

From: Jaime Novikoff - NTLAKIS [<mailto:jnovikoff@ntlakis.com>]

Sent: Tuesday, December 27, 2016 11:27 AM

To: Chief Evaluation Office

Subject: Comments of the Equal Employment Advisory Council Responding to DOL Request for Comments Regarding FMLA Wave 4 Surveys (OMB Control Number 1205-0NEW)

Ms. Yancey,

Please find the attached Comments of the Equal Employment Advisory Council Responding to the Department of Labor's Request for Comments Regarding Family and Medical Leave Act Wave 4 Surveys (OMB Control Number 1205-0NEW).

Respectfully,

Jaime L. Novikoff

Jaime L. Novikoff
Senior Counsel
Equal Employment Advisory Council
1501 M Street NW | Suite 400
Washington, DC 20005
202.629.5659 (p) | 202.629.5651 (f)
www.eeac.org

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The Equal Employment Advisory Council (EEAC) is a nonprofit association of private-sector employers dedicated exclusively to the advancement of practical and effective equal employment opportunity and affirmative action programs to eliminate workplace discrimination. EEAC does not provide legal advice. For advice regarding legal issues, members should consult legal counsel.

VIA EMAIL—ChiefEvaluationOffice@dol.gov

December 27, 2016

Ms. Christina Yancey
Chief Evaluation Office
OASP
U.S. Department of Labor
Room S-2312
200 Constitution Avenue, NW
Washington, DC 20210

**RE: Comments of the Equal Employment Advisory Council Responding to
Department of Labor Request for Comments Regarding Family and Medical
Leave Act Wave 4 Surveys (OMB Control Number 1205-0NEW)**

Dear Ms. Yancey:

The Equal Employment Advisory Council (EEAC) welcomes the opportunity to comment on the Department of Labor's (DOL) request for comments regarding the Family and Medical Leave Act (FMLA) Wave 4 (Employer) Survey, published in the *Federal Register* on October 28, 2016.

The *Federal Register* notice indicates that DOL is seeking to revise the FMLA Survey and is particularly interested in comments, regarding:

- Whether the proposed information collection is necessary for the proper performance functions of the agency, including whether the information will have practical utility;
- The accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions;
- The quality, utility, and clarity of the information to be collected; and
- Means of minimizing the burden of information collection on those who respond using various methods, including automated, electronic, mechanical, or other technological collection techniques or other forms of information technology by, for example, permitting electronic submissions of responses.

EEAC's responses to those issues follow, along with several questions we propose to be included in the Wave 3 Employer Survey that are recommended in lieu of or in addition to those included in the Wave 3 Survey document. In addition, we respectfully urge the DOL to revise, replace, or eliminate several questions in the Wave 3 Survey that as currently written are too broadly worded to produce meaningful responses. For example, the Wave 4 Employer Survey should:

- Ask more in-depth questions about use and administration of intermittent leave;
- Ask more specific and detailed questions distinguishing between exempt and nonexempt employees; and
- Eliminate any questions that do not address FMLA requirements, such as use of paid leave.

STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of private employers dedicated to the design, implementation and management of programs to eliminate employment discrimination and promote workplace compliance. All of EEAC's members are subject to the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, as well as other federal labor and employment statutes and regulations.

Because of its strong interest in ensuring sensible application of the nation's employment laws and regulations, EEAC has submitted numerous written comments on FMLA compliance and enforcement issues, including in 1993 in response to the publication of DOL's FMLA interim final rule.¹ EEAC member companies are strongly committed to helping their employees balance work, family, and personal needs. Indeed, our member companies are industry leaders in adopting wide-ranging policies providing insurance and disability programs, paid and unpaid time off from work, flexible scheduling and telecommuting, and other creative alternatives so that employees may address such personal needs as caring for illness to themselves or loved ones, participating in volunteer activities, or spending time with their families. Many of these policies go well-beyond the requirements of the FMLA.

EEAC thus appreciates and supports the FMLA's goal of ensuring that employees are able to take unpaid time off from work to attend to their own serious health condition, the birth or adoption of a child, or the serious health condition of a family member.

