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the work and family legal center

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July 16, 2021

Submitted via e-mail

White House Task Force on Worker Organizing and Empowerment
c/o Theodore Why
Why.Theodore.X@dol.gov

Re: A Better Balance Suggestions for the Task Force on Worker Organizing and Empowerment Created by Executive Order 14025

Dear Members of the Task Force on Worker Organizing and Empowerment ("Task Force"):

President Biden's Executive Order 14025 issued a clear directive that this country, and specifically executive agencies, must find ways to better build and support worker power. For too long, the federal government has failed to use its own authority to restore the degradation of workers' voices and needs. With the creation of this Task Force, the federal government has the ability to course correct and recommend a host of ways that agencies can promote worker empowerment through executive action. A Better Balance is particularly invested in offering suggestions to the Task Force that will promote worker power for marginalized groups, particularly women and people of color in low-wage industries with caregiving needs, who often face harsh penalties and termination when they need to both earn an income and care for themselves and loved ones.

A Better Balance, a national nonprofit, uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Our expert legal team are leaders in the movement to advance policies such as paid family and medical leave, paid sick time, fair scheduling, quality childcare and eldercare and to end discrimination against pregnant workers, lactating workers, and caregivers. While this country desperately needs new policies to support working families, there are already protections in place to support workers with caregiving needs, in particular the Family and Medical Leave Act of 1993 ("FMLA").

The FMLA offers critical job-protected time off to workers who have their own serious health condition, need to care for a parent, child, or spouse with a serious health condition or bond with a new child, or address certain military family needs.[1] Yet, we know firsthand that many vulnerable workers face serious impediments to exercising their FMLA rights. Through A Better Balance's free, confidential legal helpline, we hear from thousands of workers each year who are struggling to exercise their rights when facing caregiving challenges, including the right to FMLA leave. Workers cannot build power if they are penalized or terminated for needing time off to care for themselves or loved ones.

To ensure workers' power to both remain economically secure and care for themselves and loved ones, we urge the Task Force to recommend that the Department of Labor ("DOL"): 1) update certain FMLA regulations and DOL's standard poster to provide better notice of, and clarity on, workers' rights; 2) direct the Department of Labor's Wage and Hour Division ("WHD") to investigate major employers A Better Balance believes may be violating the FMLA through their use of "no fault" attendance policies; 3) direct the WHD to conduct a targeted outreach campaign to employees regarding their FMLA rights, focused particularly on low-wage industries; 4) direct WHD to do concerted outreach and education on President Obama's Executive Order 13706 which grants federal contractors the right to paid sick time, as well as greater enforcement of the EO and an assessment as to possibilities for expansion; 5) urge WHD to prioritize enforcement of the Break Time for Nursing Mothers Law; and 6) recommend DOL issue an Opinion Letter clarifying that employees are protected from FMLA retaliation if they reasonably believe they are covered by the law.

1. To Build Worker Power, the DOL Must Update FMLA Regulations and the DOL FMLA Poster.

In September 2020, A Better Balance submitted detailed comments to then-Director DeBisschop in response to Notice 85 FR 43513, a request for information ("RFI") published in the Federal Register on July 17, 2020, which sought to gather information regarding the effectiveness of the regulations implementing the FMLA [*See* Appendix A]. In response to the RFI, we made four recommendations for ways the DOL can strengthen the FMLA regulations. Those changes have not yet been made and we urge

[1] 29 U.S.C. § 2601, *et seq.*

the Task Force to revisit our recommendations and include them in the Task Force's suggestions to DOL in your report, along with one additional recommendation. Our recommendations are to:

A. implement additional language in the FMLA regulations that would strengthen employers' obligations to ensure that "no fault" attendance policies are not used to interfere with employees' exercise of FMLA rights;
B. modify existing language in the regulations to make clear that denying certain benefits, including bonuses and "credits" for perfect attendance, to employees who utilize FMLA leave is unlawful retaliation;
C. consider modifying the standard FMLA posters to include information indicating that FMLA leave can be used by workers intermittently and during pregnancy and in the event of a miscarriage; and
D. clarify that the statutory provision allowing employers to require substitution of employees' accrued paid leave does not apply to employees receiving benefits through a state paid family or medical leave program; and
E. simplify the regulations concerning serious health condition, particularly around the definition of "incapacity and treatment."

A. The Task Force Should Recommend DOL Update Its FMLA Regulations on "No Fault" Attendance Policies.

In June 2020, A Better Balance published a report, *Misled & Misinformed: How Some U.S. Employers Use "No Fault" Attendance Policies to Trample on Workers' Rights (And Get Away With It)*,[2] detailing how "no fault" attendance policies are routinely used by employers to mislead and misinform workers about their legal rights to take time off without punishment for certain medical and caregiving needs, including leave protected by the FMLA. The report analyzed the "no fault" attendance policies of 66 employers in the U.S. and found that "roughly *one-third* (30%) of the policies failed to indicate that workers would not receive 'points' or 'occurrences' or otherwise face punishment for absences protected by the FMLA."[3] Almost all of the policies failed to provide an

[2] DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) (A Better Balance 2020), https://www.abetterbalance.org/misled-misinformed/.
[3] *See* Appendix A at 3.

explanation of the FMLA and the types of absences that may excuse workers from penalty under an attendance policy.

