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MEMORANDUM

November 16, 2015

Barbara Sapin
Executive Director
Office of Compliance
110 Second Street, SE
Room LA-200, John Adams Building
Washington, D.C. 20540-1999

Subject: Comments on Notice of Proposed Rulemaking, Modifications to the Rights and Protections under the Family and Medical Leave Act of 1993

Dear Ms. Sapin:

I provide the following comments on behalf of the Architect of the Capitol ("AOC") in response to the Proposed Rulemaking published by the Office of Compliance ("OOC" or "Board") in the Congressional Record on September 16, 2015 ("Proposed Rules").

I. BACKGROUND

The Congressional Accountability Act ("CAA") applies certain provisions of the Family and Medical Leave Act ("FMLA") to employing offices in the legislative branch. *See* 2 USC §1312(a). The CAA further directs the Board to issue regulations to implement the rights and protections of the provisions of the FMLA that apply to the legislative branch. *See* 2 USC §1312(d)(1). The CAA states that the Board's regulations "shall be the same" as regulations issued by the Department of Labor ("DOL") to implement these same sections of the FMLA. *See* 2 USC §1312(d)(2). However, the CAA states that the Board may depart from DOL regulations if the Board determines, "for good cause shown," that such a departure "would be more effective for the implementation of the rights and protections" of the FMLA, as applied by the CAA. *See Id.*

In accordance with the CAA's requirements and following resolutions passed by the House and the Senate, the Board issued FMLA regulations on April 19, 1996. The Board has not since revised its FMLA regulations. After the Board issued its FMLA regulations in 1996, DOL revised its own FMLA regulations on several occasions. *See* 73 Fed. Reg. 67,934 (Nov. 17, 2008); 78 Fed. Reg. 8,834 (Feb. 6, 2013); 80 Fed. Reg. 9,989 (Feb. 25, 2015). Most recently, DOL revised its regulations to change the definition of "spouse." Prior to that, DOL also revised its regulations to incorporate FMLA statutory changes concerning military leave entitlements enacted by the National Defense Authorization Act ("NDAA") of 2008 and 2010. These changes

to DOL regulations also made additional substantive changes. In particular, DOL's 2008 amendments made several substantive changes to DOL's FMLA regulations.

The Board published the instant Proposed Rules in the Congressional Record on September 16, 2015, with the stated purpose of instituting changes concerning military leave entitlements and the definition of "spouse." The Proposed Rules also, more generally, align the Board's FMLA regulations with current DOL FMLA regulations, both substantively and structurally. Thus, the Proposed Rules incorporate several other amendments that DOL made to its own FMLA regulations over the years.

II. COMMENTS

As a general matter, the AOC welcomes the Board revising its FMLA regulations to conform to current DOL regulations. Many changes proposed in the Board's Proposed Rules provide needed clarifications and updates to the Board's FMLA regulations. The AOC provides the following specific comments, below, to particular sections of the Proposed Rules.

A. Subpart A, Coverage under the Family and Medical Leave Act

1. Subpart A Heading

For the sake of consistency and to clarify that the CAA, as opposed to the FMLA, applies directly to employing offices, the heading of Subpart A should read "Coverage under the Family and Medical Leave Act, as Made Applicable by the CAA."

2. Sections 825.102 and 825.110 ("Eligible Employee" Defined)

Section 825.102 of the Proposed Rules defines "eligible employee" in part as an employee "who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with an employing office during the previous 12-month period..." *See* Proposed Rules §825.102. However, subsection (d) of section 825.110 reads "The determination of whether an employee has *worked* for any employing office for at least 1,250 hours in the past 12 months and has been employed by any employing office for a total of at least 12 months must be made as of the date the FMLA leave is to start." *See* Proposed Rules §825.110(d)(emphasis added). For consistency and clarity, subsection (d) of 825.110 should instead read "the determination of whether an employee meets the hours of service requirement." *See also, e.g.*, 29 CFR §825.110. "Worked" is not defined in the Proposed Rules.

