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Rights
Advocates

Since 1974, Fighting for Women's Equality

November 28, 2011

VIA U.S. MAIL/ELECTRONIC MAIL

Mary Ziegler
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Ms. Ziegler:

On behalf of Equal Rights Advocates, we thank you for the opportunity to respond to the Department of Labor's request for comments on the proposed extension of the approval of information collection requirements for the Family and Medical Leave Act ("FMLA").

Equal Rights Advocates ("ERA") is a civil rights organization whose mission for over thirty years has been to protect and secure equal rights and economic opportunities for women and girls. Through ERA's toll-free, nationwide Advice and Counseling Hotline, we have advised countless individuals nationwide who call ERA seeking information and advice about their FMLA rights. We have observed widespread confusion among employees and doctors on how to properly apply and qualify for FMLA leave. Employees and doctors frequently do not understand when employees have a right to take FMLA leave and are uncertain of how to comply with the FMLA certification requirements.

The passage of the FMLA in 1993 marked a major milestone for millions of workers in the United States. For the first time, federal law provided eligible workers with up to twelve weeks of unpaid leave each year to care for close family members or to address serious personal health concerns. In addition, 2008 and 2009 amendments to the FMLA provide military families up to twenty-six weeks of unpaid, job-protected leave to care for a wounded service member, or up to twelve weeks of unpaid leave for qualifying exigencies relating to active duty. The law has been used more than 100 million times to enable women and men to better meet their work and family obligations without sacrificing their jobs and long-term economic stability. The FMLA also helps combat gender discrimination and pernicious stereotypes about gender roles. Because both male and female workers can take FMLA leave, the law helps to ensure that women are not penalized or unfairly denied job opportunities simply because of assumptions about their family caregiving responsibilities.

Establishing appropriate lines of communication between employers and employees is vital to ensure that workers can exercise the critical rights provided by the FMLA. To promote compliance with the law, the Department of Labor developed sample forms that may be used by employers and employees to meet the FMLA's notice and medical certification requirements.

The six model forms include "Certification of Health Care Provider for Employee's Serious Health Condition" (WH-380-E), "Certification of Health Care Provider for Family Member's Serious Health Condition" (WH-380-F), "Notice of Eligibility and Rights & Responsibilities" (WH-381), "Designation Notice" (WH-382), "Certification of Qualifying Exigency for Military Family Leave" (WH-384), and "Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave" (WH-385). These sample forms help to ensure that FMLA requirements are met by employers and employees alike. Model forms should serve to make the process easier to navigate and can ensure that the necessary information is both requested and received. However, improvements could be made to ensure smoother application of the FMLA. To that end, we offer the following recommendations.

1. The Department of Labor should provide a new model form that combines a fact sheet about the FMLA with an *optional* form that could be completed by employees to request FMLA leave. This form could provide basic information about FMLA rights to leave, similar to the information provided in the Department of Labor's Fact Sheet #28, "Family and Medical Leave Act of 1993." Additionally, employees could elect to complete this form to provide written notice of their request for leave.

Currently, the Department of Labor does not provide a model form that employees can opt to use to notify employers that they are seeking FMLA leave. Under the FMLA, employers are tasked with the responsibility of assessing and then telling employees when the law might entitle them to take leave. Employers must do so regardless of whether the employee makes specific reference to the law when he or she requests time off.¹ While the onus is correctly on the employer to inform the employee of his or her rights to FMLA leave, an optional request-for-leave form could help employees to better understand and exercise their rights under the FMLA and would facilitate the relay of information from employers to their employees.

As Equal Rights Advocates has observed through the calls we field through our advice and counseling hotline, all too often, employers fail to properly inform employees of their rights to FMLA leave. In some cases, this failure results in litigation. Providing a model form to enable workers to better communicate their requests for FMLA-qualifying leave could help to facilitate the exercise of FMLA rights and avoid litigation. These forms should be offered in multiple languages where language barriers can pose unique obstacles to communication between workers and employers.

Outreach to employers to inform them of their responsibilities under the FMLA is a critical part of any effort to reduce the frequency with which employers fail to fulfill their duties. Employers must be better educated about the terms of the FMLA and about their role in facilitating their employees' leaves. The prevalence of cases in which employers fail to inform employees of their FMLA rights could be reduced by preemptively addressing the problem of

¹ 29 C.F.R. § 825.301(b).

miscommunication between employers and employees through the distribution of the new optional form that we propose. Please see Appendix A for specific recommendations regarding the creation of a new, optional form that would notify workers of their FMLA rights and enable them to put their requests for FMLA leave in writing.