While FMLA regulations state that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; *nor can FMLA leave be counted under no fault attendance policies*,"[4] our analysis in *Misled and Misinformed* suggests that current FMLA regulations are inadequate and should be expanded to more fully address employer's misuse and abuse of "no fault" attendance policies.

As we stated in our September 2020 letter, "we therefore propose that the DOL consider additional regulations **clarifying the obligations of employers who maintain 'no fault' attendance policies, particularly as they pertain to notices that must be given to employees**."

B. The Task Force Should Recommend DOL Update the FMLA Regulations on "Equivalent" Leave Status

The current FMLA regulations have been interpreted to permit employers to deny certain benefits, includng cash bonuses and perfect attendance credits, to employees who utilize FMLA leave, while conferring such benefits on employees who use other types of leave, such as vacation time or bereavement leave. Allowing employers to treat employees who exercise their statutory right to job-protected leave to care for their health or a loved one worse than employees who use other employer-provided benefits discourages eligible employees from exercising their FMLA rights, and is contrary to the spirit and purpose of the law. Nevertheless, these practices have been permitted because of an overly narrow reading of the meaning of "equivalent" forms of leave in the current regulation, 29 C.F.R. § 825.215(c)(2). The relevant regulations currently read as follows:

> [I]f a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, *unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave*. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then

[4] 29 C.F.R. § 825.220(c) (emphasis added).

> the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.[5]

This language (and accompanying example) make clear that leave that is "equivalent" to FMLA leave only includes other types of *unpaid* leave, allowing many employers to treat the use of FMLA leave less favorably than other types of *paid* leave that may or may not be statutorily-protected.

To address this issue, **we recommend that the Task Force revise this FMLA regulation to make explicitly clear that "equivalent" leave status includes *any* leave, whether paid or unpaid.** We would recommend including language to this effect in 29 C.F.R. § 825.215(c)(2) and striking or modifying the current example in the regulations, which suggests that only other forms of paid leave can be considered "equivalent."

C. The Task Force Should Recommend DOL Update Its Standard Poster to Include Information About FMLA Intermittent and Pregnancy Leave.

The FMLA provides critical protections for pregnant workers. Current regulations make clear that pregnant workers are entitled to use FMLA leave before they give birth, for prenatal care or when their pregnancy makes them unable to work.[6] Yet, too many workers are unaware that the FMLA protects pregnancy-related absences. Furthermore, too few workers realize that they are entitled to FMLA leave if they suffer a miscarriage.[7] Pregnant workers regularly reach out to our helpline because they are struggling to get time off to attend their prenatal appointments or obtain emergency prenatal care, fearful that they can face penalty or termination and unaware that the FMLA may apply to them. Workers subject to "no fault" attendance policies are particularly fearful of receiving points for these absences, which can lead to penalty and termination. Only **one** of the 66 policies we reviewed for our *Misled and Misinformed* report indicated that FMLA leave can be taken during pregnancy. Astonishingly, the DOL poster also excludes that FMLA leave can be used during pregnancy. This woeful omission must be corrected.

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[5] 29 C.F.R. § 825.215(c)(2) (emphasis added).
[6] 29 C.F.R. § 825.120(a)(4).
[7] *See* H. Rep. No. 103-8, at 40 (1991); S. Rep. No. 103-3, at 29 (1993) ("Examples of serious health conditions include but are not limited to… miscarriages…"); see also *Madison v. Sherwin Williams Co*., 158 F. Supp. 2d 854, 858 (N.D. Ill. 2001) (finding that the plaintiff qualified for leave under the FMLA due to her respiratory infection and miscarriage).

Additionally, workers we have assisted are often unaware that the FMLA allows them to take intermittent leave in very small increments, such as one day or a few hours. Often, employer attendance policies penalize workers for absences that are fewer than three days when, in fact, those absences may be protected by FMLA intermittent leave.

Pregnancy leave, miscarriage leave, and intermittent leave are critical protections afforded by the FMLA. Yet, unless workers, especially marginalized workers, are informed of these rights, they may not know they can take advantage of these protections and employers are more easily able to exploit workers' gaps in knowledge.[8]

We urge the Task Force recommend that the DOL update its standard FMLA poster to include the following information:

- **The ability to use FMLA leave during pregnancy;**
- **The ability to use FMLA leave for health needs related to miscarriage;**
- **That intermittent FMLA leave can be taken in small increments (e.g. one day or a few hours)**

D. The Task Force Should Urge DOL to Update FMLA Regulations Regarding Substitution of Paid Leave and State Paid Family and Medical Leave Laws.