¹ 58 Fed. Reg. 13,394 (Mar. 10, 1993); 58 Fed. Reg. 45,433 (Aug. 30, 1993). See also comments to the 1995 proposed regulations (60 Fed. Reg. 2180 (Jan. 6, 1995)), 2002 comments regarding the information collection and notice requirements of the current regulations (66 Fed. Reg. 67,319 (Dec. 28, 2001)); 2007 Request for Information (71 Fed. Reg. 69,504 (Dec. 1, 2006)); 2008 proposed revisions to the FMLA, including the initial regulations for military family member leave (73 Fed. Reg. 7876 (Feb. 11, 2008)); and 2012 regarding revisions to the FMLA (77 Fed. Reg. 8960 (Feb. 15, 2012)).

OVERVIEW

EEAC member companies deeply respect the importance of family and personal commitments and know it is critical that these commitments be taken into account in crafting responsible workplace policies. Such policies serve not only to boost employee morale, but also to create a more efficient workplace. At the same time, it is important to understand that regulatory policies, if not applied in a sensible and constructive manner, actually can serve as a disincentive to enlightened employers that want to implement progressive employee relations policies.

Regrettably, a number of the requirements contained in the current FMLA regulations are impractical and impose unnecessary burdens on employers that work to squander time and effort that could otherwise be devoted to the development and application of employer policies that benefit those employees who have a real need. For this reason, EEAC respectfully recommends a number of changes to the FMLA Survey, specifically with respect to the use of intermittent leave, which we believe will assist the agency in getting more accurate information on how the FMLA is working in practice.

Using the 2012 Wave 3 Survey as the baseline, EEAC's comments focus on the addition of questions, or revisions to questions, that would we believe would enhance the quality, utility and clarity of the information to be collected in the FMLA Wave 4 Survey of Employers.

IMPROVING OR ENHANCING RESPONSE RATE BY CLARIFYING PURPOSES FOR WHICH RESPONSES WILL BE USED

DOL has hired a public policy research firm to conduct a nationwide survey regarding employers' leave policies, experience with family and medical leave, and to better understand the range of perspectives on the FMLA.² According to DOL, this Survey will build on previous information collection efforts, and will update and expand on FMLA use and leave-taking data that DOL has obtained from the three prior "waves" of Surveys (1995, 2000, and 2012). The Survey is anticipated to occur in 2017 and 2018.

As currently proposed, the Survey consists of two parts. The first part is an initial call from a screener, who will ask basic identifying questions, such as the name, demographic information, size of the business, and the contact information for the human resources director or person responsible for benefit plans and/or compliance with federal employment laws. The second part is the actual interview.

While the interviewer during the second part eventually explains the purpose of the Survey and that it will not be used for purposes of establishing compliance with the FMLA, this is not made clear to the interviewee at the beginning of the conversation. The process can be enhanced if the purpose of the study and the fact that it will not be

² DOL will also be contemporaneously launching a similar Survey targeted to individual employees regarding their experience with family and medical leave. EEAC's comments will focus only on the Employer Survey.

used for compliance purposes was established immediately in both stages of the survey process, by both the screener and the interviewer. Currently there is nothing in the screener's script informing the responder that participation will not result in any penalty or fines by the Department of Labor. This may put the responder at ease immediately rather than dismissing of the Survey because he or she is worried about being audited or fined by the Department of Labor.

Therefore, the EEAC recommends adding the following text to the very beginning of both the screeners' and interviewers' scripts:

Your participation in this Survey is completely voluntary. Please keep in mind that the data obtained through this Survey will be used for research purposes only, and will NOT be used by the Department of Labor to assess compliance with the FMLA or result in any penalty or fines by the Department of Labor. This is not an audit, and I am not an employee of the Department of Labor. Your responses to this Survey will remain private to the greatest extent possible under the law. The Department of Labor will receive an aggregate file of 1,800 responses from employers across the country. The file will not include any identifying information on any individual employer. We have put many procedures in place to reduce the minimal potential risk of loss of privacy in this study.