3. Section 825.102 ("Spouse" Defined)

AOC policy already allows AOC employees in legally recognized same-sex marriages to take FMLA leave on the same terms as employees in legally recognized opposite-sex marriages. Accordingly, from a substantive standpoint, AOC has no comments to the Board's revision of its regulations to encompass such marriages.

The Board requested comments on whether its own proposed definition of "spouse," or DOL's version, would be more appropriate to adopt in its amended FMLA regulations. The Board cites *Obergefell v. Hodges* as its motivation for substituting its own wording for the definition of "spouse." *See* Proposed Rules at 4 (citing *Obergefell*, No. 14–556, 2015 WL 2473451 (U.S. June 26, 2015)). As stated by the Board, *Obergefell* "requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state." *Id.* at 5. The AOC recognizes that *Obergefell* limits states from enacting laws that restrain or prevent recognition of same-sex marriages. However, AOC does not believe that DOL's definition of "spouse" is necessarily inconsistent with this holding. This definition reads as follows:

> Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either: (1) Was entered into in a State that recognizes such marriages; or (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

See 29 CFR §825.102. This definition of "spouse" does not conflict with *Obergefell* or otherwise limit or prevent the recognition of same-sex marriages. Under DOL's language, combined with *Obergefell*'s holding, the law of *all* states will now "recognize such marriages." *See id.* Furthermore, the Board's proposed definition of "spouse" writes out the requirement that, more generally speaking, a valid marriage between participants of any sex is defined by reference to state law. *See* Proposed Rules §825.102 (simply stating that a husband or a wife "refers to all individuals in lawfully recognized marriages" and referencing the requirements of state law only in connection with common law marriages). Thus, while the Board and DOL's definitions of spouse have the same substantive effect, the AOC suggests that the Board use the DOL definition.

Lastly, AOC notes that changing the definition of "spouse" in accordance with either the Proposed Rules or current DOL regulations causes the validity of a common law marriage to no longer depend on the place of residence, but instead the "place of celebration," or the location where the marriage was entered into. The vast majority of AOC employees reside in the Washington, D.C., Maryland or Virginia area. AOC has concerns regarding administering this new rule as it will, assumingly, shift the focus of defining a valid common-law marriage to the laws of many different states. AOC suggests that, at the least, OOC provide periodically updated compliance assistance information on its website to assist in determining whether common law marriages are recognized in certain states and, if so, the requisite requirements for the common law marriage to be valid.

4. Sections 825.102, 825.113, and 825.115 ("Serious Health Condition" Defined)

In its Proposed Rules, the Board proposes to adopt, unchanged, the definition of "serious health condition" contained in current DOL regulations. This includes a serious health condition defined by a period of incapacity plus continuing treatment by a health care provider. *See* Proposed Rules §825.115 and 29 CFR §825.115. This definition in the Proposed Rules, mirroring the DOL definition, requires either two visits to a health care provider within 30 days of the first day of incapacity, or a visit to a health care provider coupled with a "regimen of continuing treatment." *See id.* In either case, in the absence of extenuating circumstances, the first (or only) visit to a health care provider must occur within seven days of the first day of incapacity. The period of incapacity must last at least three days. *Id.* A "regimen of continuing treatment" can include, for example, a course of prescription medication or therapy requiring special equipment. *See* Proposed Rule §825.113 and 29 CFR §825.113.

To begin with, the AOC supports the Proposed Rule's addition of temporal limitations concerning treatment visits in its "incapacity plus treatment" definition of a serious health condition. However, under the DOL's definition, adopted in the Proposed Rules, an employee might qualify for FMLA leave if he/she is absent from work for three days, visits the doctor once within seven days and receives a course of antibiotics. *See* 29 CFR §§825.113 and 115. The AOC believes that the plain language of this definition potentially covers many minor ailments that the FMLA statute was never meant to protect.

