

September 3, 2009

Trust for America's Health
1730 M Street, NW
Suite 900
Washington, D.C. 20036

Attention: Jerome D. Mikowicz, Deputy Associate Director
Center for Pay and Leave Administration
U.S. Office of Personnel Management
Room 7H31
1900 E Street, NW
Washington, D.C. 20415-9200

Comments on Proposed Rule
5 CFR Part 630
RIN 3206-AL91

On behalf of Trust for America's Health (TFAH), I am pleased to provide you with the following comments on the proposed rule (RIN 3206-AL91) for changes to the administration of leave under the Family and Medical Leave Act (FMLA). TFAH is a non-profit, non-partisan organization dedicated to saving lives by protecting the health of every community and working to make disease prevention a national priority.

Since 2005, TFAH has outlined recommendations for policymakers on ways to better prepare the country for a pandemic outbreak. TFAH has issued a series of reports and created the Working Group on Pandemic Influenza Preparedness with more than 40 other organizations. We applaud the Office of Personnel Management (OPM) for taking positive steps to make sick and administrative leave laws for federal employees as flexible as possible to deal with the threat of infectious disease.

The ongoing outbreak of 2009 H1N1 influenza A has illustrated limitations in current sick leave policy for both federal employees and private sector workers. As the Centers for Disease Control and Prevention (CDC) and other health officials have repeatedly stated, individuals with influenza symptoms or caring for a sick family member should stay home from work. Such a recommendation is the cornerstone of a non-pharmaceutical community mitigation strategy intended to lessen the outbreak of an infectious disease. Unfortunately, many federal employees may have already exhausted their annual sick leave allotment, were unsure of federal law regarding their ability to care for a sick relative, or feared negative career or economic consequences from missing work or taking unpaid sick leave. The proposed OPM rule of August 26, 2009 would make progress in addressing those issues and allowing federal employees to comply with CDC's recommendations.

TFAH's comments deal with two sections of the proposed rule, Sick Leave for Pandemic Influenza and Other Serious Communicable Diseases (amends Sec. 630.401(a)(3) of FMLA) and Proposed Regulations on Advanced Sick Leave (amends Sec. 630.402(a)(1) of FMLA).

Sick Leave to Provide Care for a Family Member

In June, 2009, TFAH issued a report examining the early lessons learned from the H1N1 outbreak, *Pandemic Flu Preparedness: Lessons from the Frontlines* (available at <http://healthyamericans.org/assets/files/pandemic-flu-lesson.pdf>). In that report, TFAH found that limitations in sick leave policies left many employees attending work despite being sick or needing to take care of a sick family member. In the June report, TFAH recommended employers and the federal government adopt policies to allow employees to comply with public health recommendations during a pandemic. OPM's proposed sick leave rules, which entitle an employee to use accumulated sick leave to care for a family member if that person's presence in the community would endanger others, accomplish the required clarity to ensure federal employees can help protect themselves and their coworkers from a contagious disease. OPM's proposed rule has clarified the types of instances where an employee can use regular or advanced sick leave during an infectious disease outbreak, while allowing enough flexibility to ensure this is a practical rule. TFAH acknowledges that these rules are only intended for use during serious communicable disease cases. OPM's proposal is written with an appropriate level of specificity to ensure the flexibilities are not abused.

Recommendation: The proposed rule requires the health authorities or healthcare providers to first make a determination that the employee (in the case of advanced sick leave) or family member's (in the case of accrued leave) presence in the community would jeopardize the health of others. It is unclear from this provision if the employee requires a doctor's note in order to take advantage of the new sick leave rules. During the current H1N1 pandemic, public health officials are exploring ways to reduce the surge of patients into healthcare facilities, a prospect that would quickly overwhelm the system. If OPM intends that a physician's letter is necessary, the agency should consider allowing that the individual's condition be verified through telehealth, call centers, or other contingent operations that may be developed during a pandemic. Given the government's concern over surge capacity, an individual note for each employee may not be feasible or recommended.

Recommendation: OPM should consider expanding the definition of "family member" to include other individuals for whom the employee is a primary guardian.