It also may be difficult to get accurate and complete responses if the interview occurs in a single 20-minute period. The EEAC therefore recommends that DOL employ a method of information collection that will allow enough time and flexibility for companies to gather the relevant information asked from necessary internal sources. If the web survey is able to be completed in multiple sittings, the interviewer should let the responder know this, as this option might produce more accurate results and minimize the burden of information collection on those who are responding.

UNDERSTANDING AND ADMINISTERING INTERMITTENT LEAVE

Without exception, EEAC's member companies advise that leave taken on an "intermittent" or "reduced schedule" basis creates the most problems for employers under the FMLA. The current FMLA regulations and policy statements interpreting the circumstances under which intermittent leave may be used have further frustrated employer's ability to manage such leave.

For example, while the current regulations do allow an employer to "account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave," 29 CFR § 825.205(a)(1), they prohibit the employer from requiring an employee to take intermittent leave in increments of more than one hour and from reducing the employee's FMLA leave entitlement by more than the amount of leave actually taken. Tracking intermittent leave in such small increments is extremely time-consuming and invites abuse by employees.

In addition to placing no limit on the size of an increment of FMLA leave, DOL has also taken the position that an employer may not ask an employee to schedule his or her medical treatment outside work hours unless scheduling it during work hours would “unduly disrupt” the employer’s operations. 29 CFR § 825.203. And, of course, an employee with a chronic serious health condition that periodically causes incapacity cannot be expected to schedule such absences in advance.

These last-minute, unexpected absences create problems that can seriously disrupt efficient business operations and inconvenience other employees. In many cases, employers are left scrambling to cover an employee’s job responsibilities for a given day, and frequently that burden falls on coworkers. Further, employers have observed that in many cases, these “as needed” absences occur on Mondays or Fridays or around holidays and/or are taken by employees who already have attendance problems. As a result, there is a clear perception of abuse among many employers and employees with regard to the way some employees use intermittent leave.

Because of the significant administrative burden imposed in managing intermittent leave, EEAC respectfully suggests that the Wave 4 Survey develop more questions covering the intricacies of intermittent leave. The only questions that attempt to collect data on intermittent leave use do so in an incomplete manner. Accordingly, the Wave 4 Survey should ask:

- How many employees on intermittent leave requested leave beyond the scope of the original request?
- Of the [FILL IN FROM Q21b] FMLA granted intermittent leaves, how many of these leaves did you have to seek recertification from the employee’s health care provider?
- What is your policy on the notice process for each instance of intermittent leave?
- About how many intermittent leaves taken under the FMLA are given with notice from the employee that is consistent with your company’s policies?
- Of the [FILL IN FROM Q21b] FMLA granted intermittent leaves, what percent would you estimate you received advance notice of the employee’s intention to use intermittent leave?
- Did you have to reassign any employee while he was taking intermittent leave?
 - If yes, how many employees did you have to reassign?
 - If yes, how many of those employees chose to accept the reassignment?

IMPROVING THE ACCURACY OF RESPONSES BY PROVIDING MORE DETAILED QUESTIONS

While the EEAC applauds DOL for compiling and analyzing information related to the FMLA and company leave policies, many of the questions that are posed in the Employer Survey are very general and ask for a quantitative response that may be very difficult for employers to provide. Further, by asking these general questions, employers may have difficulty understanding the type of response that is being requested. We would urge DOL to take this opportunity to re-evaluate and revise these questions by breaking the questions down into more detailed parts. By asking more detailed and nuanced questions, DOL will gain more accurate responses and a more realistic understanding of the challenges employers face with FMLA administration.

For example, question 10 states, “In what time increments do employees in your organization record their work time?” This question can be difficult for employers to respond to because exempt and nonexempt employees often record time in different ways, and many exempt employees do not record their time at all. When faced with this question, employers are likely to respond based on the practice for their nonexempt employees, but this does not give a full picture of leave provided for exempt and nonexempt employees. In order to obtain a more accurate response the question can be divided into two parts, asking about exempt and nonexempt employees separately. For example, DOL should ask:

- In what time increments do nonexempt employees in your organization record their work time?
- In what time increments, if any, do exempt employees in your organization record their work time?

Question 15 states, “Does your company policy use a point or demerit system that tracks an employee’s unscheduled absences?” The FMLA prohibits an employer from interfering with or discriminating against an employee for exercising his or her rights under the law. For instance, under DOL’s implementing regulations, 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.

