

Legal Aid Society

of Middle Tennessee and the Cumberland

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SENT VIA E-MAIL TO WHDPRAComments@dol.gov

U.S. Department of Labor
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division

Re: Control No. 1235-0003
FMLA Forms

Dear Sir or Madam:

This letter evaluates the FMLA forms published by the U.S. Department of Labor along with their revised regulations in 2008. I will confine my comments to the forms which are not specific to military family leave because, unfortunately, I have not had any experience or cases yet dealing with that type of leave. Some of my comments concerning the other forms, however, may be applicable to the military family leave forms.

In general, the forms are written at an educational level that would be difficult for most employees to understand. According to the National Assessment of Adult Literacy, 53% of Tennesseans read at 8th grade level or lower. Given that not all 8th graders read at the 8th grade level, it is better to write at 5th grade level so more than 80% of Tennesseans can read it. I suspect that the DOL forms require a college level of education to understand. We have staff at Legal Aid who can evaluate the grade level necessary to read a particular form and make suggestions for improving the form's readability. Please let me know if you would like them to evaluate the grade level necessary to understand these forms.

As to each of the forms:

Form WH-380-E (Certification of Health Care Provider for Employee's Serious Health Condition).

Section III, Part A (Medical Facts)

- Items 1 and 2 -- These items request information to determine whether the employee has the type of condition that would be a serious health condition. The prior form was preferable because it was more clear. It simply asked the health care provider to check any of the definitions of serious health condition met by the employee.



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- Item 3 -- The regulation requires certification that the employee is unable to perform one or more essential job functions. This question is confusingly stated and could be misunderstood to require that the employee is not able to perform all of his/her job functions due to the condition. Furthermore, the regulation does not require identification of the job functions that the employee is unable to perform, so this question should be omitted.
- Item 4 -- This asks for “relevant” medical facts, rather than the “appropriate” medical facts stated in the regulation. The term “relevant” may have a more technical legal meaning that may be more restrictive than the word “appropriate.” In addition, this item spells out three examples of medical facts. “Diagnosis” is not relevant, but that term is in the regulation. If examples are going to be spelled out, they should include all the examples set forth in the regulations, including “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.”

Part B (Amount of Leave Needed)

- Item 6 -- The follow up question, “If so, are the treatments or the reduced number of hours of work medically necessary?” is redundant of the first question and should be deleted. The first question already establishes whether or not the employee needs the treatments.
- Item 7 -- This also has a redundancy in the original and follow up questions. They should be combined to read “Will the condition cause episodic flare-ups periodically, making it medically necessary for the employee to be absent from work during the flare-ups?” The term “medically necessary” is problematic because there are so many definitions of that term under Medicaid and various health insurance programs. Some of them are extremely restrictive and contain requirements that have nothing to do with purposes of the FMLA. To avoid misunderstanding it may be appropriate to include in the regulations a definition of “medical necessity” under the FMLA. In addition under this item, the language “Based upon the patient’s medical history and your knowledge of the medical condition” should be omitted since it is unnecessary. These are always used by the health care provider in making the estimation.

Form WH-380-F (Certification of Health Care Provider for Family Member's Serious Health Condition). Some of the items commented on for the previous form WH-380-E also apply to this one. In addition:

Part B (Amount of Care Needed)

- Item 4 -- The follow up question should be revised to state “If yes, estimate the beginning and ending dates that the employee needs to care for your patient during the period of incapacity: _____.” There is no need to elaborate on the care received by the patient and why such care is medically necessary so that request for information should be deleted.
- Item 5 -- This initial question should be revised to state: “Will the employee need to care for the patient during follow-up treatments, including any time for recovery?” Again, there is no need to elaborate on the care received by the patient, or why such care is medically necessary, so that request for information should be deleted.
- Item 6 -- This question should be restated: “Will the patient have a medical need for care by the employee on an intermittent or reduced schedule basis, including any time for recovery?” The follow up request should ask the health care provider to “estimate the hours the patient needs the employee’s care on an intermittent basis, if any.” Again, there is no need to elaborate on the care needed by the patient and why such care is medically necessary so that request for information should be deleted.
- Item 7 -- This question should be restated: “Will the condition cause episodic flare-ups periodically making it medically necessary for the employee to care for the patient during these flare-ups?” No further elaboration of the care or why it is medically necessary is needed so that last request for information should be deleted.

WHD Publication 1420 (Notice to Employees of Rights Under FMLA). In general, this notice is very difficult to understand. It should be in a more helpful question-and-answer format, with questions such as “Who can get FMLA leave?” and “What do you have to do to ask for FMLA leave?” In addition:

- Under the Basic Leave Entitlement section this should specify that the 12 weeks of leave available under the FMLA, are “per 12 month period.” Otherwise, this implies that the employee can only have 12 weeks during their entire

employment. In addition, the notice should define the applicable 12 month period.

- The definition of Serious Health Condition section is confusing and incomplete. It should state all the definitions of serious health condition using a bullet format and making it clear that any one of the definitions will justify FMLA leave.
- The section on Employee Responsibilities should specify that the employee does not have to say "FMLA" unless it is for a second leave for a condition where FMLA leave was taken previously.

Form WH-381 (Notice of Eligibility and Rights & Responsibilities).

- Under Part B - Rights and Responsibilities for Taking FMLA Leave, a certification form should always be enclosed when the employer requires that to support the request for FMLA leave.
- The language at the end, starting with "Once we obtain the information from you as specified above," should be placed either at the end of the first page, or else there should be a more clear reference to that part of the form talking about whether more information is needed.
- I do not see a specification in this form that leave may be designated and counted against the annual leave entitlement of 12 weeks per year. That is required by 29 C.F.R. § 825.300(c)(1)(i).

Form WH-382 (Designation Notice). This form looks like it has the right content, but it has the same readability problems as the other forms and notices.

Please let me know if you would like to discuss any of these matters or any other issues concerning FMLA enforcement.

Very truly yours,



William Bush
Attorney at Law