2. Irrelevant and invasive questions should be removed from the medical certification forms. In the interest of deterring unlawful discrimination and protecting workers' privacy with regard to sensitive medical information, over-reaching questions should be removed from the medical certification forms. Individuals with serious medical conditions often face discrimination and prejudice on the basis of their disabilities. To be sure, discrimination on the basis of disability remains a prevalent problem in the workplace. In 2010, a quarter of the charges filed with the Equal Employment Opportunity Commission alleged discrimination on the basis of disability.² Employees with mental health problems, for example, report that when their employers are aware of their conditions, they often "experience direct discrimination because of prejudicial attitudes from employers and workmates."³

Despite the real danger of unlawful discrimination, the current medical certification forms (WH-380-E and WH-380-F) include overbroad questions that demand sensitive information to which employers are not entitled under the FMLA. The regulations specify that employers are permitted to demand "a statement or description of *appropriate* medical facts regarding the patient's health condition for which FMLA leave is requested...[which] must be sufficient to support the need for leave."⁴ The regulations provide suggestions about the types of information that might be useful to employers in determining whether to grant FMLA leave, stating, "such medical facts *may include* information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), *or* any other regimen of continuing treatment."⁵

Though these categories of information are provided as the types of information that *may* be relevant, the medical certification forms ask health care providers to offer information about *each* of these categories. Because the FMLA regulations establish that certifications may be considered "incomplete" if the "employer receives a certification, but one or more of the applicable entries have not been completed," the language of the model form effectively compels doctors to fill out information that exposes far more about an employee than might otherwise be necessary to fulfill the underlying requirements of the statute.

The form language that provides instructions to health care providers should be modified to instruct health care providers to use their professional discretion as to what information is probative of the need to take leave, in keeping with the regulatory requirement to provide "appropriate medical facts [. . .] sufficient to support the need for leave." This would enable doctors to avoid providing unnecessary information that could be misinterpreted by a layperson. For example, an employee who has suffered a stroke may not be given medication to treat her

² Equal Employment Opportunity Commission, Charge Statistics, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

³ Heather Stuart, *Mental Illness and Employment Discrimination*, 19 Current Opinion in Psychiatry 522-26 (2006).

⁴ 29 C.F.R. § 825.306(a)(3) (2011).

⁵ *Id.* (emphasis added).

symptoms, but her need for medical leave is no less imperative than that of someone who is prescribed medication. But because the form currently requires doctors to state whether medication has been prescribed, employers may misinterpret the fact that medication has not been prescribed to mean that the employee does not have a qualifying serious health condition. Outreach and education for employers on this point could help to ensure that medical information provided on certification forms is interpreted in a manner consistent with the FMLA and its regulations.

Additionally, the forms should not require doctors to disclose their practice areas or medical specialties. The type of provider a patient sees can unnecessarily betray the type of condition for which she seeks care. For example, a patient who seeks leave because of complications caused by her HIV-positive status might see an HIV specialist. Disclosure of the provider's specialty, however, would have the unintended effect of alerting the employer to the employee's HIV status, even if the status itself is not relevant to the need for leave. Though employers must be able to assess whether the medical provider qualifies as such under the FMLA's regulations, there are alternative ways to supply this information without potentially violating the employee's privacy. Providers could, for example, be asked to sign a statement affirming that they meet the requirements enumerated in 29 C.F.R. § 825.125.

The forms also should be modified to ensure that employers and health care providers are aware that state laws may limit the extent of the health care provider's ability to disclose private medical information. The forms should explicitly inform employers and health care providers that state laws may prohibit disclosure of an employee's diagnosis or other private medical facts and should direct them to consult their local laws before providing or requesting information.

Finally, Question 3 of the certification form used when a family member suffers a serious health condition, and Question 4 of the certification form for an employee's serious health condition both make overbroad requests for sensitive medical information. They ask health care providers to "describe other relevant medical facts, if any, related to the condition for which the employee seeks leave...." This prompt could encourage health care providers to list private medical facts related to the condition, regardless of whether those additional facts are actually relevant to the determination of the need for leave. This prompt could also lead doctors to disclose information in violation of state laws. Instead, the prompt should instruct health care providers to "describe other appropriate medical facts, if any, relevant to the need for medical leave and permitted under your state's privacy laws."

