TTD

A bold voice for transportation workers

April 30, 2012

VIA ELECTRONIC SUBMISSION

Mary Ziegler
Director of the Division of Regulations, Legislation and Interpretation
Wage and Hour Division
US Department of Labor; Room S-3510
200 Constitution Ave., NW
Washington DC, 20210

RE: The Family and Medical Leave Act; RIN 1235-AA03

Dear Ms. Ziegler,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), we are pleased to submit comments on the Department of Labor's (DOL) Notice of Proposed Rulemaking (NPRM) implementing statutory changes to the Family and Medical Leave Act (FMLA) in accordance with the Airline Flight Crew Technical Corrections Act (AFCTCA) and on DOL's consideration of the "physical impossibility provision." By way of background, TTD represents 32 affiliated unions in the transportation sector including several that have submitted comments in this proceeding or who have members directly impacted by this NPRM.[1]

TTD's comments discuss our views on how to best establish FMLA eligibility for Flight Crew Members (FCMs) based on duty hours, the application of an entitlement bank of FMLA leave as opposed to the DOL proposed fractional calculation, and the minimum standard increment for allocating FMLA leave. These comments also support the elimination of the "physical impossibility provision," which was established by the DOL in a 2008 rule and affects certain employees in the rail industry – in addition to FCMs – due to the traveling nature of their work.

Transportation labor has long advocated not only for fundamental workers' rights and benefits, but also for their equitable application regardless of the job being performed. Enacted in 1993, the FMLA entitles eligible employees to up to 12 works weeks per year of unpaid leave for the birth of a child, adoption of a child, to care for a spouse, parent or child with a serious medical condition, or when the employee is unable to work due to a serious health condition. Employees are eligible if they work 1,250 hours per year – approximately 60 percent of a full time schedule.

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[1] Specifically, the Air Line Pilots Association (ALPA), the Association of Flight Attendants-CWA (AFA-CWA), the International Association of Machinists and Aerospace Workers (IAM), the Transport Workers Union of America (TWU), the United Steelworkers (USW), and the United Transportation Union (UTU) together represent airline pilots, flight attendants and train and engineer workers in the rail sector. A complete list of TTD unions is attached.

Transportation Trades Department, AFL-CIO

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However, the unique scheduling of pilots and flight attendants and the way that time on duty is calculated resulted in these workers being unfairly excluded from the FMLA. Among other things, FCMs on "reserve" status – meaning employees on call for duty to cover another FCM unable to work an assigned flight – found that such work was not counted toward FMLA eligibility.

The enactment of AFCTCA on December 21, 2009, established new FMLA leave eligibility that addresses the unique nature of FCM scheduling. With changes to FMLA eligibility effective upon enactment, carriers and unions have negotiated benefits to comply with the new law. However, we feel that this rulemaking is necessary to ensure that benefits and leave policies are consistently applied throughout the industry, and to ensure that an adequate benefit floor is in place which will cover all FCMs regardless of their specific collective bargaining agreements. We commend DOL for taking the initiative with the NPRM, and appreciate the thoroughness of the proposed rule. We hope that our comments, along with those submitted by our affiliates, will help DOL issue a final rulemaking that accurately reflects the intent of FMLA and AFCTCA and appropriately covers all airline employees, and that properly addresses the impossibility provision.

Flight Crew Eligibility

The biggest impediment for FCM eligibility for FMLA prior to the enactment of AFCTCA was an overly restrictive interpretation of "hours worked," including the exclusion of reserve time. TTD supports the comments made by ALPA, AFA-CWA, IAM and USW, endorsing the Department's determination that for the purposes of FMLA eligibility, "duty hours" be counted as hours worked, and "hours paid" be based on the number of hours for which a FCM earned wages during the prior 12-month period.

In order to be eligible for FMLA leave, the statute requires airline flight crew employees to have worked, or been paid at least 60 percent of the applicable monthly guarantee, and have worked or been paid at least 504 hours in the previous 12-month period. The Department is correct in finding that "duty hours" are the most appropriate basis for determining FMLA eligibility for line-holders. Duty hours include pre- and post-flight duties such as boarding and deplaning passengers, emergency equipment checks, securing the aircraft, and administrative responsibilities, and are a more accurate representation of the overall job responsibilities of FCMs.

TTD also believes that DOL should specifically include all time spent training, whether ground or simulator training, as hours worked for the purposes of determining FMLA eligibility. Training is mandated by federal regulations and documented by carriers. The forthcoming rules should clearly indicate that this documented training time count in determining hours worked.

Finally, TTD supports the proposed 29 C.F.R. §825.110 (c)(4), which places the burden of proving an employee ineligible for FMLA benefits on the employer, and is consistent with application of the law for non-aviation employers. Should a dispute arise in determining an FCM's eligibility, the employer must be able to clearly demonstrate that the crew member has not worked or been paid for the required duty time hours.

