

Waterman, Robert - WHD

From: Gail Cohen <Gail.Cohen@matrixcos.com>
Sent: Friday, October 04, 2019 12:40 PM
To: WHDPRAComments
Cc: Marti Cardi
Subject: Matrix Absence Management, Inc. comments- proposed FMLA forms
Attachments: Matrix Absence Management Comments to the DOL on Proposed FMLA CHP forms 4Oct2019.pdf

Good morning
Please see attached letter.

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MATRIX
ABSENCE MANAGEMENT
A MEMBER OF THE TOKIO MARINE GROUP



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October 4, 2019

VIA email to WHDPRAComments@dol.gov

U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Certification of Health Care Provider Forms
(Family and Medical Leave Act)

Dear Sir or Madam:

Matrix Absence Management, Inc. ("Matrix") is pleased to submit this letter with comments and suggestions on the recently proposed revised FMLA Certification of Health Care Provider forms. Matrix is in the business of providing third-party administration services for leaves of absence to employer clients with sizable national workforces. We are in a unique position to provide these comments, given our decades of experience managing thousands of leaves of absence every year.

Certification of Health Care Provider for Employee's Serious Health Condition

On **page 1** of the proposed form, **question (3)** requires the employer to complete a series of blanks identifying the date the employer "learned of your need for leave." We believe that requiring the employer to put this information on the form conflates the deadline for the employer to put the employee on notice of his or her rights and responsibilities and eligibility, 29 C.F.R. §§825.300(a) and (b), with the separate and distinct regulation requiring the employee to provide a "complete and sufficient certification." 29 C.F.R. §§825.305 and 825.306. Moreover, we believe that this addition is confusing.

In addition, the date on which the employer "learns of the employee's [possible] need for leave," may not be the same date that is set forth on this form. For example, employees of our clients have a number of methods by which they can initiate a leave of absence through Matrix, including placing a call to our 24-hour, 7-day a week call center, staffed by personnel. Doing so triggers Matrix sending a packet acknowledging that the employee has initiated his or her leave request and that packet includes the DOL Notice of Rights and Responsibilities. It is entirely possible that the employee, without any knowledge to Matrix, told his or her supervisor or HR department on a different date and that doing so is what prompted the call to initiate leave through Matrix. That

does not mean, however, that the date on which he or she called is the same day that his or her employer "learned of the need for leave." Moreover, Question 3 serves no function in gathering information permitted by the regulations to assess the employee's request for leave – and this is the purpose of the certifications. For these reasons, Matrix would encourage the DOL to remove this language from the certification.

Page 1, Question (7) asks for a statement of the employee's essential job functions. This should indicate that it is optional for the employer to provide but if not completed, the health care provider can rely on the employee's description of essential functions.

Page 1, Question (4) provides: "The medical certification form must be returned by _____, absent unusual circumstances. (List date the certification is due, which must be at least 15 days from the date the certification is given to the employee." We believe that putting the term "absent unusual circumstances," without some definition or guidance, is overly confusing to the employee recipient. A better option is to use on the forms the same term used in the regulations, "extenuating circumstances" to avoid the confusion of two different terms governing the same issue. Then, it would be helpful to add the definition of "extenuating circumstances" from the regulations: "circumstances beyond the employee's control." See 29 C.F.R. §§ 825.102 and 825.115(a) (5).

Page 2, Part A – (1) We suggest that the form should instruct the employee and provider that a separate form is required for each serious health condition causing the employee to be unable to perform the essential functions of the position. Each condition needs to be managed separately, with different frequency and duration parameters. We experience significant challenges when an employee has multiple conditions and doesn't understand the need (and the employer's right to require) separate certifications for each condition.

We recommend including the full GINA safe harbor language. Otherwise, employers using the form are not protected from a GINA violation by the provider

Page 3 creates a series of check box categories for the health care provider to check to identify their patient's condition that meets a summarized definition of a "serious health condition" under the FMLA. We certainly agree with this approach, having used it ourselves in the certification forms we designed for Matrix.

We are concerned about the **order of the form**, with the instructions to the provider *after* the questions the provider is to answer. It is very likely that the provider will complete the form without reviewing the instructions (even though there is a reference to them) and will not go back to change any answers based upon the new information provided later in the instructions.

The likely result is an increase in the need to use the processes to obtain clarification or a complete and sufficient certification, thereby delaying the approval of an employee's request for FMLA.

