



May 31, 2011

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

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

Dear Sir or Madam,

Subject: Proposed Information Collection Request for the Family Medical Leave Act Employee and Employer Surveys (Pages 18254 – 18255, DOCIS: fr01ap11-125)

## Who We Are

Aon Hewitt is the global leader in human resource consulting and outsourcing solutions. The company partners with organizations to solve their most complex benefits, talent, and related financial challenges, and improve business performance. Aon Hewitt designs, implements, communicates, and administers a wide range of human capital, retirement, investment management, health care, compensation, and talent management strategies. With more than 29,000 professionals in 90 countries, Aon Hewitt makes the world a better place to work for clients and their employees.

We manage Family and Medical Leave Act (FMLA) leaves for many large employers that together have a total of more than one million employees. In 2010, Aon Hewitt Absence Management administered 101,762 FMLA leaves. In that capacity, Aon Hewitt has deep knowledge of the practical administrative considerations with FMLA leaves that employers experience, and in addition to our own proprietary database, we conduct employer surveys to add further enrichment to our data.

## Comments

We applaud the Department of Labor for undertaking this survey and permitting public comment, and welcome the opportunity to submit our comments for consideration. We believe the survey to be comprehensive and that it will reap valuable data. Our comments are predominantly considerations formed from our own data or experiences. These comments to the proposed information request (ICR) for the FMLA Employer Survey are provided below.

**S21: “And does your company process requests for FMLA internally, or do you utilize a third party for this? (IF NECESSARY: do you hire another company to administer the requests for FMLA, or do you do this yourselves?)”**

Aon Hewitt is supportive of and delighted that the Department will get data on the prevalence of using providers of administrative services like us. Our suggestion would be to broaden the question to incorporate more than just “requests for FMLA” (or, as it’s put in Question 18, “process requests”) including other tasks such as determining eligibility; sending, receiving, and reviewing completed certification forms; and requesting recertifications, etc. For reference, Aon Hewitt’s own FMLA 2011 survey, scheduled for release later this spring, found that only 20% of employers used a vendor to administer their FMLA processes fully, while another 21% hired a provider to do part of the administration. More broadly, employers were able to

describe their use of a vendor on a four-step continuum from doing all work themselves to delivering “all aspects of administration including [employee] interaction.”<sup>1</sup>

**Q10: “In what time increments do employees in your organization record their work time?”**

Aon Hewitt’s experience is that the answer to this question often depends upon whether employees are FLSA exempt or non-exempt. Specifically, we find that at many (or even most) employers, exempt employees do not record their time worked (survey choice 3). Aon Hewitt suggests dividing this question into two parts, asking the question both for exempt employees and then for non-exempt employees. It is noteworthy that since the 2009 regulations became effective, two courts have ruled for employees where the hours worked for the plaintiffs—exempt employees—were not adequately tracked. See: *Shaw v. Total Image Specialists*, 2009 U.S. Dist. LEXIS 15318, 16 WH Cases2d (BNA) 186 (S.D. Ohio Feb. 12, 2009); and *Erdman v. Nationwide Insurance Co.*, 582 F. 3d 500 (3rd Cir. 2009).

**Q21: “How many of the . . . employees took their leave on an intermittent basis . . .”**

In attempting to gauge the challenges associated with intermittent leaves, it may be helpful to divide all intermittent leaves into scheduled and unscheduled categories—the latter of which is really the most vexing for employers.

**Q21a: “How would you evaluate the ease or difficulty of administering intermittent leaves?”**

The ease or difficulty experienced in administering intermittent leaves is largely related to the priority an employer puts on managing or scrutinizing intermittent leaves and the challenges that employer has with its employees taking intermittent leave (either across the entire population or in particular subsets or locations). Aon Hewitt is concerned that the data elicited by this question, as currently constructed, may be misleading. For example, if ten employers that have not identified intermittent leaves to be a problem reply that it is “very easy” for their company, that data will not be representative of employers where intermittent leave abuse does create trouble for their HR department or administrators. We suggest layering the question so that the challenge element currently in the question could be compared to how big of a problem intermittent leaves are at that company or worksite. In other words, whatever answer the employer selects, the next question would ask the employer to identify whether it believes that intermittent abuse is an issue within their organization.