Current FMLA regulations allow employers to require employees to substitute their accrued paid leave while they are taking unpaid FMLA leave.[9] However, FMLA regulations also include an exception to that allowance, wherein employers are not allowed to require employees to substitute wage replacement they receive under a disability leave or workers' compensation plan while taking unpaid FMLA leave.[10] Since the passage of the FMLA 28 years ago, several states have passed paid family and medical leave laws. As we stated in our September 2020 letter,

> By the same logic [as that extended to disability leave and workers' compensation], the substitution of paid leave provision should not apply where workers are receiving wage replacement

[8] Part of the problem is that FMLA statutory penalties are far too low to have a deterrent impact on employer violations, but we understand that legislative solutions are beyond the scope of the Task Force's purview.
[9] 29 U.S.C. § 2612(d)(2).
[10] 29 C.F.R. § 825.207(d)–(e).

> through a state paid family or medical leave law. However, at present, the regulations do not explicitly extend the same reasoning to wage replacement under state paid family or medical leave laws, likely due to the fact that the current regulations were enacted prior to the passage or implementation of many of today's state paid family and medical leave laws. This has resulted in confusion for employers and employees.

We urge the Task Force to recommend that the DOL issue regulations clarifying that the statutory provision allowing employers to require substitution of paid leave does not apply to situations where a worker is receiving wage replacement through a state paid family or medical leave program, unless required by state law.

E. **We Urge the Task Force Recommend that the DOL Update the FMLA Regulations Regarding the Definition Of "Incapacity And Treatment."**

Too many workers, especially low-wage workers, women, and workers of color, are unable to take FMLA when they need it for a host of reasons, including fear of retaliation, a misunderstanding of their rights, and difficulty navigating the application process. The FMLA regulations detailing the type of serious health condition one must have, or one's loved one must have, in order to be eligible for FMLA, only adds unnecessary confusion and a barrier for workers seeking to take job-protected leave.

As we explained in our September 2020 letter:

> The regulatory definition of "incapacity and treatment" for the purposes of continuing treatment includes strict and complex requirements around the length of the initial period of incapacity, the length of time within which one must receive in-person treatment, and the number of times one must receive treatment over a certain time period. These inflexible requirements fail to account for the variability of medical conditions, treatments, individual provider practices, and other external circumstances (such as pandemic-related limitations on in-person visits). This requirement also does not reflect progress over the past several decades in surgeries and other medical developments that have led

> to individuals recovering in the safety of their own homes rather than risking a longer hospitalization and the attendant infections or other harms. These requirements are arbitrary and difficult to navigate for workers, employers and health care providers and provide too many excuses for an employer to deny a legitimate need for leave. Rather than relying on arbitrary time limitations, deference should be given to health care providers to state when an individual needs leave.

2. DOL's Wage and Hour Division Should Conduct an Investigation Into Major Employers Whose "No Fault" Attendance Policies, On Information and Belief, Are Violating the FMLA.

In our report, *Misled and Misinformed*, we were particularly concerned to find in our analysis that many of this country's major employers, including government agencies, hospitals, and universities, include blatantly inaccurate information about the FMLA in their "no fault" attendance policies:

> For example, several policies indicated that no points would be assessed for FMLA leave, as long as that leave was approved in advance of the absence—leaving no room for the possibility that the need for FMLA leave may be unforeseeable, which is explicitly contemplated by the regulations. Others implied that employees would only be protected by the FMLA if they were absent for a period of several days—which is also plainly wrong, because the FMLA can cover intermittent absences of less than a day.[11]

Our report analyzed 66 employers' "no fault" attendance policies. Together, these policies cover an estimated 18 million workers, most of whom are low-wage workers. Several of the policies included misleading and/or inaccurate information about the FMLA, and nearly *all* of the policies contained such sparse, bare-bones information about the statute (often no more than a reference to the acronym "FMLA" without any further elaboration) as to render it impossible for workers to clearly exercise their FMLA rights.

[11] MISLED & MISINFORMED, *supra* note 2, at 15.

These inaccurate FMLA policies have led to brutal consequences for workers such as **Vincent Gutner**, who worked as a millwright at a copper tubing manufacturing plant in Pennsylvania. Vincent was fired under his employer's "no fault" attendance policy for absences related to his asthma. He brought in a doctor's note for each and every absence, but was still given disciplinary points. He had requested FMLA paperwork but was fired before he could even turn it in.[12] Another worker, **Victoria Ballard,** worked as a grocery store cashier in Illinois and needed time off related to her diabetes. She was fired for absences related to her diabetes just minutes after receiving FMLA paperwork from her supervisor for her doctor to complete. When she was fired, her supervisor explicitly told her, "we're terminating you due to your absences, due to your medical condition." Victoria indicated that she had just been given the FMLA forms to complete, but management told her that it was "too late."[13]

When crafting solutions to build worker power, the Task Force must take into account workers' ability to exercise their rights under current law. When workers like Vincent and Victoria are fired for taking lawfully protected time off, it not only affects their individual economic security and dignity but also sends a message to their colleagues that they should think twice before trying to exercise their rights, lest they face a similar fate.

