Family Medical Leave Act

STATUS: Labor Department reviewing comments

Congress approved the Family and Medical Leave Act (FMLA) in 1993. The FMLA provides eligible workers of public agencies and large private employers 12 weeks of unpaid leave for pregnancy, infant care, or the employee’s or a close family member’s “serious health condition.” The Department of Labor is now considering possible revisions to the regulations that implemented the act.

When the FMLA passed, a competitive labor market highlighted controversy over the need for government action. The 1995 federal Commission on Leave reported to Congress that, as of 1992–1993, 60 percent of firms with 15 or more employees already offered workers unpaid sick leave. The commission noted that the preceding decade had been “a period of tremendous innovation and experimentation in the employee benefits field as employers tried to accommodate the needs of a rapidly changing workforce.”

More recently, concern over the FMLA has shifted to the regulations that implemented it. Two areas have received considerable attention: (1) what constitutes a “serious health condition” and (2) the amount of notice required of employees prior to their taking leave.

SERIOUS HEALTH CONDITION

After the FMLA passed, the Labor Department promulgated a rule with two overlapping interpretations of the statutory definition of “serious health condition.” On one hand, the rule states that the common cold, flu, earaches, upset stomach, and other minor conditions do not, without complications, count as serious health conditions. On the other hand, the rule applied the definition to employees who are incapacitated for more than three consecutive days, are treated by a healthcare provider at least once, and begin “a regimen of continuing treatment” under the healthcare provider’s supervision. These criteria could make a serious condition out of an otherwise minor cold, earache, or flu.

To rectify this conflict, it seems sensible for the Labor Department to consider the legislative intent of the FMLA. Rep. William D. Ford (D-Mich.), who introduced the legislation on the floor of the House, described its purpose as follows: “Workers should not be forced to stay on the job when they are needed at home to help a mother with a broken hip, a husband going for chemotherapy, or a child facing surgery.” Given that description, it should not be difficult for the Labor Department to parse out what lawmakers meant by “serious health condition.”

NOTICE

Under the law, workers who want to take FMLA leave must give employers 30 days notice if the leave is foreseeable. If leave is not foreseeable, the employee must give notice “as soon as practicable.” Because medical leave is often not foreseeable, and because employers must fulfill several obligations in a very short time under the FMLA when leave is requested, employers complain about the rising costs of short-notice and no-advanced-notice leave-taking.

A 2004 survey by the Employment Policy Foundation found that more than 40 percent of FMLA leave-takers did not give any advanced notice before taking leave. Yet, when an
employee does give notice, the employ- 
er has just two days to determine whether the worker is eligible for FMLA leave (i.e., has worked for a full year and 1,250 hours within that year), to decide whether to request medical certification, and to inform the worker both whether he or she is eligible and whether the leave will be counted against the employee’s 12 weeks. Fur- ther complicating this process is that some 20 percent of FMLA leave is for periods of one day or less, which suggests considerable administrative cost for relatively little employee leave. If the Labor Department chooses to address this concern, it may want to spread the administrative burden between the employer and the worker. It is likely, for instance, that employers track certain things more accurately than workers, and vice versa. A rule that splits duties on this ground could cut administrative cost significantly.

— Joseph A. Rotondi

Food Advertising to Children

STATUS: FCC task force formed

In late January, the Federal Communi-
cations Commission and Sen. Sam 
Brownback (R-Kansas) jointly 
announced the formation of a public-
private taskforce to study the possible 
correlation between food advertising 
and childhood obesity. The announce-
ment came one month after the Feder-
al Trade Commission closed a 
comment period (to which Mercatus 
Testimony came one month after the Feder-
al Trade Commission closed a 
comment period (to which Mercatus 
Testimony was submitted). Given the 
overall decline in children’s exposure to 
television advertising and the changing 
composition of advertis-
ing, it is highly probable that children 
are seeing fewer televised food ads than 
their more slender peers of previous 
generations. As a result, it seems inap-
propriate to blame today’s growing 
waistlines on television ads.

Perhaps the best predictor of the 
likely inconsequential effects of a gov-
ernment ban on food advertising to 
children comes from countries or 
regions that have already banned food 
advertising to children. Childhood 
obesity is not just an American 
problem; rates of childhood obesity 
have been increasing around the world, 
in countries with much different adver-
sising cultures than America’s. More 
than 10 years ago, Sweden banned all

— Joseph Adamson and Todd J. Zywicki.

advertising directed at children, and 
Quebec banned food advertising aimed 
at children in the 1980s. Yet neither 
country shows a meaningful benefit 
from the ban; Sweden has similar 
childhood obesity rates as the rest of 
Europe, and Quebec has similar obesi-
ety rates as the rest of Canada. 
Moreover, the prevalence of children’s 
obesity has also rapidly increased in 
countries as diverse as Haiti, Brazil, 
Egypt, and Ghana, which have media 
and advertising cultures very different 
from the United States.

The FCC and Senator Brownback’s 
regulatory concerns are very similar to 
those that motivated the FTC’s hearings 
on Children and Television, better 
known as “Kidvid,” nearly 30 years ago. 
Kidvid began when the FCC investigat-
ed whether ads for sugary cereals were 
unfairly targeting children and whether 
they contributed to tooth decay and 
cavities. The final conclusion was that 
the marketing of sugary cereals was of 
legitimate public concern, but regulato-
ry solutions were not workable. Precise-
ly targeting the suspect ads during pro-
grams with high child viewership was 
nearly impossible. In the process, the 
FTC suffered a loss of public 
confidence, as the hearings were seen as 
an example of government overreach.

Members of the new FCC taskforce 
should bear the Kidvid flop in mind. 
They should also consider whether 
government intervention in food 
advertising to children may end up 
cause more harm than good. A cau-
tionary tale is the one involving the 
health benefits of fiber in some of its 
cereals. Other companies quickly 
followed suit, as consumers began buy-
ing more high-fiber cereal. The result 
was that overall fiber consumption 
increased significantly, and federal reg-
ulators were forced to revise their poli-
cies. Similar restrictions on advertising 
will reduce the informational “good” 
that advertising represents, resulting in 
consumers less able to compare foods’ 
nutritional merits at the supermarket.

— Joseph Adamson and Todd J. Zywicki. 