

November 28, 2011

Ms. 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

Sent via email to: [WHDPRAComments@dol.gov](mailto:WHDPRAComments@dol.gov)

Re: FMLA forms (Control Number 1235-0003: proposed extension of the approval of information collection requirements, as published in the *Federal Register*, [76 Fed Reg 60086](#), September 28, 2011)

Dear Ms. Ziegler:

At Vigilant, we counsel companies on employment issues across the Northwest and California. We advise employers of all kinds and help them navigate the complexities of HR compliance, employee relations, employment and labor law, workplace safety and more. The most common questions we receive from our members are on the subject of family and medical leave, including the federal Family and Medical Leave Act (FMLA).

On behalf of Vigilant and our member companies, please accept the following comments in response to the proposed continuation of the model FMLA forms provided by the Department of Labor (DOL).

## General Comments

We greatly appreciate the fillable PDF format of the forms, but would like to ask if it is at all possible to allow the forms to be saved electronically with the information entered by the employer. This would help in electronic storage of the documents, as well as ease of recordkeeping. Currently, most employers who want to keep an electronic copy of these documents must print each completed document and then scan it, unnecessarily imposing printing costs and doubling the paperwork entailed.

It would also be helpful if an alternative version of each form in a word-processing format could be made available. This would allow employers the option of customizing the forms to fit their policies (e.g., specifying the 12-month period, without having to check a box to do so). By removing extraneous information that doesn't apply to the particular employer, the forms would be simpler for employees to read and understand.

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

Our suggestions on this form are as follows:

- In Part A, instead of saying, “on \_\_\_\_\_ you informed us that you needed leave,” it would be better to say “on \_\_\_\_\_ *we learned* that you needed leave...” The form is used not only in situations where an individual comes forward to request FMLA leave, but also where the individual is absent and hasn’t requested leave but the company has reason to believe that the leave could be covered by FMLA. For example, a family member may call to say the employee is in the hospital. Saying “we learned that you needed leave” allows the form to apply to all situations universally.
- In Part A, after the list of reasons for leave, and before the section informing the individual of their eligibility for leave, it would be helpful to insert a sentence stating, “We understand that your expected date of return to work is/was \_\_\_\_\_.” In situations where a medical condition of unpredictable duration is involved, the employer could insert “unknown” into the blank field. In situations where the employee has requested leave for a specific time period, this would enable the company to confirm the anticipated return date. We suggest saying “is/was” because in some situations, the employee may already have returned to work by the time he/she receives the paperwork.
- In Part B, on page 2, approximately one-third of the way down the page, it says, “if the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form....” This sentence is what prompted our suggestion above. The sentence refers to a return date on the reverse side of the form, but in fact there currently isn’t a place to enter such information.

## Designation Notice (Form WH-382)

Our suggestion on this form is as follows:

- In the first sentence under the date, instead of saying “we have reviewed your request for leave under the FMLA....”, make it more universal by saying “we have reviewed your leave situation in light of the FMLA....” Again, not all FMLA situations are initiated by a request for leave.
- Also, sometimes an employee has multiple FMLA events. It would be helpful to include space for the employer to indicate the dates and reason for leave covered by this designation notice.
- The bold text immediately under the bold line near the top of the form states, “Your FMLA leave request is approved. All leave taken for this reason will be

designated as FMLA leave.” We suggest removing the word “request” for the reasons explained above. Also, the current wording could mislead the employee into believing that all of their leave will be protected by the FMLA, even if it lasts longer than their maximum entitlement under the FMLA. Therefore we recommend instead saying, “Your time off is approved as FMLA leave, and all leave taken for this reason will be designated as FMLA leave, to the extent you have FMLA leave available.”

### **Certification of Health Care Provider for Employee’s Serious Health Condition (Form WH-380-E)**

Our suggestions on this form are as follows:

- In Section III, at the bottom of the first page, it would be helpful to include a line for the health care provider’s email address. Email correspondence has become a common method of communication.
- In Part A, question #3 on page 2, the current wording of the question (“is the employee unable to perform any of his/her job functions due to the condition”) is confusing. Some health care providers seem to think this question is asking whether the individual is totally incapacitated (i.e., unable to perform even a single function), although we believe the question is intended to indicate whether there is at least one essential job function that the individual is unable to perform. We suggest rewording this to say, “Does the condition prevent the employee from performing one or more of his/her job functions?” Or, an alternative might be, “Is the employee unable to perform one or more of his/her job functions due to the condition?”
- In Part B, question #5 on page 3, we question whether the word “single” is necessary or appropriate. It seems to sometimes confuse health care providers, in situations for example where someone may have multiple surgeries and will have more than one continuous period of incapacity. Because the second part of the question allows for entering specific beginning and ending dates, we suggest eliminating the word “single” from the first sentence and changing the second sentence so it reads, “if so, estimate the beginning and ending dates for the period(s) of *continuous* incapacity.”

### **Certification of Health Care Provider for Family Member’s Serious Health Condition (Form WH-380-F)**

Our suggestions on this form are as follows:

- In Section III, just before Part A on the second page, as indicated in our comments above, it would be helpful to include a line for the health care provider's email address.
- In Part B, question #4, consistent with our comments on Form WH-380-E above, we suggest eliminating the word "single" from the first sentence and changing the second sentence so it reads, "if so, estimate the beginning and ending dates for the period(s) of *continuous* incapacity."
- Questions #4, 5, 6, and 7 all refer to the "care needed by the patient" but fail to specify that the real question is whether the employee is needed to provide the care. Specifically:
  - Question #4, third sentence, should read, "During this time, will the patient need care *from the employee*?" The fourth sentence should read, "Explain the care *the employee will give* and why such care is medically necessary."
  - Question #5, third sentence, should read, "Explain the care *the employee will give* and why such care is medically necessary."
  - Question #6, second sentence, should read, "Estimate the hours the patient needs care *by the employee* on an intermittent basis, if any." The fourth sentence should read, "Explain the care *the employee will give* and why such care is medically necessary."
  - Question #7, third sentence, should read, "Does the patient need care *from the employee* during these flare-ups?" The fourth sentence should read, "Explain the care *the employee will give* and why such care is medically necessary."

## Conclusion

We believe these recommendations will clarify the eligibility and designation forms, and will also make it easier for health care providers to understand the medical certification questions. Thank you for your time and consideration of these comments on behalf of Vigilant's members.

Sincerely,



Karen E. Davis  
Senior Employment Attorney  
Vigilant