3. The medical certification form and designation notice should be combined into a single form that requires employers to describe the perceived deficiency when a medical certification is deemed to be insufficient or incomplete. Combining the medical certification form with the designation notice (WH-382) would streamline the paperwork process, make it easier for employees and their health care providers to understand an employer's basis for rejecting a medical certification, and enable health care providers to complete the medical certification form in a satisfactory way.

The regulations require employers to explain the reason for rejecting an employee's request for FMLA leave, if the denial is based on insufficient information from the medical provider.⁶ Employees then have at least seven calendar days to correct the problem by providing a complete, sufficient medical certification. However, the medical certification forms currently do not provide space for employers to explain the reason for rejecting the request for leave.

While the designation form does provide space for employers to explain the reason for rejecting a request for leave, the employer's explanation should actually be provided on the medical certification form. The designation form is given to employees to inform them of the amount of leave that will be counted against the employee's FMLA leave entitlement. It includes a short section where employers can ask for more information and give an explanation as to why that information is needed. The information provided in the current designation notice would be better utilized and more effective if it were folded into the current medical certification forms.

Employers often fail to provide this information to employees, or when they do, their explanations lack the clarity and detail that would enable the employee and the employee's health care provider to respond to employer concerns. Consequently, employees are frequently unable to give their providers any clear understanding as to what was wrong with the certifications as they were initially filled out. This confusion can also lead to multiple medical visits that could be avoided with greater clarity regarding the employer's reason for finding a certification incomplete or insufficient.

In addition to combining the designation notice and the medical certification forms, the form should include more space for employers to explain the reasons for denying leave. The space provided in the current designation notice form is inadequate. Employers should be given the opportunity to provide more than a cursory description of the information needed to change the employer's determination. The space provided for employer explanations should also include a reference to the regulations and a description of the type of information that may be requested. This information will help to alert employees of their rights and remind employers of the boundaries established by the FMLA.

4. The medical certification forms also should include an introduction that informs health care providers about the implications of their failure to properly complete the certification form. Though the form currently includes instructions indicating that certain answers could be insufficient to determine FMLA coverage, these instructions are inadequate. Litigators who regularly deal with the dynamic between clients and their doctors express concerns that some health care providers fail to appreciate the significance of these forms for employees. Health care providers must understand that their failure to properly and completely fill out the form could lead to the denial of statutory rights to critical leave and even discipline or termination of

⁶ 29 C.F.R. §825.305(c) (2011) ("The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or not responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.").

the worker. Please see Appendix B for suggested language to improve the instructions for health care providers.

5. The medical certification language should be changed to reflect the fact that medical diagnoses cannot be made with complete certitude and should use proper medical terminology. The current language of the medical certification forms asks doctors to make conclusive statements about their patients' health. Forms WH-380-E and WH-380-F require health care providers to establish the amount of leave needed by answering a series of questions that require them to make conclusive statements. For example, Part B of the WH-380-E form asks the following questions "*Will* the employee be incapacitated...?"; "*Will* the employee need to attend follow-up treatment appointments...?"; and "*Will* the condition cause episodic flare-ups..." [emphasis added]. The wording of these questions creates a tension with the form's instructions for providers to use their "best estimate." These questions ask health care providers to make definitive statements about medical facts that cannot be ascertained with such certainty. Health care providers are often averse to making definitive statements, leading them to leave sections of the form blank or to use ambiguous language that can lead employers to reject the certification.⁷ To avoid such a result, the form's language should be tempered. Rather than asking "*Will*," a more reasonable prompt should ask "*Do you expect that...*"

The medical certification forms should also employ terminology that correctly reflects the types of conditions for which employees are seeking leave. The current form asks health providers to establish whether the condition in question will cause "episodic flare-ups." This term is too narrow and could lead to confusion among those filling out the forms. A worker who suffers from migraines, for example, may have a chronic and episodic condition, but a doctor is unlikely to refer to periods when they have migraines as "flare-ups." The form should be changed so to ask doctors to assess whether the employee or family member has a chronic condition that requires treatment.

Please see Appendix B for the specific recommended changes to the medical certification forms discussed above and for other modifications that will make the forms clearer and more effective.