The Task Force can help put an end to employers' abusive use of "no fault" attendance policies. WHD has the authority to visit employers to "assure[] an employer's compliance" with the laws under its purview, which includes the FMLA.[14] According to WHD's Fact Sheet #44, "In addition to complaints, WHD selects certain types of businesses or industries for investigation. The WHD targets low-wage industries, for example, because of high rates of violations or egregious violations, the employment of vulnerable workers, or rapid changes in an industry such as growth or decline."

We recommend that the Task Force urge the WHD to initiate investigations into the "no fault" attendance policies and practices of the major employers whose policies were analyzed as part of our *Misled & Misinformed* report. In addition to investigating the "no fault" attendance policies, WHD should investigate whether

[12] *Id*. at 17.
[13] *Id.* at 18.
[14] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #44: VISITS TO EMPLOYERS (Jan. 2015), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs44.pdf.

employers are misclassifying their employees as independent contractors so as to avoid having to provide them with FMLA leave. This is another common abuse we frequently see taking place in workplaces.

3. **The Task Force Should Direct the WHD To Conduct a Targeted Outreach Campaign For Employees Regarding Their FMLA Rights, Focused Particularly On Low-Wage Industries.**

In conjunction with the investigation into employers' abusive use of "no fault" attendance policies, the WHD should simultaneously conducted a targeted outreach campaign for employees of large companies (which are more likely to use "no fault" attendance policies) to ensure they are aware of their rights under the FMLA. In particular, WHD's outreach campaign should ensure workers are aware of:

a) The purposes for which they can take FMLA leave, including but not limited to, FMLA leave during pregnancy or in the event of a miscarriage;
b) The right to be free from retaliation or interference for requesting or taking FMLA leave, which includes not being penalized under a "no fault" attendance policy;
c) The right to take continuous or intermittent leave, including in very short increments;
d) Information about how to apply for FMLA leave; and
e) Information about how to file a complaint for FMLA violations.

4. **The Task Force Should Direct WHD To Conduct a Concerted Outreach and Education Effort to Inform Federal Contractors About Their Right to Paid Sick Leave Under President Obama's Executive Order 13706. WHD Should Also Assess Opportunities for Enforcing and Expanding Executive Order 13706.**

In 2015, President Barack Obama signed Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors ("EO").[15] The groundbreaking Executive Order grants certain federal contractors the right to seven days of paid sick and safe time. When the

[15] Exec. Order No. 13,706, 3 C.F.R. 13706 (2016), 29 C.F.R. pt. 13.

DOL issued its final rule on the EO in 2016, it estimated the EO would extend paid sick leave rights to 1.15 milion workers,[16] a number which has likely only grown in the last five years with the continued expansion of the federal contract workforce.

While the WHD did issue a final rule on the EO and put out general guidance, a fact sheet, and a poster, WHD has yet to conduct a broad outreach and education campaign to educate eligible contractors about their right to paid sick leave **Therefore, we ask that the Task Force recommend that WHD launch a concerted outreach effort to all eligibile contractors[17] to educate them about their rights to paid sick leave under EO 13706.**

As a first step, WHD should update its contractor-specific posters and fact sheets to include the EO requirements. While WHD does have a specific fact sheet and poster on the paid sick leave EO, neither the WHD's poster[18] nor WHD's fact sheet[19] on labor obligations for procurement contracts for construction covered by the Davis-Bacon Act ("DBA") include a reference to the EO or any information that contractors must be granted seven days of paid sick leave. The same is true of the WHD's materials on service contracts covered by the McNamara-O'Hara Service Contract Act ("SCA")[20]

Outreach efforts should also be sure to highlight that the EO allows contractors to use sick leave to care for a diverse range of loved ones including a "child, parent, spouse,

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[16] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET: FINAL RULE TO IMPLEMENT EXECUTIVE ORDER 13706, ESTABLISHING PAID SICK LEAVE FOR FEDERAL CONTRACTORS (Sept. 2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/PaidLeaveFS.pdf.

[17] The EO applies to four major categories of contractual agreements as well as any subcontract of a covered contract. For more information, *see id*.

[18] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, DAVIS-BEACON ACT POSTER (GOVERNMENT CONSTRUCTION), https://www.dol.gov/agencies/whd/posters/dbra.

[19] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #66: THE DAVIS-BEACON AND RELATED ACTS (DBRA) (April 2009), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs66.pdf.