In the absence of inpatient care, the FMLA's statutory definition of "serious health condition" is sparse, simply requiring "continuing treatment by a health care provider." *See* 29 USC §2611(11)(A). Yet the FMLA's legislative history suggests that Congress never intended the FMLA to cover minor conditions with short periods of incapacity. *See* S. REP. 103-3, 28, 1993 U.S.C.C.A.N. 3 ("S. Rep."), 30 ("The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief"). Nevertheless, DOL's definition of a serious health condition potentially allows such conditions to merit FMLA coverage. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001)("It is possible, of course, that the definition adopted by the Secretary [of a serious health condition] will, in some cases…provide FMLA coverage to illnesses that Congress never envisioned would be protected…"). While DOL regulations and the Proposed Rules clarify that minor ailments like the cold and the flu should not qualify for FMLA coverage, this language is often at odds with the "incapacity plus treatment" definition outlined above and is accordingly difficult for employers to rely on when administering FMLA leave.

Thus, the Board should provide clarity to the serious health condition definition while also ensuring that genuinely serious conditions, as opposed to minor ailments, qualify for FMLA coverage by increasing the required period of incapacity from three to five days. *See* Proposed Rules §825.115. In addition, AOC believes that the Board could provide further clarity to this subset of the serious health condition definition by requiring two visits to a healthcare provider within 30 days of the incapacity in order to demonstrate "continuing treatment," as opposed to also allowing one visit coupled with "a regimen of continuing treatment." *See id.* Besides further ensuring that truly serious conditions qualify for FMLA coverage, this change would alleviate

the need to determine whether an employee is under a "regimen of continuing treatment," often a confusing concept to administer.

The Board has "good cause" to depart from DOL regulations and make these changes to the definition of "serious health condition." *See* 2 USC §1312(d)(2). First, these changes accurately reflect the legislative intent of the FMLA. Furthermore, when Congress enacted the FMLA, the record indicates that Congress recognized that minor ailments are more appropriately addressed by employer paid time off and sick leave policies, not the statutory protections of the FMLA. *See* S. REP. at 30 ("It is expected that such [minor] conditions will fall within even the most modest sick leave policies"). This is particularly appropriate in the context of the legislative branch. While practices of private sector employers subject to DOL FMLA regulations may vary widely, legislative branch employing offices offer generous paid time off and sick leave policies that provide more than ample coverage for non-chronic ailments lasting for short periods of time. Second, these changes would merely clarify, instead of conflict with, DOL regulations because DOL regulations already state that minor ailments should not qualify for FMLA coverage. *See* 29 CFR §825.113(d).

B. Subpart B, Employee Leave Entitlements Under the Family and Medical Leave Act, as Made Applicable by the Congressional Accountability Act

1. Military Leave Entitlements (Generally)

The Board includes FMLA military leave entitlements, for qualifying exigency leave and military caregiver leave, in its Proposed Rules. In the preamble to the Proposed Rules, the Board states that these changes are necessary to "resolve any ambiguity regarding the applicability of the 2008 and 2010 FMLA amendments [enacted by the 2008 and 2010 NDAA] to the legislative branch," given that, in the accompanying committee reports, "Congress failed to make clear its intent as to whether these additional rights and protections apply to the legislative branch." *See* Proposed Rules at 3. The Board then seems to suggest that even if these statutory amendments did not apply to legislative branch entities by way of the CAA, or otherwise under the law, the Board could nevertheless require legislative branch entities to provide these rights through the Board's rulemaking power, with Congressional approval. *See id.* at n. 2.

The AOC already provides FMLA military leave entitlements to its employees, in accordance with statutory amendments to the FMLA and corresponding DOL regulations. The AOC finds that the Board's Proposed Rules are in agreement with these statutory entitlements, DOL regulations, and current AOC policy. Thus, the AOC has no substantive comments concerning the Board's Proposed Rules on military leave entitlements. However, the fact that AOC declines to provide any further comment on the Board's regulations concerning military leave entitlements does not necessarily indicate its agreement with the Board's characterization of its rulemaking authority in the preamble to the Proposed Rules.

2. Section 825.200 (Amount of Leave)

The Board's Proposed Rules provide that if an employee works at two different employing offices sequentially, time spent by the employee at both employing offices may be aggregated to

determine whether the employee meets the 12 months of employment and/or the 1,250 hours of service FMLA eligibility requirements. *See* Proposed Rules §825.110. Section 825.200 of the Proposed Rules should contain a corresponding clarification that FMLA leave taken by an employee at a former employing office may count against that employee's FMLA entitlement at another employing office, if the employee is sequentially employed at another employing office during the same leave year. For example, if an employee works for one employing office, uses 200 hours of FMLA leave, then moves to another employing office in the same leave year, then he/she should have 280 remaining hours of FMLA leave for the leave year, not 480. AOC suggests that the Board add such a clarification as subsection (j) to this part.

