

November 28, 2011

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  
WHDPRAComments@dol.gov

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

Dear Ms. Ziegler:

This letter is submitted by the National Women's Law Center in response to the Department of Labor's Notice of Proposed Rulemaking (NPRM) soliciting comments on the proposed extension of the approval of information collection requirements for the Family and Medical Leave Act ("FMLA"). Specifically, the NPRM requests comments on the optional sample forms that employers and employees may use to meet the notice and medical certification requirements of the FMLA.

For nearly forty years, the Center has worked to expand and protect women's rights and has been a strong supporter of the FMLA since it was first introduced. Since 1993, the FMLA has enabled millions of workers to attend to their own health needs and to critical family needs without risking loss of their jobs. Moreover, by providing for leave on a gender-neutral basis, the FMLA works to combat gender discrimination in the workplace by employers who might otherwise refuse to hire women because of their presumed greater need for leave.

The ability of workers to take advantage of the protections provided by the FMLA, however, is contingent on workers' knowledge of their rights and employers' compliance with the law. We submit these comments to highlight several aspects of the sample forms that could be improved to allow the forms to better inform employees of their FMLA rights and protect their privacy.

*First*, we urge the DOL to provide a model form that employees may use to request FMLA leave, which should include a basic description of FMLA rights, such as that provided in the DOL's Fact Sheet #28, "Family and Medical Leave Act of 1993." In addition, the model form should notify employees that, in some jurisdictions, state and/or local laws may provide family

and medical leave entitlements beyond those provided by the FMLA. Employers currently—and appropriately—have sole responsibility for assessing employees’ leave requests and notifying employees when they are entitled to FMLA leave. However, a voluntary, optional form for use by employees would help employees to better understand their FMLA rights and would facilitate communication between employers and employees.

*Second*, it is important for all employees seeking FMLA leave, and especially for the families of wounded warriors, for the DOL to remove irrelevant, invasive questions from the medical certification forms to deter unlawful discrimination and to protect the privacy of employees. Currently, the medical certification forms (WH-380-E and WH-380-F) include questions requesting medical information that is not necessary to the determination of whether an employee is eligible for FMLA leave. For example, the language of these forms compels doctors to provide responses to each category of information listed on the forms, which regulations identify as only possibly relevant for employers. The medical certification forms should be revised to instruct health care providers to exercise their professional expertise as to what information is in fact relevant to the evaluation of an employee’s need to take leave.

*Third*, the request on the forms that doctors disclose their medical specialties may be unnecessarily invasive. This information could indicate to the employer information about the employee’s medical condition that is irrelevant to the need to take leave. As an alternative, the forms could request that doctors certify that they meet the requirements enumerated in 29 C.F.R. § 825.125. The forms should also be revised to notify health care providers and employers that state laws may affect the ability of the health care provider to release private medical information and to instruct providers and employers to consult local laws before disclosing or requesting the disclosure of such information. The forms should also ensure that providers are aware of the importance of the information they are providing to the determination of the employee’s ability to take FMLA leave.

*Fourth*, as noted above, some state and/or local laws provide family and medical leave entitlements beyond those provided by the FMLA. While we recognize that it is not the DOL’s responsibility to regulate with respect to these laws, the DOL should not make it more difficult for employers to comply with state and local laws. In particular, the DOL should note on the 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), 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) that the forms’ language informing employers that they cannot request that employees provide more information than that allowed under the FMLA regulations only pertains to requests for information related to an employee’s entitlement to leave under the federal FMLA, and not to requests for information related to leave under state and local family and medical leave laws.

*Finally*, the NWLC believes that Congress’ intent to aid injured service men and women in the statute should be implemented as effectively as possible. Therefore, the language in the form used by service members and their families, the “Certification of Qualifying Exigency for Military Family Leave” Form (WH-384), should be modified to reflect the 2010 National Defense Authorization Act’s (NDAA) expansion of FMLA protections. The NDAA expanded the types of circumstances that can be considered a “qualifying exigency,” such as a qualifying illness incurred or aggravated during active duty that manifests itself later, and the military caregiver leave provisions to include

veterans as “covered service members.” The instructions on form WH-384 should be modified to reflect these changes in the law.

Thank you for considering these comments and the importance of the FMLA to American workers and their families – including those serving in the armed forces.

Sincerely,



Nancy Duff Campbell  
Co-President



Marcia D. Greenberger  
Co-President