

From: [Bryan Embley](#)
To: [WHDPRAComments](#)
Cc: [Rebecca Parr](#); [Tim Evans](#); [Rosanne Ricks](#)
Subject: WH381 - Requested Revision - FMLA Leave Available
Date: Wednesday, August 14, 2019 1:17:43 PM

To Whom It May Concern:

I am writing at about an internal conflict that has always existed in the form WH-381 Notice of Eligibility and Rights and Responsibilities and is apparently in the draft to be perpetuated in the proposed revision of the same. In the [old "Part B"](#) and in the [new "Section II,"](#) the form states: "As explained in [previous section], you meet the eligibility requirements for taking FMLA leave *and still have FMLA leave available in the applicable 12-month period*" (emphasis added).

The problem with the emphasized text is that the previous section of both forms are completely silent as to the possibility that an employee has already exhausted their FMLA leave entitlement. Furthermore, both forms point to 29 CFR 825.300(b) for the details of calculating eligibility and that section of the regulation is also silent as to the possibility of an employee having exhausted their FMLA leave entitlement for the applicable 12-month period.

It is possible (and we do see it) that an employee who has already used 12 weeks of FMLA leave still meets the eligibility criteria and the qualifying event remains when the 12 weeks of leave have elapsed. As I read the statute and regulations, the person is still technically eligible (because 29 CFR 825.300 only talks about 12 months, 1,250 hours, and 50+ employees within 75 miles) but may not take additional FMLA leave until a new 12-month period begins because they exhausted their entitlement as outlined in 29 CFR 825.200(a). This is supported in both the old and new WH-382 Designation Notices which have a checkbox the employer can check which says, "You have exhausted your FMLA leave entitlement in the applicable 12-month period" ([old form](#)) and "As of the date the leave is to start, you do not have any FMLA leave available to use" ([new form](#)). This suggests an approach where communications regarding remaining leave entitlements should be handled at the designation notice phase of the process.

Another possibility is an employee who has used 12 weeks of leave for their own serious health condition in the applicable 12-month period but then has a new qualifying event relating to providing care for a covered servicemember with a serious illness or injury. Such an individual would indeed remain eligible after the use of their initial 12 weeks of FMLA leave AND would still have 14 additional weeks of FMLA time for the purpose of caring for the ill/injured covered servicemember pursuant to 29 CFR 825.200(f).

I can understand the desire to include notification that FMLA is or is not actually available based on prior use with the eligibility notice as a normal employee will not care about the distinction between eligibility under 29 CFR 825.300 and exhausted entitlement under 29 CFR 825.200. But it needs to be addressed in only one place in the forms to avoid additional confusion.

As currently constituted, using the federal forms presents the very real possibility of telling an employee they are eligible AND that they have time available on the WH-381 before turning around and issuing a WH-382 that says they do not have time available and cannot use FMLA. Such a circumstance is completely antithetical to the regulations requiring clear

communication regarding an employee's rights under the FMLA.

I do see a counter to my argument in 29 CFR 825.300(b)(3) where an employer need only issue one WH-381 during any applicable 12-month period. This would mean that a WH-381 need not be issued at a time when a statement affirming the availability of FMLA hours would be problematic. While this may allay some of the potential confusion to the employee, it does not solve the problem of form WH-381, operating under 29 CFR 825.300(b) and (c), touching on the potential exhaustion of FMLA leave which properly belongs to the designation notice under 29 CFR 825.300(d) in paragraphs (1) and (5). Whether the employee has exhausted their leave or not should only be on one form--WH-382 Designation Notice.

For the foregoing reasons, will you please revise form WH-381 to eliminate any statement affirming that the employee has FMLA leave available in the applicable 12-month period?

I would be happy to answer any follow-up questions to my comments. Thank you for your consideration.

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