Advanced Sick Leave

In the case of an influenza pandemic, ill individuals are advised to stay home for at least a day after fever subsides. That could mean being sick and missing work for a week or longer. There are numerous possible scenarios where an employee would need to use advanced sick leave during an infectious disease outbreak. A new parent may have used all of his/her annual sick leave on maternity/paternity leave; an employee may have expended sick leave caring for a sick child during the spring H1N1 outbreak; an

employee may not have the financial stability to take unpaid leave after exhausting paid sick days. One oft-reported story throughout the spring outbreak was that employees showed up to work despite being ill because they feared losing their jobs or the economic costs of taking unpaid sick leave. Allowing advanced leave on a limited basis will protect the federal workforce's health and productivity by limiting the spread of a communicable disease between employees.

On August 19, 2009, the CDC, along with the Departments of Health and Human Services, Labor, Commerce, and Homeland Security, announced guidance to employers for mitigating the H1N1 outbreak. Among their recommendations was to “ensure that sick leave policies are flexible and consistent with public health guidance and that employees are well aware of these policies.”¹ This recommendation aligns closely with TFAH's June report and the advice of public health officials. However, it is difficult to enforce private sector adherence to this guidance without legislation. The federal government can, however, affect its own sick leave policies. Since the beginning of the outbreak, TFAH has been concerned that sick leave policies for federal employees did not follow the best public health recommendations. OPM, as the regulator of nearly 1.7 million civilian employees,² has the opportunity to serve as a model for private sector employers. These proposed rules, which are consistent with public health principles, achieve that goal. Private employers should follow OPM's lead and clarify sick leave rules for sick employees or to care for a sick family member, define specific cases where advanced sick leave is allowable, and ensure supervisors do not penalize employees for following the best public health guidance.

Overall Comments

Recommendation: One major concern of the proposed rule is that the second wave of the H1N1 pandemic is already underway in the U.S. By the time the final rule is issued, it may be too late to have an effect on sick leave policies for the current crisis. TFAH urges OPM to issue an interim emergency rule that applies to the H1N1 outbreak before issuing the final rule on sick leave for future pandemics and outbreaks.

Recommendation: OPM should extend to federal contractors working within government agencies the same flexibility for *both* use of accrued sick leave to care for a family member and for use of advanced sick leave. OPM should require that all federal contractors provide sick leave during public health emergencies, even if this is not part of their normal personnel policies. Although many of these contractors are technically employed by the private sector, they are often assigned to work in federal agencies and should therefore receive the same considerations in leave policy. OPM's proposed rules are intended to protect federal workers, maintain continuity of operations, and minimize

¹U.S. Department of Health and Human Services. “Guidance for Businesses and Employers to Plan and Respond to the 2009 – 2010 Influenza Season,” Centers for Disease Control and Prevention, August 19, 2009. Available from: <http://www.flu.gov/plan/workplaceplanning/guidance.html>.

² U.S. Office of Personnel Management, “Federal Civilian Employment by Major Geographic Area, State, and Selected Agency,” September, 2008. Available from: <http://www.opm.gov/feddata/html/geoagy08.asp>.

the cost and risk from an infectious disease outbreak. The same goals are true for contractors assigned to work in federal agencies.

Recommendation: OPM asked for comment on the list of disease which would meet the threshold for the new sick leave rules to apply. TFAH recommends allowing flexibility for new and emerging infections which may not yet be on the current consolidated list of communicable disease for which federal isolation and quarantine are authorized.

Recommendation: An issue not discussed in the proposed rules relates to federal personnel who acquire a serious communicable disease in the course of their work. For example, an employee of a Veterans Affairs (VA) hospital or at a workplace-based clinic could become ill as a result of exposure to a patient or employee with the H1N1 virus. In such an instance, the employee who became sick in the course of his/her normal work should not have to exhaust accrued, accumulated, or advanced sick leave while recovering. During a pandemic, it will be critical for all health care workers and other first responders to continue to work, and all incentives and protections – such as not using up leave time – should be assured. TFAH urges OPM and other federal agencies to provide this flexibility and communicate such guidance clearly to federally-employed healthcare workers.

If you have any questions, please contact Richard Hamburg, TFAH's Director of Government Relations, at (202) 223-9876 or rhamburg@tfah.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Levi". The signature is fluid and cursive, with the first name "Jeffrey" and the last name "Levi" clearly distinguishable.

Jeffrey Levi, PhD
Executive Director
Trust for America's Health