6. The form used by service members and their families should be updated to reflect the 2010 National Defense Authorization Act's (NDAA) expansion of their FMLA rights. The 2010 NDAA expanded rights to FMLA leave for military service members and their families, and these changes should be reflected in the "Certification of Qualifying Exigency for Military Family Leave" form (WH-384). First, the law expanded the types of circumstances that can be considered a "qualifying exigency." Previously, exigent leave was available if the service member was engaged in *contingency* operations. After the 2010 change in the law, exigent leave is available if the service member is deployed to a foreign country.⁸ However, the current form still refers to the pre-2010 language. References to "contingency operations" should now instead refer to "deployments to foreign countries."

Second, the 2010 NDAA expanded the military caregiver leave provisions of the FMLA, to include veterans among those who may be considered "covered service members." Family

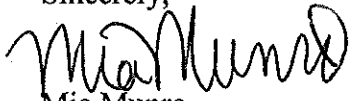
⁷ *Id.*

⁸ 29 U.S.C. §§ 2611(14)(a)-(b).

members may now take time off to care for veterans who are “undergoing medical treatment, recuperation, or therapy for a serious injury or illness” if the veteran was an Armed Forces member “at any time during the period of 5 years preceding the date on which the veteran undergoes the medical treatment, recuperation or therapy.”⁹ The instructions on form WH-384 should be changed to provide notice that veterans may qualify as “covered military members.”

Equal Rights Advocates appreciates this opportunity to recommend improvements to the Department of Labor’s critical model forms that help to promote proper communication between workers and employers. For all of the reasons outlined above, we support this information collection effort, which will enable the Department to better meet the needs of its stakeholders and enhance compliance with the FMLA. Should you have any questions regarding our recommendations, please contact me at (415) 575-2386 or at mmunro@equalrights.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Mia Munro". The signature is fluid and cursive, with the first name "Mia" and last name "Munro" clearly distinguishable.

Mia Munro

Law Fellow, Equal Rights Advocates

⁹ 29 U.S.C. § 2611(15)(b).

Appendix A

Creation of a New Optional Request for FMLA Leave Form

We recommend that the Department of Labor combine the know-your-rights information provided in the Department of Labor's Fact Sheet #28 titled "Family and Medical Leave Act of 1993," with an *optional* form that employees could complete to request FMLA leave:

INSTRUCTIONS: This form is optional and may be used by employees to give notice of the need for FMLA leave, should the employee opt to provide written notice. Completion of this form cannot be required of employees requesting leave. An employee giving notice of the need for FMLA leave does not need to provide notice in writing, expressly assert rights under the Act, or mention the FMLA to meet his or her obligation to provide notice. 29 C.F.R. § 825.301.

I, _____ request Family and Medical Leave Act leave for:
(name)

☐ The birth of a child or placement of a child with me for adoption or foster care

☐ My own serious health condition

☐ Because I need to care for my ☐ spouse* ☐ child** ☐ parent*** due to his/her serious health condition****

☐ Because of a qualifying exigency arising out of the fact that my ☐ spouse ☐ son or daughter ☐ parent is a service member who has been deployed to a foreign country

☐ Because I am the ☐ spouse ☐ son or daughter ☐ parent ☐ next of kin of a covered service member or veteran with a serious injury or illness

(Signature)

(Date)

* A "spouse" means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized. 29 C.F.R. § 825.122(a).

**A "parent" means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. 29 C.F.R. § 825.122(b).

***For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, a "son" or "daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence. 29 C.F.R. § 825.122(c).

****Incapacity due to pregnancy is a "serious health condition" that qualifies for FMLA leave.

Appendix B

Recommended Changes to “Certification of Health Care Provider for Employee’s Serious Health Conditions” (WH-380-E)

In Section I, under Instructions to the Employer, add:

State laws may prohibit employers from requiring disclosure of an employee’s diagnosis or other private medical facts. Consult your local laws for clarification.

In Section III, under Instructions for Health Care Provider, add:

Patients requesting that you complete this form have an obligation to share it with their employers. Employees who are unable to give employers a fully completed form that provides adequate information about why leave under the FMLA is necessary may be denied the right to take the requested time off. In addition, without a sufficiently completed form, employees may also be subjected to discipline or termination if they fail to properly certify their leave. Please note, however, that employers may not require, and you may not provide, information whose disclosure would violate state and federal privacy laws.