3. *Section 825.206 (Interaction with FLSA)*

The Board proposes to adopt the DOL version of this section verbatim, except to omit any reference to computer employees because the Board's proposed Fair Labor Standards Act (FLSA) regulations adding computer employees to the list of exempt employees under the CAA have not been enacted into law.

AOC understands the Board's concern that its regulations concerning the FMLA agree with its current FLSA regulations. Yet the Board can retain the intent of this section by simply referencing OOC's FLSA regulations concerning employees exempt under a salary and duties test, instead of mentioning each category of employee subject to this exemption and specifically excluding computer employees. For example, the following suggested language, containing minor adjustments to the Board's proposed language, could accomplish this purpose:

> Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, because the employee meets salary requirements and a specified duties test (under regulations issued by the Board, at part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.

4. *Section 825.207 (Substitution of Paid Leave)*

The Board requested comments concerning the use of compensatory time. As with other types of paid leave, the AOC allows employees to substitute compensatory time for unpaid FMLA leave. Accordingly, the AOC believes that the provision proposed by the Board is appropriate. However, minor additions, italicized below, are necessary to delineate the fact that the CAA, and not the FLSA, applies to employing offices:

> Under the FLSA, *as applied by §1313 of the Congressional Accountability Act*, an employing office always has the right to cash out an employee's compensatory time or to

require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA entitlement.

5. Section 825.217 (Key Employees)

As discussed in AOC's comment to Section 825.206 of the Board's Proposed Rules, there is no need to specifically reference the professional, administrative, and executive exemptions in Section 825.217. Instead, the language of subsection (b) of section 825.217 that is italicized below, referencing executive, administrative, and professional employees, should be deleted:

> (b) The term salaried means paid on a salary basis, within the meaning of the Board's regulations at part 541, implementing section 203 of the CAA (2 U.S.C. 1313), regarding employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA, *as executive, administrative, and professional employees*).

In addition, the final parenthesis contained in this subsection is superfluous and should be deleted.

C. Subpart C, Employee and Employing Office Rights and Obligations under the FMLA, as Made Applicable by the CAA

1. Employing Office and Employee Notice Requirements, Generally

The AOC supports the OOC's reorganization and consolidation of its FMLA notice provisions to better align with DOL's FMLA regulations concerning notice. The AOC believes the Proposed Regulations will be more user friendly for both employers and employees. In particular, the AOC supports the Board's clarification, by adopting these Proposed Rules, that the procedural requirements of an employing office's normal absence notification policy apply to both foreseeable and unforeseeable leave requests. *See* Proposed Rules §§825.302(d) and 825.303(a). In addition, the AOC welcomes the extension of the time frame for an employing office to provide the required eligibility notice following an employee's FMLA request, as well as to provide notice of whether leave is designated as FMLA leave after acquiring necessary information from the employee, from two to five business days. *See* Proposed Rules §825.300. The AOC believes that this period of time is more reasonable and, furthermore, allows legislative branch entities to operate under the same notice timeframes as other entities subject to the FMLA.

2. Section 825.300 (Employing Office Notice Requirements)

Subsection (c)(6) of Section 825.300 of the Proposed Rules adopts the corresponding DOL regulation to allow employing offices to distribute the required rights and responsibilities notice electronically. The Board's explanation of this section states that "electronic distribution of the notice of rights and responsibilities is allowed, so long as the employing office can demonstrate

that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically." *See* Proposed Rules at 13-14.