Entitlement Bank for Intermittent Leave

TTD concurs with the comments submitted by its affiliates proposing the use of an entitlement bank for administering and tracking FMLA as opposed to the fractional calculation method proposed by DOL. While the methods for calculating leave proposed by DOL may be equitable, TTD believes that they are unnecessarily complex and could be difficult for employers and employees to track. An entitlement bank of days that is uniformly applied would allow employees to take leave as needed and simply subtract this time from their total allotment. Additionally, due to the unique scheduling of FCMs the fractional approach could be inconsistently applied so that FCMs would be charged different amounts of leave based on the amount of hours scheduled in a given week. Comments submitted by ALPA, AFA-CWA and IAM detail this dilemma and use examples to show how an FCM could be penalized if he or she takes FMLA during a week with fewer scheduled hours.

TTD believes that an 84-day bank is an ideal minimum (based on 7-days a week and 12-weeks of leave); however an entitlement bank of 72-days is the absolute minimum approach that could be easily applied and tracked, and which would account for the scheduling differences inherent in the aviation industry. Current Federal Aviation Administration regulations mandate that FCMs have one 24-hour period off duty in any 7-day period, resulting in a de facto FCM work week of 6-days. The 72-day allotment is calculated by multiplying the 6-day work week by the 12-weeks of FMLA granted by law. It should be noted that 6-day work weeks are common in the industry. This use of an entitlement bank can also be applied for both line-holder and reserve FCMs.

For the purposes of this rulemaking, TTD believes that a 72-day bank is the absolute *minimum* benefit, and that this should not inhibit employees from being able to negotiate greater benefits through the collective bargaining process. Some collective bargaining agreements between major air carriers and their employees provide for 84-or 90-day banks.

Minimum Increment

For the purposes of deducting FMLA from a bank of days, TTD proposes a minimum increment of 1-day for FCMs. While this requires FCMs to take a full day of leave when only a few hours may be needed, it is a fair application given the transient nature of airline work. However, in the final rule DOL should include language to ensure that leave is deducted fairly and prevents employers from deducting more leave than is necessary. Along with the elimination of the "physical impossibility provision," which is discussed below, the 1-day minimum increment would allow for leave to be appropriately allocated while protecting the interests of both the employees and the employers.

Elimination of the "Physical Impossibility Provision"

The NPRM contemplates either adjusting the "physical impossibility provision" or deleting it in its entirety. We support deleting the provision in its entirety. This provision applies where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to begin or end work mid-way through a shift. This is a common situation in the transportation industry, where the workplace is often a plane or train and the trip spans multiple days.

The FMLA provides that leave taken intermittently or on a reduced schedule "shall not result in a reduction in the total amount of leave to which the employee is entitled … beyond the amount of leave actually taken." 29 U.S.C. Section 2612(b)(1). From 1993 when the FMLA was passed, until 2008, the DOL correctly interpreted that provision to mean that employees could not be forced to take more leave than was necessary to address the serious medical circumstances that necessitated the leave. However, the 2008 rule added the "impossibility exception" at § 825.205(a)(2). This provision has been misused by air and rail carriers to force employees to use more FMLA leave than necessary, limiting the amount of leave employees have remaining for necessary FMLA-covered purposes. For example, if a flight attendant or pilot is scheduled for a 5-day trip but is unable to depart because he or she needs 1-day of FMLA leave, that employee may still be required to deduct 5-days of FMLA leave. This is contrary to both the language of the statute and the intent of Congress when it passed the FMLA.

In its 2008 final rule, the DOL stated as its justification for adopting the provision, in part, that "the existing policy exposes employees to the risk of discipline in situations in which an employee's need for a short FMLA-protected absence from work actually results in a much longer absence because of the unique nature of the worksite." 73 FR 67977. We appreciate this concern and would note that the Act at 29 U.S.C. 2615(a)(1) prohibits any such discipline. But given the concern about discipline, it is essential for the Department to clarify in its regulations that the Act prohibits employers from taking any disciplinary or other adverse action against an employee who takes FMLA leave as well as any other time off necessitated by the taking of the FMLA leave.

We applaud DOL for offering this proposed rulemaking, and look forward to the implementation of regulations that will ensure FMLA coverage for all workers in the aviation industry, and protect both rail and air employees from carrier attempts to improperly force employees to use FMLA leave beyond the amount actually required by their FMLA-certified conditions. We hope that you will consider these comments along with those submitted by TTD affiliates which represent the employees directly affected by this rulemaking. Thank you in advance for your consideration of our views.

Sincerely,

Edward Wytkind
President

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)
United Transportation Union (UTU)

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