Page 4 Part B, Amount of Leave Needed sets forth some good improvements, including a better chart for the doctor to complete to elaborate on the frequency and duration of the employee's need for leave. However, the instructions should indicate "Complete all that apply" rather than "Select as appropriate." In many situations the employee may need varying types of leave (for example, continuous leave for surgery and initial recovery, then reduced schedule for initial return to work, then intermittent for follow-up doctor's appointments).

Page 4, Question (2), it would be more helpful to include a requirement that the doctor discuss the time required for each appointment as well as anticipated duration of any recovery period associated with planned medical treatments. Placing this question solely in connection with question (3), referrals to other providers, is likely to result in the doctor not providing this information if he or she will be the treating provider to administer those planned medical treatments. This will make accurate management of the employee's absences very difficult, as the employer or TPA will not have complete information.

Page 5, Part C, Essential Functions: The term "essential" should be used every time there is a reference to job functions to drive home that important point – inability to perform marginal function does not support FMLA leave. We also suggest including the ADA definition of essential functions contained in 29 C.F.R. § 1630.2(n).

Certification of Health Care Provider for Serious Health Condition of the Family Member

We adopt our comments above to the family member certification.

On **page 2**, in the opening paragraph of Section II, the DOL has made revisions to the description that we think are inappropriate. The current form states that: "[t]he FMLA allows an employer to require that you submit a timely, complete and sufficient medical certification to support a request for FMLA leave **to care for a covered** family member with a serious health condition." (Emphasis supplied). This has been changed to state that an employee can take FMLA time "due to the serious health condition of [his or her] family member." We believe these changes omit two important thresholds to entitlement to FMLA to care for a family member – that the family member is covered by the FMLA definition of a family member and that the employee is needed to care for him or her. We respectfully suggest that the DOL retain the current language.

On **page 2**, we think **questions (3b) and (4)** of Section II, which ask the employee to opine on his or her best estimate of the amount of leave he or she needs to provide care to his or her family member, are inappropriate and contrary to the purpose of the health care provider's certification. The purpose of the certification form is not for the employee to offer his or her own opinion of the need for time off but, rather, to obtain information from the health care provider of the family member that establishes how much FMLA entitlement the employee should receive in connection with care for that family member. By asking the employee to opine on this, we believe that it is overly suggestive to the treating provider about how much time he or she should put on the form when asked, and also sets forth information that is unnecessary and not required for employers to consider under the current FMLA regulations.

On **page 3, Section III**, to be completed by the health care provider, we understand requiring an email address to be a good improvement, given advances in technology. However, while Matrix has made significant investments to ensure that emails we transmit are done so via secure methods, in general, email is not a secure method to transmit personal medical information and we are not certain that most health care providers would have made those investments to ensure that the data they transmit is secure.

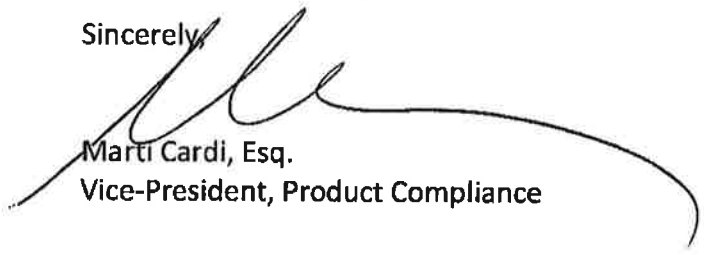
Part A, question (4) is always a very important one for Matrix, on behalf of its employer clients, to carefully review and consider. That question asks the provider to describe the medically necessary care the employee is to provide to his or her covered family member. Unfortunately, the form as currently drafted leaves very little room for the provider to elaborate on this important information and we would suggest that additional space and lines be added for the doctor to do so.

Similar to our comments above, **page 4, question (11)** on the certification for care of family member form, asks the provider to describe "other appropriate medical facts," but like the previous form, does not define what this means until the instructions, which are located on page 5.

Finally, **page 5, question (4)** provides what we believe to be a good improvement to require the provider to elaborate in more detail on frequency and duration. What is missing, however, is one of the benefits of the current DOL form, which requires the provider to identify whether time off is needed on an intermittent or reduced schedule basis.

We appreciate the opportunity to submit our comments on this important initiative and are happy to lend more assistance to the DOL upon request.

Sincerely,



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