Given the commonplace practice of electronic communication in the workplace, the AOC is in favor of adopting DOL language that allows for electronic receipt of required notices. However, the AOC believes that the Board should include more concrete guidance in the Proposed Rules concerning what methods are sufficient to assume and/or demonstrate electronic receipt by the employee. In addition, even beyond electronic communications, examples in the regulations of when and how an employing office may assume an employee's receipt of an FMLA notice would offer welcome guidance. Court decisions illustrate some uncertainty in this area of the law, both in the context of electronic transmissions and when notice is mailed. *See*, *e.g.*, *Gardner v. Detroit Entertainment*, 2014 WL 5286734 (E.D. MI 2014) (denying summary judgment to employer where it was not clear whether employee opened an FMLA email notification that the employer sent to her); *but see Lupyan v. Corinthian Colleges*, 761 F.3d 314 (3rd Cir. 2014) (suggesting that, "in this age of computerized communications," using ordinary mail to submit a notice may leave the employer in a difficult position if the employee asserts that he/she never received a mailed FMLA notice). Finally, the OOC should clarify that electronic receipt of the designation notice, in addition to the rights and responsibilities notice, is also permitted.

3. *Section 825.307 (Authentication and Clarification; Second and Third Opinions)*

The AOC welcomes the Board's adoption of DOL regulations that allow personnel other than a healthcare professional to contact an employee's healthcare provider for purposes of authentication and clarification. *See* Proposed Rules §825.307(a). Authentication and clarification serve as important avenues for an employing office to verify or understand information in an FMLA certification without resorting to the second opinion process. Broadening the use of these tools benefits both employing offices and employees, as the second opinion process is costly for the employing office while burdensome for the employee or, as the case may be, the employee's family member. Furthermore, authentication provides an important method to guard against FMLA fraud while also imposing little to no burden on employees with legitimate FMLA requests. Thus, the AOC supports allowing another individual identified in the Proposed Rules to contact the employee's healthcare provider for this purpose.

Regarding the Board's Proposed Rules on second and third opinion examinations, the AOC would welcome the Board's clarification that an employing office may rely on the findings of second and third opinion examinations to deny FMLA protection for future absence requests by the employee for the same condition. For example, suppose that a second and third opinion examination demonstrates that an employee needs only one week to recover from a back injury. However, following the conclusion of the second and third opinion examination process, the employee again submits a certification from his or her original doctor stating that he or she must be absent for an additional five weeks for the same injury, without evidence that the employee's condition has worsened or changed. In that scenario, the employing office should be entitled to rely on the second and third opinions and deny FMLA protection for the employee's leave. Considering the cost and burdens of engaging in the second and third opinion process, this interpretation is both practical and equitable. Furthermore, a logical interpretation of the statute

and DOL regulations, adopted by the Board here, support this interpretation because to find otherwise would essentially allow the employee to nullify the second and third opinion process. Nevertheless, the Board could provide welcome clarification on this point in its final proposed FMLA regulations, as current regulations are silent on this issue.

D. Subpart G, Effect of Other Laws, Employing Office Practices, and Collective Bargaining Agreements on Employee Rights under the FMLA, as Made Applicable by the CAA

1. Section 825.700 (Interaction with Employing Office's Policies)

AOC objects to the first sentence of subsection (a) of this section. By including this provision in the Board's regulations as written, this subsection misleadingly suggests that an employee has the right to bring a claim under the CAA, by reason of the application of the FMLA, if an employing office fails to observe a program providing greater benefits than those provided under the FMLA. This is, however, not the case. For example, if a union representing employees of an employing office were to allege that an employing office failed to observe greater leave rights provided in a collective bargaining agreement ("CBA"), the avenue to contest that alleged violation would be through the CBA's grievance procedure and, potentially, through other provisions of the CAA. *See, e.g.*, 2 USC §1351. The violation, if any, would not rest on the application of the FMLA.

E. OOC Proposed Model Forms

1. General

The AOC supports the Board's compilation of its own model forms given that, as described further below, the AOC believes that improvements can be made to the DOL's model forms. The AOC believes that the forms should be available on the Board's website rather than in the regulations themselves. Future updates to the model forms could be simplified and streamlined if the Board excludes the forms from their FMLA regulations. Furthermore, because use of the OOC's proposed model forms is not mandatory, AOC believes that the forms' inclusion in the Board's regulations is not necessary.