**Q26: “How many medical certifications did you receive and accept . . . at this location?”**

We suggest following this question with one asking whether the employer uses the optional versions of the form created by the Department. According to our 2011 survey, 43% of employers use “a modified version...(e.g., a company-designed form)” for the employee’s own serious health condition and 41% use a

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<sup>1</sup> The categories and descriptions were: “Insourced: We handle all administration on a custom built, in-house system; Internal and vendor model: We handle all administration internally on a system purchased from a vendor; Co-sourced model: We do some of the administration internally and a vendor does the other parts of the administration; Fully outsourced model: A vendor handles all aspects of administration, including participant interaction.”

modified version for the family member. By adding this question, and combining the data with the current Question 26, the Department might be able to roughly gauge the efficacy of the WH-380 *et seq.* forms.

**Q27 INTRO: “Now I’d like to ask you about denial of FMLA leave.”**

We suggest this be clarified regarding whether the questions that follow include employees who were ineligible for FMLA.

**Q28: “[H]ave any eligible employees at . . . been denied Family and Medical Leave because they used their entire time allotment covered by FMLA” and**

**Q29: “[h]ow many eligible employees were denied leave for this reason?”**

We suggest that this question also delineate between exhaustion of continuous and intermittent leaves. The general perception is that employees who take intermittent leaves exclusively never exhaust their 12 weeks because they never use enough time before they refresh their allotment or before the time begins to “roll” back. While this is almost certainly true, this presumption that employees cannot exhaust their time intermittently could be tested through this question.

**Q37: “The FMLA generally permits employer to request re-certification of long term serious health conditions. How often do you require re-certification?” and**

**Q47: “Why did you suspect this misuse [of FMLA by some portion of your employee population]?”**

When an employer suspects misuse of a leave, its only recourse, as provided within the regulations, is to request a recertification unless and until that employee’s leave request ends (e.g., reaches one year in length). Given that, Aon Hewitt suggests that the Department connect the data in Questions 37 and 47. Specifically, it would be helpful to know not only how often employers recertify (Question 37) but for what reasons (e.g., “misuse”) employers are using recertifications. In addition to the misuse, it would be valuable to learn how often employers request recertifications when circumstances change significantly and/or, when he/she exceeds the frequency and/or duration of approved intermittent usage. Furthermore, with regard to the misuse reasons in Question 47, Aon Hewitt suggests the addition of another selection. The added option would speak to suspicion caused not by the employee himself or herself necessarily, but by the systemic perceived misuse at that worksite or within that working group. To wit, the Department should include an option to the effect of: “Works at a location with suspected rampant abuse.”

**Q43: “Has leave taken on an intermittent basis had an impact on this location’s productivity?” and**

**Q44: “Has leave taken on an intermittent basis had an impact on this location’s profitability?”**

The questions regarding the impact on productivity and profitability are important. We would also suggest that the Department ask about the effect on location morale. While that sentiment is perhaps indirectly included in the “productivity” question, Aon Hewitt believes that the effect of pervasive intermittent use on employee morale to have a significant impact on employers and employees, and therefore warrants specific mention.

**Q54: “How easy or difficult are each of the following activities for your organization?”**

We suggest adding an option to the effect of “Receiving sufficient and complete certifications from employees within the prescribed dates (within 15 days).” Our experience with employers is that getting back valid certification forms is a common struggle, one that may take several attempts on the same leave for the same employee.

**Q68: “Do you have a specific computer software or person in human resources that tracks use of family and medical leave?”**

We like this question, but given the frequent and significant changes to the FMLA over the past four years, Aon Hewitt also suggests that the Department ask how the “computer software” and/or the designated HR person are/were updated on the changes to the law.

**Closing**

If you have any questions or comments, please contact the undersigned at the telephone number or email address provided below.

Sincerely,

Aon Hewitt

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