[20] *See* U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #39F: THE PAYMENT OF SUBMINIMUM WAGES TO WORKERS WITH DISABILITIES WHO ARE EMPLOYED ON FEDERAL SERVICE CONTRACTS SUBJECT TO THE MCNAMARA-O'HARE SERVICE CONTRACT ACT (July 2008), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs39f.pdf; U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, EMPLOYEE RIGHTS ON GOVERNMENT CONTRACTS POSTER (SERVICE CONTRACT ACT; PUBIC CONTRACT ACT), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/govc.pdf.

domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."[21]

Furthermore, the Task Force should recommend that WHD conduct an overall assessment of the EO's implementation, including enforcement actions taken, complaints received, and resolutions reached, including settlements and monetary recovery. WHD should also initiate its own investigations into any contractors it believes may be in violation of the EO.

Finally, WHD should assess the feasibility of expanding the EO to apply to those federal contractors currently excluded from the bill, including those covered under:

a) Acts under which federal agencies provide financial and other assistance to construction projects through grants, loans, guarantees, insurance and other methods, but do not directly procure construction services; and

b) Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government, including contracts subject to the Walsh-Healy Public Contracts Act.

If feasible, WHD should then recommend President Biden expand the EO to apply to a broader range of federal contractors.

5. The Task Force Should Urge WHD to Prioritize Enforcement of the Break Time for Nursing Mothers Law.

In 2010, Congress passed the Break Time for Nursing Mothers Law ("Nursing Mothers Law") granting all overtime-eligible employees the right to break time and private, clean space, other than a bathroom, to express milk at work.[22] WHD is charged with enforcing the Nursing Mothers law.

[21] Exec. Order No. 13,706, *supra* note 15.
[22] *See* 29 U.S.C. § 207(4).

Given the law's weak private enforcement mechanisms,[23] WHD's enforcement role is all the more critical. While the agency has taken the position that it cannot level civil penalties against employers for violations,[24] the WHD does have the authority to bring an action in federal court to seek injunctive relief and lost wages for the employee. Employees are also able to file retaliation claims with the WHD. WHD's authority to seek injunctive relief in court is especially critical in the context of expressing milk. If an employee cannot access break time and space to express milk, it can lead to serious health consequences for a nursing employee, including mastistis and other infection, and could lead to a worker losing her milk supply and the ability to provide breast milk for her child.

In its preliminary interpretation of the law, DOL wrote that "to the extent possible, WHD intends to give priority consideration to complaints received by the agency alleging that an employer is failing to provide break time and space to express milk as required by law to allow expeditious resolution of the matter in order to preseve the employee's ability to continue to breastfeed and express milk for her child."[25] **The Task Force should urge WHD to renew its commitment to enforcing the Nursing Mothers Law to the fullest extent possible, and WHD should do so by:**

a) Prioritizing seeking injunctive relief and lost wages in federal court for violations of the Nursing Mothers Law;
b) Investigating potential Nursing Mothers Law violations at the same time as WHD investigates wage and hour violations to determine if Nursing Mothers violations are also occurring;
c) Investigating employers for potential wage and hour violations when an employee files a Nursing Mothers Law complaint so that the

[23] *See Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing*
Before the Subcomms. On Civil Rights and Human Services and Workforce Protections of the H. Comm. On Ed. & Lab., 117th Cong. 21–23 (2021),
https://edlabor.house.gov/imo/media/doc/BakstDinaTestimony0318211.
pdf (testimony of Dina Bakst) (outlining how the Nursing Mothers law has inadequate remedies for employees whose rights have been violated).
[24] *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., REASONABLE BREAK TIME FOR NURSING MOTHERS, 75 FED. REG. 80073, 80078 (Dec. 21, 2010) (Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement.").
[25] *Id.*

Department may be able to level civil penalties against employers for wage and hour violations;

d) Issuing an annual report on violations of the Nursing Mothers Law as well as any resolutions reached, including monetary recovery;
e) Conducting broad outreach and education to employers about employees' rights under the Nursing Mothers Law.

6. The Task Force Should Urge DOL To Issue an Opinion Letter Clarifying that Employees Are Protected from FMLA Retaliation If They Reasonably Believe They Are Covered by the Law.

WHD should issue an Opinion Letter making clear that the FMLA's anti-retaliation protections, specifically that "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter,"[26] extends to workers who request FMLA leave based on a reasonable belief that they are protected by the statute, even if they are later determined to be ineligible for coverage due to the FMLA's stringent eligibility requirements.

Existing FMLA regulations make clear that the law is intended to protect both prospective employees[27] and employees who "oppose any practice which they *reasonably believe* to be a violation"[28] of the FMLA. Nevertheless, many employees continue to face termination after attempting to exercise their FMLA rights to deal with an unforeseeable health or family emergency, only to later learn that their leave was not covered because, for example, a loved one's illness requiring a trip to the emergency room did not qualify as a serious health condition.[29] The FMLA was intended to protect such employees from retaliation, including termination, but it is evident that more clarity is needed.