Many companies that use a point or demerit system for employee absences also include exceptions for specific types of leave, including intermittent FMLA and sick leave under applicable state law. Therefore, it is important to understand that if a company is using the point system it also has exceptions to this system in place. The question as worded does not take into account any exceptions. Therefore, it would be better to ask:

- Does your company policy use a point or demerit system that tracks an employee’s unscheduled absences?

- Does this company policy provide for any exceptions or instances where an unscheduled absence would not result in a point or demerit?
- Are absences covered under the Family and Medical Leave Act covered under any exception to your company attendance policy?

Alternatively, we would suggest adding a response to question 15 as worded, that states “Yes with exceptions” and then adding a second follow-up question that states, “Does your company policy provide an exception for absences covered under the Family and Medical Leave Act.”

Question 25 states, “About how many leaves taken under FMLA are given with notice from the employee that is consistent with your company’s policies?” Again, the broad language of this question makes it difficult for the responder to understand what the question is asking for. Further, employers are not necessarily tracking whether employees are following the technical requirements of their FMLA policies rather than tracking whether they ultimately provided the proper paperwork and were granted or denied the leave. It would also be beneficial to understand how many employers accept or allow an employee to take FMLA leave even when the employee’s notice is not consistent with company policy. Many companies give employees the benefit of the doubt and grant FMLA leave even before all the required paperwork is completed, and work with employees to ensure the proper procedures are ultimately followed. For instance, the Survey could ask:

- If an employee does not give notice of a leave under the FMLA that is consistent with your company’s policies, how often is the leave nonetheless granted or approved?

It would also be helpful for employers to understand the type of information that other companies are gathering by asking whether an employer is using its own FMLA form or the forms available on the DOL website.

ELIMINATING QUESTIONS THAT DO NOT ADDRESS FMLA REQUIREMENTS

The FMLA entitles an “eligible” employee to take up to 12 workweeks (26 weeks in the case of a military caregiver) of unpaid leave during a 12-month period for a qualifying reason. An eligible employee is an employee who has been employed for at least 12 months by the employer from whom leave is requested, and for at least 1,250 hours of service with such employer during the previous 12-month period.

A qualifying reason is: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the serious health condition of a spouse, child, or parent; (4) for the employee’s own serious health condition; or (5) for a “qualifying exigency” that arises as a result of the employee’s spouse, parent, or child who is in the Armed Forces being called up to active duty in support of a particular operation. The FMLA also

entitles an eligible employee to up to 26 workweeks of military caregiver (or “wounded warrior”) leave during a single 12-month period to care for a spouse, child, parent, or next of kin who is injured or becomes ill in the line of duty.

Several questions in the Survey ask about leave that is outside the scope of the FMLA. For example, part of question 16 asks about paid leave, which is not an FMLA requirement. Question 16x_5 states, “Does this site provide full or partial pay during these types of leave?” If the goal of the DOL is to gather information about how many companies allow employees to use sick leave or other types of employer provided paid leave in order to be paid during FMLA qualifying absences, then those are the types of questions DOL should be asking in the Survey. We would recommend rewording this question to ask if employees are permitted to use vacation, sick, PTO time etc. concurrently during FMLA qualifying leaves.

Further, question 14, part A asks, “How many employees at [FILL] are allowed to take leave for the following reasons ... A. to attend a child’s school meetings.” Taking leave to attend a child’s school meetings is not a qualifying reason to request leave under the FMLA. Therefore, we would suggest eliminating this part of question 14.

CONCLUSION

EEAC appreciates this opportunity to submit these comments. They are made in the spirit of improving and simplifying the current FMLA regulatory scheme, keeping in mind the practical compliance issues we have raised as experienced by our member companies. Addressing these issues will enhance the quality, utility and clarity of the information to be collected. We would welcome a further opportunity to discuss our views with DOL at any time.

Sincerely,

A handwritten signature in blue ink, reading "Jaime L. Novikoff". The signature is fluid and cursive, with the first name "Jaime" being more prominent.

Jaime L. Novikoff
Senior Counsel