In Section III, following the Instructions to the Employer, substitute this language:

I am a healthcare provider, as defined by 29 C.F.R. § 825.125, which defines a health care provider as a 1) doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or 2) a podiatrist, dentist, clinical psychologist, optometrist, chiropractor (whose practice is limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under state law; or 3) a nurse practitioner, nurse-midwife, clinical social worker and physician assistants who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law; or 3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts, or 4) any health care provider from whom an employer or the employer’s group health plan’s benefit manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; or 5) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

In Section III, Part A, 1, insert underlined language:

Approximate date that the condition for which leave is requested commenced:

In Section III, Part A, substitute this language:

Question 1: Please provide a statement or description of appropriate medical facts regarding the patient's health condition for which the FMLA leave is requested. The information should be sufficient to support the need for leave, without providing unnecessary details that would violate the employee's privacy. The information could, but is not required to, include information on symptoms, diagnosis, hospitalization, doctor's visits, whether medication has been or will be prescribed, referrals for evaluation or treatment, or any other necessary regimen of continuing treatment.

Question 4: If there is other information that you believe is critical to understanding why leave is necessary for the employee's condition, please describe it here.

In Section III, Part B, substitute this language to eliminate a duplicative question:

Question 6: Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced work schedule because of the employee's medical condition?

In Section III, Part B, insert underlined language:

Question 5: Do you expect that the employee will be incapacitated....

Question 6: Do you expect that the employee will need follow-up care ... Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period and including time needed for travel and waiting periods at a health care provider's office.

In Section III, Part B, substitute this language:

Question 7: Do you expect that the condition will be a chronic condition that will require periodic visits for treatment by a health care provider, or will continue over an extended period of time (including recurring episodes of a single underlying condition) or may cause episodic periods of incapacity (e.g. asthma, diabetes, epilepsy, etc.) rather than a continuing period of incapacity? Is it medically necessary for the employee to be absent from work when experiencing an episode of the chronic condition?

**Recommended Changes to
“Certification of Health Care Provider for Family Member’s Serious Health Condition”
(WH-380-F)**

In Section I, under Instructions to the Employer, add:

State laws may prohibit employers from requiring disclosure of an employee’s diagnosis or other private medical facts. Consult your local laws for clarification.

In Section II insert underlined language:

Describe care you will provide to your family member and estimate leave needed to provide care (care may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care).

In Section III, under Instructions for Health Care Provider, add:

Patients requesting that you complete this form have an obligation to share it with their employers. Employees who are unable to give employers a fully completed form that provides adequate information about why leave under the FMLA is necessary may be denied the right to take the requested time off. In addition, without a sufficiently completed form, employees may also be subject to discipline or termination if they fail to properly certify their leave. Please note, however, that employers may not require, and you may not provide, information whose disclosure would violate state and federal privacy laws.

In Section III, under Instructions for Health Care Provider, substitute underlined language:

Limit your response to the condition for which the patient needs care from the employee.

In Section III, following the Instructions to the Health Care Provider, substitute this language:

I am a healthcare provider, as defined by 29 C.F.R. § 825.125, which defines a health care provider as a 1) doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or 2) a podiatrist, dentist, clinical psychologist, optometrist, chiropractor (whose practice is limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under state law; or 3) a nurse practitioner, nurse-midwife, clinical social worker and physician assistants who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law; or 3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts, or 4) any health care provider from whom an employer or the employer’s group health plan’s benefit manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; or 5) a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his

or her practice as defined under such law.

In Section III, Part A, 1, insert underlined language:

Note: State law may prohibit employers from requiring disclosure of a family's medical diagnosis or other private medical facts about the family member.

Question 1: Approximate date that the condition for which leave is requested commenced:

In Section III, Part A, substitute this language:

Question 1: Please provide a statement or description of appropriate medical facts regarding the patient's health condition for which the FMLA leave is requested. The information should be sufficient to support the need for leave, without providing unnecessary details such that would violate the employee's privacy. The information could, but is not required to include information on symptoms, diagnosis, hospitalization, doctor's visits, whether medication has been or will be prescribed, referrals for evaluation or treatment, or any other necessary regiment of continuing treatment.

Question 3: If there is other information that you believe is critical to understanding why leave is necessary for the employee's condition, please describe it here.

In Section III, Part B, insert underlined language:

Question 4: Do you expect that the patient will be incapacitated....

Question 5: Do you expect that the patient will need follow-up care ... Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period and including time needed for travel and waiting periods at a health care provider's office.

In Section III, Part B, substitute this language

Question 6: Do you expect that the condition will be a chronic condition that will require periodic visits for treatment by a health care provider, or will continue over an extended period of time (including recurring episodes of a single underlying condition) or may cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc...)?