Department's Fact Sheet for general distribution to employees when the employer does not have an employee handbook in which FMLA policies have been incorporated. The Department has made no final decision on the viability of installing an 800 number.

## Appendix E

The Department had promised earlier that if the IRS published guidance concerning the relationship between FMLA and certain aspects of the tax code, e.g., COBRA, the Department would include the IRS guidance as an appendix to the final rule. IRS published guidance concerning COBRA in Notice 94–103, appearing in Internal Revenue Bulletin No. 1994–51, dated December 19, 1994. A copy of the notice is attached to the regulation as Appendix E.

## X. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96-354 (94 Stat. 1164; 5 U.S.C. 601 et seq.), Federal agencies are required to analyze the anticipated impact of proposed rules on small entities. Because FMLA applies only to private employers of 50 or more employees (and to all public agencies regardless of the number of employees employed), it covers only the larger private employers—in total, about five percent of all possible employers, or approximately 300,000. Also, FMLA requires covered employers to grant only unpaid leave to eligible employees for specified reasons. For these reasons, the Department concluded that the implementing rules likely would not have a "significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act. The Acting Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA) filed official comments on the interim final FMLA rules which disagreed with DOL's conclusion. SBA contended essentially that the FMLA regulations will have a significant impact on all businesses covered by the FMLA, the vast majority of which, SBA contends, are small.

The definition of "small" business varies considerably, depending upon the policy issues and circumstances under review, the industry being studied, and the measures used. SBA generally uses employment data as a basis for size comparisons, with firms having fewer than 100 employees or fewer than 500 employees defined as small.<sup>1</sup>

Statistics published by the Internal Revenue Service indicate that in 1990, of the estimated 20.4 million business tax returns that were filed (4.4 million for corporations, 1.8 million for partnerships, and 14.2 million for sole proprietorships), fewer than 7,000 would qualify as large businesses if an employment measure of 500 employees or less were used to define small and medium-sized businesses.2 The SBA stated in its comments that, based upon 1990 Census tabulations, there are 105,720 firms which employ between 50 and 99 employees; 55,249 firms which employ between 100 and 249 employees; and 14,999 firms which employ between 250 and 499 employees, providing a total of 175,968 businesses with fewer than 500 employees.3 Thus, the SBA suggests that if an employment measure of 500 employees is used to define "small" businesses, 92.4 percent of all those businesses which are affected by the FMLA and its implementing regulations are "small" businesses.4

In fact, however, this analysis overstates the number of "small" businesses that are actually affected by FMLA's requirements because they must grant unpaid leave only to employees who are defined as "eligible" under the law. It is conceivable, for example, that a covered "small" business with 250 employees working at several geographically dispersed worksites would have no employees who are eligible to take FMLA leave (because there would be fewer than 50 employees working within 75 miles of each worksite). Similarly, an employer

Together with The Annual Report on Small Business and Competition of the U.S. Small Business Administration (United States Government Printing Office, Washington, D.C., 1991), p. 19. A more detailed breakdown also used by SBA is: under 20 employees, very small; 20–99, small; 100–499, medium-sized; and over 500, large. On the other hand, the size standard established by SBA at 13 CFR § 121.601 is 500 employees for most industries.

with a very transient workforce, with all part-time employees, may have no eligible employees.<sup>5</sup>

Assuming the appropriateness of the 500-employee criterion applied by SBA to define "small" businesses for purposes of FMLA, and acknowledging that there are a number of small businesses that would be covered by the FMLA rules, we note that the Congress, in selecting the 50-employee coverage threshold, frequently characterized the new legislation as exempting smaller businesses and applying only to larger ones. We also note the overwhelming majority of small businesses that are not subject to the FMLA. Information compiled by the U.S. Department of Commerce and reported in County Business Patterns. 1990. indicates that there are 5,862,938 establishments employing between one and 49 employees; 175,375 establishments employing between 50 and 99 employees; 97,742 establishments employing between 100 and 249 employees; 24,334 establishments employing between 250 and 499 employees; 9,592 establishments employing between 500 and 999 employees; and 5,582 employing 1,000 or more employees.<sup>6</sup> These numbers confirm the Department's earlier estimates that roughly five percent (i.e., 312,625) of all establishments would be covered by FMLA at the 50-employee coverage threshold. Moreover, these numbers suggest further that, if SBA's 500-employee threshold for defining "small" businesses is applied, less than five percent of all small businesses would be covered by the FMLA, while more than 95 percent of all small businesses would be exempted from FMLA coverage.

In addition, William M. Mercer, Incorporated and the Institute of Industrial Relations at the University of California, Berkeley jointly conducted a survey of nearly 300 employers on the FMLA in November 1993. This report notes that, before FMLA was passed, there was opposition to mandated leave based on the idea that small business would be negatively impacted by such leave. However, small employers (those with less than 200 employees) who

<sup>&</sup>lt;sup>1</sup> The State of Small Business: A Report of the President Transmitted to the Congress (1991),

<sup>&</sup>lt;sup>2</sup> U.S. Department of the Treasury, Internal Revenue Service, *SOI Bulletin* (Spring 1990) Table 19; reprinted by SBA in The State of Small Business (1991), *Ibid.*, p. 21.

<sup>&</sup>lt;sup>3</sup>U.S. Department of Commerce, Bureau of the Census, *Current Population Survey*, 1990. These tabulations contain firms with employees only; the self-employed were excluded. The self-employed would not constitute a covered "employer" for purposes of the FMLA and, therefore, these tabulations tend to understate the *actual* number of "small" businesses that are excluded from FMLA's coverage and overstate the *proportion* of small businesses that are covered by the FMLA.

<sup>&</sup>lt;sup>4</sup> This 92.4 percent figure appears misleading to us for measuring the universe of employers at issue for purposes of this analysis in that it excludes the very substantial number of small businesses employing fewer than 50 employees which would not be covered by the FMLA and, therefore, would not be impacted by the rule.

<sup>&</sup>lt;sup>5</sup>Not every employee of a covered employer is eligible for FMLA leave. To be eligible, an employee must work for a covered employer and have worked for at least 12 months and 1,250 hours in the 12 months preceding the leave, and work at a location where the employer employs at least 50 employees within 75 miles of the worksite. § 101(2) of FMLA; 29 CFR § 825.110.

<sup>&</sup>lt;sup>6</sup>U.S. Department of Commerce, Bureau of the Census, *County Business Patterns*, 1990 (CPB–90–1), issued January 1993, Table 1b. These tabulations exclude most government and railroad employees, and self-employed persons.