2. Uniform Suggested Change for Forms A, B, F, and G—GINA Notice

The Genetic Information Non-Discrimination Act ("GINA") applies to legislative branch employing offices. *See* 42 USC §2000ff. Generally speaking, with some exceptions, GINA prohibits employing offices from requesting, requiring, or purchasing genetic information from their employees. *See* 42 USC §2000ff-1(b). However, GINA includes an exception for medical requests made via the certification requirements of the FMLA. *See* 42 USC §2000ff-1(b)(3). GINA regulations issued by the Equal Employment Opportunity Commission ("EEOC"), which provide guidance in the Board's enforcement of GINA, include certain "safe harbor" language for employers to use to warn employees and their healthcare providers not to provide genetic information in their response to an FMLA request. *See* 29 CFR §1635.8.

For reasons that are unclear, the language used in current DOL FMLA forms, reproduced here on proposed OOC forms A, B, F, and G (see section III, "Instructions to the Health Care Provider"), differs from the "safe harbor" language used in the EEOC GINA regulations noted above. The language used on current DOL forms, as well as the proposed OOC forms, reads:

> Do not provide information about genetic tests as defined in 29 C.F.R. §1635.3(f), genetic services, as defined in 29 C.F.R. §1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. §1635.3(b).

The Board should instead substitute the model warning language used in the EEOC regulations. This language reads as follows:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

The AOC also suggests that the Board make this language more obvious (for example, by bolding the language or setting it apart). While FMLA certifications constitute legitimate requests for medical information under GINA and while OOC's proposed language may suffice as an adequate notification under applicable laws and regulations, using the EEOC's model language would assuage any doubts on the part of employing offices and thus reduce the tendency to provide additional notices to employees, a practice that can create confusion for employees and additional burdens on employing offices.

3. *Uniform Suggested Change for Forms A, B, F and G—Medical Facts*

Language used in current DOL forms to solicit "medical facts" within the knowledge of the employee's healthcare provider, reproduced by the Board in proposed OOC forms A, B, F and G as question 4, is not specific enough and can create confusion when administering FMLA leave. This language currently reads as follows:

> Describe other relevant medical facts, if any, related to the condition for which the employee [or patient] seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment).

It is our experience that the phrasing of this question causes many providers to decline to provide any medical facts, believing they have already provided sufficient information in the other questions on the certification and that this final question only invites them to provide "other

information" if they wish to do so. AOC recognizes that a form cannot solicit all of the potential information a provider may have regarding a patient's condition. Yet it follows that some further information is often necessary to determine if a condition qualifies for FMLA, particularly when the condition is not easily categorized as a pregnancy or hospitalization. Furthermore, the FMLA statute states that certifications "shall be sufficient" if they state "the appropriate medical facts within the knowledge of the health care provider regarding the condition." 29 USC §2613(b)(3); *see also Novak v. MetroHealth Medical Center*, 503 F.3d 572 (6th Cir. 2007) (a certification is complete and sufficient if it contains appropriate medical facts); *Woods v. Daimler Chrysler*, 409 F.3d 984 (8th Cir. 2005) (employer is entitled to medical facts). Medical facts also assist the employer in administering the second opinion process given that, in the absence of a diagnosis or symptoms, the employer cannot request a provider in the appropriate specialty. In addition, the employer may not know whether to seek a second opinion in the first place, as it is difficult to determine whether the need for leave is supportable without knowing what condition/symptoms the employee suffers from.

Accordingly, we recommend that OOC delete the phrase "if any" from question 4. We also suggest that the Board replace "may" with "should."

4. *Additional Change to Form B*

Reformat the "No/Yes" boxes for Question 1 under "Medical Facts."

5. *Additional Change to Form C*

Delete the form's reference to the FMLA poster. As recognized in the Board's Proposed Rules, the FMLA posting requirement does not apply to legislative branch employing offices. *See* Proposed Rules at 12.

6. *Additional Change to Form G*

Reformat the "No/Yes" boxes Under Part C, "Veteran's Need for Care by Family Member."

The AOC respectfully requests consideration of the above comments. If there are any questions, please feel free to contact me by electronic mail at jbaltimore@aoc.gov.

Sincerely,

Ingrid Addison Freeman

for Jason Baltimore
General Counsel