals/denials by employers of FMLA requests;
5. Effect on employee morale; and,
6. Impact on existing employer policies.

Before addressing each concern listed above in more detail with regard to potential new paid leave mandates, we would like to suggest that the U.S. Department of Labor concentrate its efforts on eliminating any added layer of expense and operational inefficiency imposed by gray areas left unaddressed by existing FMLA guidance. Ultimately, it is in the interests of everyone, workers and employers alike, to have clarity regarding FMLA rights and obligations. Clear standards reduce unnecessary cost burdens on employers thereby allowing vulnerable businesses like restaurants to remain in business and to continue to employ their workers.

1. The costs associated with paid leave.

First, even before COVID-19, restaurants have traditionally operated with small profit margins relative to other businesses, averaging just 6.1% of sales for full-service restaurants and 6.6% of sales for limited-service restaurants, before taxes. *See* National Restaurant Association and Deloitte & Touche LLP, *Restaurant Operations Report* at 5, 10, 37 (2016 ed.). This means

that businesses in the industry have very little ability to absorb increased operational costs associated with additional paid leave mandates.

Second, employers in the hospitality industry have been ravaged by the COVID-19 pandemic and various governmental shutdowns and/or limitations. According to U.S. Census Bureau figures, between March and June of 2020, sales at eating and drinking places, which are the primary component of the foodservice industry in the nation and historically account for 75% of total industry sales, were down more than $116 billion from expected levels. By July 2020, according to the Association, the total shortfall in sales had reached an estimated $145 billion.

Even in areas where the local authorities have allowed restaurants to remain open, the public has been wary of venturing out and being around other people. As a result of the ongoing situation, an enormous number of restaurants have already gone out of business or are teetering on the edge of insolvency, and many other restaurants that have closed during the pandemic will ultimately not be able to reopen. According to Yelp's Q2 Economic Average Report, as of July 10, 2020, there have been 26,160 total restaurant closings since the arrival of COVID-19, an increase of 2,179 from June 15, 2020. With this many restaurants closing, the restaurant industry cannot afford to absorb additional costs. Once the pandemic passes, it will take the industry years to recover to pre-COVID levels. It is against this backdrop that we must look at the costs associated with mandating additional paid leave on our industry.

According to a 2016 report by the Center for American Progress, the potential cost per year to employers for providing paid family leave is $28.9 billion in wages. As stated, prior to the pandemic, it was estimated by the Association that the United States had 15.6 million restaurant industry employees, approximately 11% of the entire working population of the

United States Workforce. Taking these figures together, the potential cost per year to restaurant employers for providing additional paid leave would be $3.18 billion in additional wages during a time when the shortfall in sales reached $145 billion through the first six months of 2020.

The hospitality industry can ill afford to have billions of dollars of additional annual costs thrust upon them during periods of growth, let alone during a time with this level of historic shortfalls and when businesses have been temporarily shutdown, severely limited, or closed forever. As a result of the erosion of already-low profit margins stemming from COVID-19, businesses in the restaurant industry are especially ill equipped to shoulder the burdens imposed by an added paid leave mandate.

2. The definition of a "serious" health condition is vague.

The definition of a "serious" health condition continues to be vague and "care for" would make the situation worse. Restaurants have experienced issues with determining whether or not an employee has a "serious health condition" because the phrase is extremely broad and very confusing. Generally, many in the employer community feel that the regulations have all but written the word "serious" out of "serious health condition" definition. Specifically, the test set forth in section 825.114(a)(2)(i) (period of incapacity lasting more than three days) is broad enough to cover minor illnesses, like the ones specifically excluded in section 825.114(c). Yet, those same minor illnesses are common reasons employees give for requesting Family Medical Leave Act ("FMLA") leave.

Contrary to Congress' intent to provide protected leave for a narrow set of circumstances, the regulations ignore the limiting word 'serious' in 'serious health condition' and assume a condition is serious merely because an employee gets a sympathetic physician to give them a

note saying that an employee cannot work for three or more days. As a result of these overbroad and vague definitions, adding pay to the current regulatory structure will only result in employers paying employees for the common cold or other minor illnesses.

Furthermore, the above problem will be compounded by adding a vague phrase such as "care for" as a covered reason for FMLA. Employers are learning firsthand how employees may abuse this provision during the current application of the Families First Coronavirus Response Act ("FFCRA"). We have heard of numerous reports of employees invoking the FFCRA's protections and pay provisions to "care for" a school age child when other care is readily available. For instance, where a mother and father have both worked and cared for their minor children prior to the FFCRA providing for paid leave, we are now seeing numerous requests for paid leave.

Rather than work together to both work and care for their minor children, employers are now receiving numerous requests for paid leave that they can neither verify nor refuse. The paid provisions of Emergency FMLA under the FFCRA have created an incentive not to balance work and personal lives. This harbinger of what would come should previous unpaid FMLA leave become paid leave should not be underestimated.

3. Intermittent and unscheduled leave provisions encourage some to abuse it.

In addition to the vague definitions of "care for" and "serious health condition," the prospect of having to pay for intermittent leave will acerbate an already serious issue. Employers are frustrated with employees' ability to avoid promptly alerting their employers of their need to take intermittent and/or unscheduled leave, especially where it is practicable for them to do so.

In many instances this arises when employees ignore mandatory shift reporting procedures, and then report the absence as FMLA-qualifying after-the-fact. Restaurants have experienced employees misusing intermittent FMLA leave to avoid discipline for tardiness. They have also seen employees misuse intermittent FMLA leave to try and secure a preferred shift or to leave a shift early to the detriment of their coworkers. This is especially prevalent with front of the house employees who receive tips. Those that see natural ebbs and flows in customers pick and choose when their own shift ends, under the guise that their reason for intermittent FMLA leave has occurred. Similarly, if they get a shift during the week that they know is historically slow, they call off pursuant to their intermittent FMLA leave.