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[26] 29 U.S.C. § 2615(a)(2).
[27] 29 C.F.R. § 825.220(c) ("The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee *or prospective employee* for having exercised or attempted to exercise FMLA rights.") (emphasis added).
[28] 29 C.F.R. § 825.220(e) (emphasis added).
[29] *Trail v. Utility Trailer Mfg. Co.,* No. 1:18-cv-00037, 2020 WL 104681, at *1-2, *6 (W.D. Va. Jan. 8, 2020) (granting summary judgment for employer on FMLA claims, but noting that the employer "did not comply with its duties under the FMLA" and that "[i]ts rush to terminate Trail was ill-advised.").

We therefore urge the Task Force to recommend that the DOL issue an Opinion Letter making clear that employees who reasonably believe they are protected by the FMLA are covered by its anti-retaliation provisions.

7. Conclusion

The Task Force is in a unique position to look critically at the current labor policies and practices that remain a barrier to workers' exercising their power. The first step to building worker power is ensuring that workers understand and can exercise the rights available to them. The FMLA, EO 13706, and the Nursing Mothers Law afford workers critical rights to care for themselves and their loved ones, but if workers cannot meaningfully exercise those rights, they are left powerless and financially vulnerable. We urge the Task Force to include recommendations to strengthen regulations, enforcement, and notice of these laws in its report and to recognize that worker power must rest on a foundation that supports our nation's working families.

Sincerely,

A Better Balance

APPENDIX A

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September 15, 2020

Submitted Electronically

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Re: Regulatory Information Number (RIN) 1235-AA30

Director DeBisschop:

On behalf of A Better Balance, we are writing in response to the Notice 85 FR 43513, a request for information ("RFI") published in the Federal Register on July 17, 2020, which seeks to gather information regarding the effectiveness of the regulations implementing the Family and Medical Leave Act of 1993 ("FMLA").

A Better Balance, a national nonprofit advocacy organization, uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through policy work, strategic litigation and direct legal services, and public education, our expert legal team combats discrimination against pregnant workers and caregivers, and advances fair and supportive workplace policies like paid sick time, paid family and medical leave, predictable and flexible scheduling, and more.

A Better Balance operates a free, confidential legal helpline to help workers around the country understand their rights related to paid sick time, family and medical leave, and pregnancy and parenting in the workplace. During the COVID-19 pandemic, calls to our helpline have quadrupled, as workers have become desperate for information about how to stay healthy while maintaining their jobs. After speaking with almost 2,000 workers over the past six months, we have gained an even greater understanding of the concerns and challenges facing workers seeking to exercise their workplace rights, including the right to FMLA leave. Consequently, we are writing to share what we've learned and urge you to take this opportunity to strengthen the FMLA regulations to better protect workers. Specifically, we are writing to urge you to (1) simplify the regulations around the definition of "incapacity and treatment;" (2) implement additional language in the regulations that would strengthen employers' obligations to ensure that "no fault" attendance policies are not used to interfere with employees' exercise of FMLA rights; (3) consider modifying the standard FMLA posters to include information indicating that FMLA leave can be used by workers during pregnancy; and (4) clarify that the statutory provision allowing employers to require substitution of employees' accrued paid leave does not

apply to employees receiving benefits through a state paid family or medical leave program. We believe that these modifications are critical to ensuring that workers are able to exercise their FMLA rights and consistent with the Wage & Hour Division's goal of increasing compliance with the FMLA. Additionally, we write to show our support for the continuing robust availability of intermittent leave, a crucial component of the FMLA.

i. Regulations Concerning Serious Health Conditions

The FMLA provides eligible workers with up to 12 weeks of unpaid, job-protected leave to bond with a new child, care for a seriously ill or injured family member, address their own serious health condition, or address needs related to a family member's deployment; or up to 26 weeks to care for a servicemember or veteran injured or ill as a result of their service. Since it became law, the FMLA has been used nearly 280 million times, and approximately 13 million workers take FMLA-type leaves each year.[30] In enacting the FMLA, Congress laid out findings regarding the need for job security for parents, family caregivers, and people with serious health conditions that temporarily prevent them from working, as well as the need for equal employment opportunities for women and men. These considerations are no less important today and must remain central to any proposed updates to the regulations and guidance.

DOL's most recent comprehensive survey on the FMLA reveals that the most vulnerable workers — including low-wage workers, women, workers of color, and single parents — are disproportionately more likely to need FMLA leave and be unable to take it. Nearly half of workers with an unmet need reported the reason being that they were afraid to lose their jobs — which is precisely the fear that the FMLA was enacted to counteract. Other significant reasons included fear of being treated differently, difficulty with the process or notice requirements for taking leave, privacy concerns and lack of awareness. These findings point to an urgent need for DOL to engage in worker outreach to increase awareness and identify compliance gaps and barriers to use.

