The Mercatus Center at George Mason University is an education, research, and outreach organization that works with scholars, policy experts, and government officials to bridge academic theory and real-world practice. The center's Regulatory Studies Program works within the university setting to improve the state of knowledge and debate about regulations and their impact on society. More information about the center can be found on the Web at www.mercatus.org.

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."

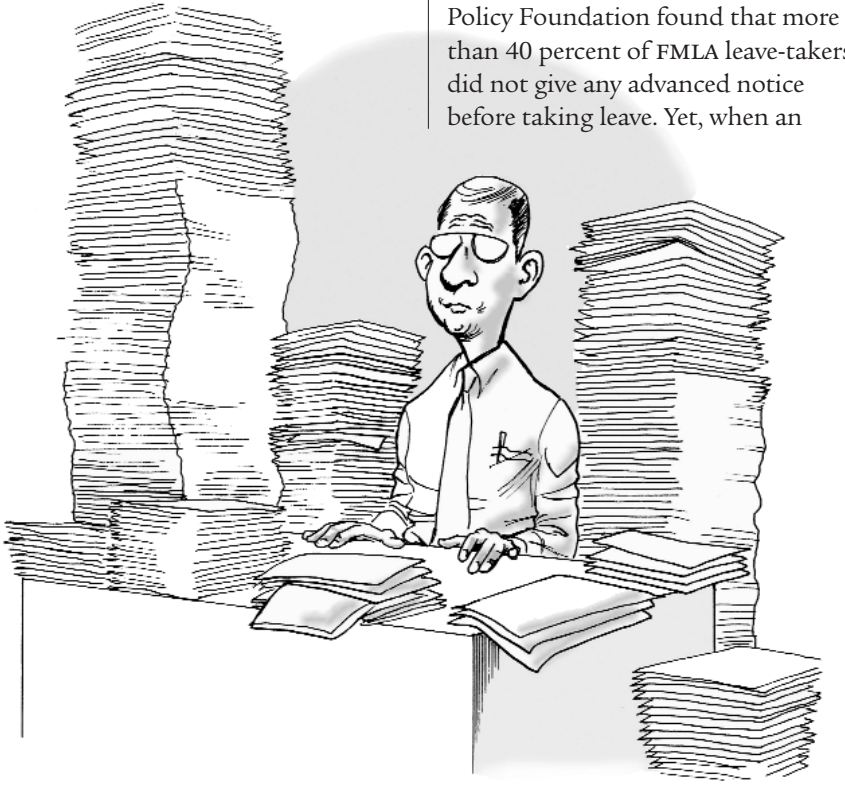
More recently, concern over the FMLA has shifted to the regulations that implemented it. Two areas have received considerable attention: (1) what constitutes a "serious health condition" and (2) the amount of notice required of employees prior to their taking leave.

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



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employee does give notice, the employer 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. Further 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 Communications 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 announcement came one month after the Federal Trade Commission closed a comment period (to which Mercatus filed a comment) concerning the creation of a similar study, this one mandated by the Senate in 2005.

Some studies have shown a correlation between increased watching of television and an increased risk of obesity. But is the correlation a result of food advertising, or because television-watching is a sedentary activity that often is accompanied by snacking on unhealthy foods? If the latter is the case, limits and even outright bans on advertising will likely have little positive effect on the public welfare. Put simply, being overweight and obesity are caused by greater energy intake than energy expenditure. Of all the known and suspected risk factors for obesity — and there are dozens that range from rising incomes, to falling food prices, to the challenges of preparing healthy foods in families where both parents work — food ads are a secondary factor, at most.

Consider that, over the last 30 years of increasing concern over childhood obesity, children's exposure to food advertising has likely decreased substantially. Children now watch less television programming than they did in the 1970s — on average, more than an hour less per day. Partly as a result of this change, the actual number of television ads viewed by children is declining. The Federal Trade Commission has estimated that a child saw an average of 17,507 paid television ads in 2004, down from 20,000 in 1977.

Though children view less commercial television today, they have replaced that hour of TV-watching with equally sedentary DVD, video game, and Internet activity. These three media have also cut into children's physical activity time, likely reducing their daily energy expenditure.

The composition of advertising has also changed. Far more non-food products geared to children (e.g., video games and DVDs) are advertised today than in years past, and television programming includes more commercials promoting other programs and more public service announcements. Given the overall decline in children's exposure to television advertising and the changing composition of advertising, 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 inappropriate to blame today's growing waistlines on television ads.

Perhaps the best predictor of the likely inconsequential effects of a government 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 advertising cultures than America's. More than 10 years ago, Sweden banned all 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 obesity 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 FTC investigated 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 regulatory solutions were not workable. Precisely targeting the suspect ads during programs 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 causing more harm than good. A cautionary tale is the one-time U.S. policy against food producers making health claims for their food products. In the mid-1980s, Kellogg's defied federal policy and began to advertise the health benefits of fiber in some of its cereals. Other companies quickly followed suit, as consumers began buying more high-fiber cereal. The result was that overall fiber consumption increased significantly, and federal regulators were forced to revise their policies. 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.