Many in human resources capacities have come to observe that intermittent leave turns the well intentioned FMLA into the "Friday Monday Leave Act" with employees dictating their own schedules. This untenable situation exists currently with unpaid intermittent FMLA leave. These problems would only be exacerbated if those hours are now paid for and the natural disincentive of the leave being unpaid falls away.

The FMLA regulations have subordinated employers' routine call-in procedures. For instance, (29 C.F.R. § 825.303(a)), allows notice "within one or two working days of learning of the need for leave." Section 29 C.F.R. § 825.208(e)(1) goes further expanding the time period for an employee to notify the employer that her absence was for an FMLA protected reason up to two days **after** returning to work. Section 825.302(d) does not even try to mask the FMLA's subordination of employers' policies.

There, the regulation has been interpreted by the DOL to limit the imposition of call-in procedures on employees who are absent from work for an FMLA related reason where the call-

in procedure is more onerous than the verbal and written notice procedures set forth in 29 C.F.R. § 825.303. These rules and interpretations have caused abuse even in the instance where there is a financial disincentive to do so. Should paid leave become required, the pathway to abuse that these regulations have created will expand from a two-lane country road to an eight-lane interstate freeway.

These issues are further magnified as a result of an employer's inability to verify that an unscheduled absence is in fact caused by a chronic serious health condition. In a typical situation for restaurants, they will receive a single doctor's note substantiating the need for intermittent leave with the dreaded words "as needed." These doctors notes essentially promote the employee to the position of supervisor in control of their own scheduling. The employer has little recourse to determine if the reason for the unscheduled intermittent leave was really "needed." By expanding the reasons for leave to include the care for children under one year old and taking away the financial disincentive for abuse, this leave would only increase the issues employers are currently facing with unpaid FMLA leave.

Scheduled unpaid leave does not create the same issues as intermittent leave. When an employee and her manager have an opportunity to discuss the situation and prepare a plan of action that takes into consideration both the employee's and employer's needs our experience shows us that these leaves can be effectively given. On the other hand, unplanned intermittent leave, creates a significantly greater burden on the employer and other employees.

It is also worth noting that the impact that intermittent leave has on an employer's labor costs would not be limited to the additional pay to employees taking intermittent leave. As the result of unscheduled intermittent leave, both back of the house and front of the house employees

are forced to work unexpected overtime, resulting in additional labor costs to the employer. This certainly has a negative impact on employee morale for those that have to pick up the work, duties and hours for those taking unplanned intermittent leave.

4. Approvals/denials by employers of FMLA requests.

An added paid leave mandate has the potential to increase denials by employers of FMLA requests. Given the current regulatory application of the FMLA, many in our industry have expressed that they readily accept employees stated reasons for FMLA leave because the leave is unpaid. They feel that if they can reasonably anticipate the need for leave, then it becomes manageable. However, those same employers express that, if the time was paid, they would need to more closely scrutinize the reasons for leave, whether it is a "serious health condition" or "to care for" a newborn child.

The employer would also need to more closely scrutinize whether the stated intermittent leave was indeed taken for the stated health or childcare condition. By creating additional incentives for abuse and a direct cost to the employer, this change may result in additional denials by employers of claimed needs for family leave in situations where employees are currently being afforded "protected" leaves of absence.

In addition, where many in our industry will retain employees in an unpaid status during economic downturns. By adding a cost to having employees that are not otherwise working, you create an incentive for employers to quickly act and lay off employees by seniority. Where done for objective reasons, the employer can avoid the costs associated with additional paid leave. Whereas, if the leave was without pay, employers would be more likely to keep the individual

employed during their leave of absence, potentially being able to return them to the schedule at the conclusion of the leave.

5. Effect on employee morale.

Restaurants report a great deal of co-worker resentment and employee morale issues related to those employees calling off for claimed FMLA related reasons so they can be off for holidays and weekends. This can especially impact the restaurant industry where most holidays are worked serving guests.

These call-offs reportedly have interfered with the vacation requests of other employees—requiring them to come to work while another employee uses FMLA. Again, this is what many refer to as part of the "Friday Monday Leave Act." This is because there is little recourse for an employer to address these types of abuses/misuses of leave. In fact, we have heard of employees requesting a vacation day, have that denied because of how busy the location expects to be that day, only to have the employee call off sick that day stating it was for a FMLA issue.

6. Impact on existing employer policies.

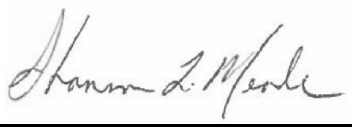
As stated earlier, many employers already have paid leave policies. Even before the current pandemic, many restaurants had existing paid vacation, paid sick, or paid time off policies. Those policies have notification requirements, minimum increments of leave, restrictions regarding the time of year leave may be taken, as well as more time for employees who have been with the company longer. Paid FMLA leave will allow for employees to circumvent certain aspects of these employer policies and requirements. In addition, the

existence of widespread paid FMLA leave may provide a disincentive for employers to provide increases in their current paid leave and other benefits.

In Closing

We appreciate the opportunity to provide information regarding the issues associated with creating additional paid leave requirements. On behalf of the Restaurant Law Center, the National Restaurant Association, and the industry we represent, we thank you for the opportunity to submit our comments and thank you for your attention to this matter.

Sincerely,



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