In response to the RFI's question about the regulations concerning serious health conditions, we believe the regulations around the definition of "incapacity and treatment" should be simplified to remove unnecessary barriers to people taking the leave they need. The statute defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." The regulatory definition of "incapacity and treatment" for the purposes of continuing treatment includes strict and complex requirements around the length of the initial period of incapacity, the length of time within which one must receive in-person treatment, and the number of times one must receive treatment over a certain time period. These inflexible requirements fail to account for the variability of medical conditions, treatments, individual provider practices, and other external circumstances (such as pandemic-related limitations on in-person visits). This requirement also does not reflect progress over the past several decades in surgeries and other medical developments that have led to individuals recovering in the safety of their own homes rather than risking a longer

[30] National Partnership for Women & Families. (2020, January). *Key Facts: The Family and Medical Leave Act.* Retrieved 9 September 2020, from https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/key-facts-the-family-and-medical-leave-act.pdf

hospitalization and the attendant infections or other harms. These requirements are arbitrary and difficult to navigate for workers, employers and health care providers and provide too many excuses for an employer to deny a legitimate need for leave. Rather than relying on arbitrary time limitations, deference should be given to health care providers to state when an individual needs leave.

ii. "No Fault" Attendance Policies

In June 2020, we published a major report, *Misled & Misinformed: How Some U.S. Employers Use "No Fault" Attendance Policies to Trample on Workers' Rights (And Get Away With It)*[31], detailing how "no fault" attendance policies are routinely used by employers to mislead and misinform workers about their legal rights to take time off without punishment for certain medical and caregiving needs, including leave protected by the FMLA.

After analyzing the "no fault" attendance policies of 66 U.S. employers, impacting an estimated 18 million workers, we found that employers' "no fault" attendance policies regularly provided incomplete or misleading information to workers regarding their right to time off under the FMLA. Roughly *one-third* (30%) of the policies that we reviewed failed to indicate that workers would not receive "points" or "occurrences" or otherwise face punishment for absences protected by the FMLA. This omission is dangerously misleading, because these policies typically communicate in unequivocal terms that workers will be punished for every absence *unless* it is specifically carved out as exempt from points. Thus, a reasonable worker reviewing such a policy would be unlikely to understand that they may have additional protections for certain absences that are not included in the policy. Indeed, we often hear from workers who are so scared to leave work or miss a day, or even inquire about whether an absence would be protected, and thus jeopardize their health or the health of a loved one for fear of getting points.

Furthermore, although 70% of the attendance policies that we reviewed did indicate that workers would not receive punishment for absences protected by the FMLA, the vast majority of these policies simply identified "the Family and Medical Leave Act" or "FMLA" as a reason for an absence that would exempt a worker from discipline. Noticeably absent was *any* detail about what those terms mean, including the types of absences that may qualify for FMLA protection or its eligibility requirements.

Even more troubling, we found that some employers' "no fault" attendance policies contained information about the FMLA that is clearly inaccurate. For example, several policies indicated that no points would be assessed for FMLA leave, as long as that leave was approved *in advance* of the absence—leaving no room for the possibility that the need for FMLA leave may be unforeseeable, which is explicitly contemplated by the regulations.[32] Others implied that employees would *only* be protected by the FMLA if they were absent for a period of several days—which is also plainly wrong, because the FMLA can cover intermittent absences of less

[31] DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) (A Better Balance 2020), https://www.abetterbalance.org/misled-misinformed/.
[32] 29 CFR § 825.303.

than a day.[33] Based on this review, we are extremely concerned that "no fault" attendance policies are being used by employers to mislead workers about their FMLA rights and prevent them from exercising those rights.

Additional clarity in employers' "no fault" attendance policies about what the FMLA protects is needed – and in our view, it is crucial that this information be provided *within* attendance policies themselves. It is important to recognize that their employers' policies are frequently a low-wage worker's *only* source of information about their legal rights. Our experience, based on countless conversations with workers who have contacted our free and confidential legal helpline, is that when a worker needs time off from work unexpectedly, such as in a personal or family health emergency, they are likely to access their employer's attendance policy, and nothing else – and if that policy does not describe which absences are protected and how to invoke those protections, the worker is unlikely to seek any additional information.

The current regulations address "no fault" attendance policies, making explicitly clear that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; *nor can FMLA leave be counted under no fault attendance policies*."[34] Although this language is useful in clarifying that disciplining a worker under a "no fault" attendance policy for an FMLA-qualifying absence would constitute FMLA interference, it has not curbed the misleading practices described above, and we believe that this information needs to be affirmatively communicated to workers in order to be effective.

