



Via E-mail (WHDPRAComments@dol.gov)

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Re: Department of Labor Request for Information on the Family and Medical Leave Act
Control number 1235-0003

Thank you for the opportunity to provide comments on the Department of Labor's proposed extension of the approval of information collection requirements for the Family and Medical Leave Act ("FMLA"). On behalf of the Legal Aid Society-Employment Law Center (LAS-ELC), we submit the following comments.

Founded in 1916, the LAS-ELC is the oldest legal aid agency in the Western United States. It is one of the nation's leading nonprofits providing legal assistance to low-income workers. Since the inception of its Work and Family Project in 1983, the LAS-ELC has provided advice, counseling, administrative advocacy, and legal representation to thousands of employees who must grapple with the competing demands of work and family. In collaboration with sister organizations, the LAS-ELC spearheaded the passage of landmark laws, including the California Family Rights Act (CFRA)—which provides unpaid family and medical leave to eligible employees and preceded the passage of the FMLA—and the Paid Family Leave Act (PFL), which allows workers to take paid leave to care for a seriously ill family member or to bond with a new child. The LAS-ELC also was involved in the passage of the FMLA, and has litigated numerous FMLA cases in state and federal court.

We commend the Department of Labor (DOL) for developing model FMLA forms to help employers and employees understand and meet their notice and medical certification obligations under the Act. The LAS-ELC has joined in the comments of the National Partnership for Women and Families to the DOL's six model forms. We write separately to express our concerns and share recommendations regarding two forms in particular: The Certification of Health Care Provider for Employee's Serious Health Condition Form (WH-380-E) and The Certification of Health Care Provider for Family Member's Serious Health Condition Form (WH-380-F). As discussed below, these forms unnecessarily invade the medical privacy of employees and their family members.

As you know, California has several laws that protect individuals' medical privacy, and the right to privacy is enshrined in the state Constitution. These provisions prohibit the disclosure of

confidential medical information without the express consent of the patient, and also protect third-party privacy.

Although California's privacy protections are stronger than those under federal law, the FMLA specifically provides that more protective state laws shall govern and preempt the FMLA. In our experience enforcing the FMLA and its state counterpart, however, we have seen many large employers that operate throughout the United States violate the privacy rights of California workers by requiring, as a condition of granting leave, disclosure of private medical information about the employees' or their family member's serious health condition, including the diagnosis and course of medical treatment. Multi-state employers often use the DOL's model FMLA medical certification form—or a form similar to it—to elicit this information. California law flatly prohibits employers from requiring such disclosures; yet the DOL model FMLA certification forms specifically ask for medical facts regarding the serious health condition that may be unnecessary and may violate the patient's privacy.

California's model certification form provides a better approach, asking the health care provider to certify that the patient has a condition that meets at least one of several categories of "serious health condition" as defined by the CFRA regulations, while not intruding on the patient's privacy by asking for specific medical facts about that condition. The LAS-ELC therefore recommends that the DOL adopt a certification form that follows this approach. The California model certification form is available at <http://www.fehc.ca.gov/commission/pdf/health-provider.pdf>.

Alternatively, the DOL should at the very least include in its model certification forms a cautionary note that state laws may prohibit employers from requiring disclosure of the patient's diagnosis or other private medical details about the patient's condition.

Similarly, the DOL's model certification forms ask for the health care provider's type of practice or medical specialty. For certain types of conditions, this question may elicit information that invades the patient's privacy and is not necessary (e.g., treating HIV or a mental health condition). Thus, the LAS-ELC recommends that the form be amended to simply ask the health care provider to certify that s/he meets the definition of health care provider within the FMLA regulations.

In sum, for the sake of employers and employees alike, the LAS-ELC urges the DOL to modify its model FMLA certification forms to help ensure that employers comply with California's more protective privacy and medical confidentiality laws.

Please do not hesitate to contact us should you have any questions.

Very truly yours,

Sharon Terman