We therefore propose that the DOL consider additional regulations **clarifying the obligations of employers who maintain "no fault" attendance policies, particularly as they pertain to notices that must be given to employees**.

iii. The Use of FMLA Leave During Pregnancy

Additionally, there is a critical need for information clarifying the rights of pregnant workers to utilize FMLA leave before they give birth. Although existing regulations make clear that pregnant workers are entitled to use FMLA leave before they give birth, for prenatal care or when their pregnancy makes them unable to work,[35] there is still widespread confusion about these protections.

Through A Better Balance's legal helpline, we have heard from so many pregnant workers – many who struggled to get time off to attend routine doctor's appointments or were threatened with discipline when they needed to miss work to seek emergency medical care – who did not realize that the FMLA could protect their absences prior to giving birth. Had they been armed with the information that they were legally entitled to such leave and could not be punished for it, they would have been much better equipped to advocate for their needs – and less likely to face the impossible choice between a job and a healthy pregnancy.

[33] 29 C.F.R. §§ 825.202, 825.205(a).
[34] 29 C.F.R. § 825.220(c) (emphasis added).
[35] 29 C.F.R. § 825.120(a)(4).

For workers who are subject to "no fault" attendance policies, this knowledge gap is most acute. Shockingly, our review of employers' policies for *Misled & Misinformed* revealed that only one of the 66 policies we reviewed mentioned that FMLA leave could be used during pregnancy. Perhaps this is not surprising, because the workplace posters provided by the DOL also fail to mention that FMLA leave can be used during pregnancy. We believe that this omission is extremely problematic, and **strongly recommend that the DOL consider modifying its standard poster to include information indicating that FMLA leave can be used by workers during pregnancy.** We also believe this underscores the need for stronger obligations on employers who utilize "no fault" attendance policies, as we have discussed above.

iv. Substitution of Paid Leave and State Paid Family and Medical Leave Laws

We urge the Department to issue regulations clarifying that the statutory provision allowing employers to require substitution of paid leave (29 U.S.C. § 2612(d)(2)) does not apply to situations where a worker is receiving wage replacement through a state paid family or medical leave program. Current regulations (29 C.F.R. § 825.207(d)-(e)) state that the law's provisions allowing employers to require employees to substitute accrued paid leave for unpaid FMLA leave do not apply to FMLA leaves during which employees are receiving wage replacement through a disability leave or workers' compensation plan. Those regulations specify that, because the leave is not unpaid, the provision allowing employers to require substitution is inapplicable. By the same logic, the substitution of paid leave provision should not apply where workers are receiving wage replacement through a state paid family or medical leave law. However, at present, the regulations do not explicitly extend the same reasoning to wage replacement under state paid family or medical leave laws, likely due to the fact that the current regulations were enacted prior to the passage or implementation of many of today's state paid family and medical leave laws. This has resulted in confusion for employers and employees. We urge the Department to explicitly extend the existing regulatory exclusion to cover state paid family and medical leave laws.

v. The Importance of Intermittent Leave

Finally, the RFI inquires about intermittent leave under the FMLA. Intermittent leave is a vital part of the FMLA because many health conditions are, by nature, unpredictable. Intermittent leave is crucially important for people with disabilities and their family members, as well as other people dealing with serious health conditions, and will only grow in importance as the demographics and direction of the workforce evolve (indeed, usage of intermittent leave has increased by nearly 30 percent since DOL's 2012 FMLA survey).[36] For example, given the nationwide shortage of direct care workers, it is very likely that if a direct care worker is sick, the care recipient's family member must step in. And although a few employers report negative effects from intermittent leave, a strong majority report neutral or even positive impacts.[37] After all, a caregiver who has access to intermittent leave can take such leave when necessary while still continuing to work as much as possible, rather than completely leaving their job for months

[36] Brown, S., Herr, J., Roy, R., & Klerman, J. A. (2020, July). *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, pp. 54. Retrieved 27 August 2020, from U.S. Department of Labor website: https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf

[37] Ibid.

on end. Intermittent leave is also critically important for military families, whose needs in relation to deployment may not occur all at once.

The economy and workforce have changed dramatically in the 27 years since the FMLA's passage. In updating the regulations and guidance around the law, DOL must center the workers who need greater economic security the most if it wishes to meet the promise and purpose of the law. Thank you for the opportunity to share these comments.

Sincerely,

A Better Balance

Appendix of Resources

- DINA BAKST, ELIZABETH GEDMARK & CHRISTINE DINAN, MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) (A Better Balance 2020), https://www.abetterbalance.org/misled-misinformed/.
- MOLLY WESTON WILLIAMSON, MADELEINE GYORY, SHERRY LEIWANT, & DINA BAKST, A FOUNDATION AND A BLUEPRINT: BUILDING THE WORKPLACE LEAVE LAWS WE NEED AFTER TWENTY-FIVE YEARS OF THE FAMILY & MEDICAL LEAVE ACT (A Better Balance 2018), https://www.abetterbalance.org/resources/a-foundation-and-a-blueprint/.