

Waterman, Robert - WHD

From: Matthew Morris <mmorris@compsych.com>
Sent: Friday, October 04, 2019 5:38 PM
To: WHDPRAComments
Subject: Control Number 1235-0003 - Comments on the Proposed Revisions to FMLA forms
Attachments: ComPsych Comments to DOL on changes to the FMLA forms FINAL.pdf

Control Number 1235-0003

Wage and Hour Division, Department of Labor.

Dear Mr. Waterman,

Please find the attached comments from ComPsych Corporation on the proposed changed to the FMLA forms.

Very truly yours,
Matt Morris

Matt Hoffer Morris
Vice President, FMLASource
ComPsych Corporation
NBC Tower – 13th Floor
455 N. Cityfront Plaza Drive
Chicago, IL 60611
Telephone: 312.983.3692
Mobile: 312.696.9592
Email: mmorris@compsych.com

DISCLAIMER: The information contained in this e-mail may be confidential and is intended solely for the use of the named addressee. Access, copying or re-use of the e-mail or any information contained herein by any other person is not authorized. If you are not the intended recipient please notify us immediately by returning the e-mail to the originator.

October 4, 2019

Submitted via electronic mail at WHDPRAComments@dol.gov

Wage and Hour Division, Department of Labor.

Control Number 1235-0003

Mr. Robert Waterman,
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

Dear Mr. Waterman:

Re: Proposed revisions to FMLA forms

ComPsych Corporation and its division, FMLASource, are grateful for the opportunity to provide the comments below on the proposed changes to the optional-use forms. We have provided information on several sections of the different forms and, where sensible, provided suggested revisions or further opportunities for modifications that could help achieve the stated goals¹ of the revisions. In particular, we focused on challenges relating to the administration of FMLA owing to our experience in administering outsourced absence solutions including the FMLA.

About ComPsych

FMLASource®, a ComPsych Corporation program, is a major provider of leave of absence administration. The program administers the Family and Medical Leave Act, leaves under the Americans with Disabilities Act and more than 200 other federal and state leave laws.

Started in 2004, FMLASource now administers leave in and tracks regulations for all 50 states for more than 3,700 customers, covering 4.5 million employees throughout the United States. Our customers span all industries and range from the Fortune 500 to smaller public and private concerns.

General Comments

In broad strokes, ComPsych believes that the new proposed versions of the forms significantly improve the current templates and will fulfill the stated goals of improving the experiences of employees and employers and doing so in a compliant and efficient manner. Using more checkboxes and asking health care providers if their patients meet the specific standards of the different categories of serious health conditions will create greater ease for the providers and clarity as to their intent, thereby benefiting employers. Two other improvements repeated throughout are worth mention. First, the expansion of verb tenses (e.g., “has been” and “will be” in the WH-380-F, Section III, Part A, Question 6a) will be of great help for all users of the form, but particularly health care providers who, in our experience, have struggled in the past to match their patients’ conditions with the structure of the form. Second, the repeated use and

emphasis of “best estimate” when asking the employee or the health care provider for the time that the employee will need to take.

With regard to the layout, it is clear to us—an organization that reviews over 10,000 medical certifications each week—that the current form’s structure encourages health care providers to skip questions which then often results in incomplete or insufficient forms, and/or additional discussions with the health care providers. The proposed versions improve upon this but we recommend that the Department look for ways to organize or annotate the certification forms to show the health care provider immediately which questions are germane to her patient’s condition.

ComPsych also recommends that in addition to these revisions the Department create a new form related to recertification. Although the regulations in Section 825.308 of the FMLA Rule provide significant detail related to reasons for recertification, the reasons often do not fit neatly into a standard certification form creating confusion for the health care provider. For example, Section 308(c)(3) describes a situation in which an employee’s leave for knee surgery is called into doubt due to his participation in the company softball game which then triggers a recertification by the employer. In this situation, it would be sensible for the health care provider to be put on notice that the reason he/she is being asked again about his/her patient is due to the suspect circumstances at hand. However, there is no clear place on the form to put that information and highlight it for the physician. Indeed, when an employer uses the standard WH-380-E, for example, the health care provider most often assumes that the employer is asking for him/her to repeat all the same information (e.g. dates he/she treated the patient) that the health care provider recently provided. As a result, we find that many times the health care provider is confused by what is being asked and does not return a complete and sufficient form, if he/she returns anything at all. By creating a template form, this will not only help create better clarity for the health care provider, it will also allay any fears by employers that their questions are inappropriate or interfering with the employee’s leave by shoehorning such questions into a general certification form.

Finally, we strongly encourage the Department to create an online version of the form for health care providers to use. An online form would create efficiencies by effectively removing the transmission of the form from the employer to the employee, then to the doctor and back again. It would also foster the completion and sufficiency of the documentation (and remove the questions back to the health care provider) by creating a “smart” form that leads the provider to only the appropriate questions (e.g., does not ask intermittent questions for continuous leaves) and also would not allow the form to be submitted unless the provider completed all relevant sections, preventing questions from being skipped.

Our comments on the specific forms are listed below. We have not commented on the following forms: WH-384 Certification of Qualifying Exigency for Military Family Leave; WH-385 Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave, and WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

Revisions to the Certification of Health Care Provider for Serious Health Condition of the Family Member (Form WH-380-F)

Section I – Employer

The addition of the actual due date (in question 3 of the form) requires more work for the employer by calculating and denoting the actual due date as opposed to the current template's generic statement that the employer "must give [the employee] at least 15 calendar days to return" the form. However, FMLASource has found that with our own custom version of the certification form, this provision of the actual date is not only helpful to employees, but just as importantly, creates better adherence and minimizes confusion by giving the employee the actual date as opposed to having the employee figure it out himself/herself.

That said, for forms sent through the mail, there is a lack of clarity as to how to calculate the 15 days and whether any additional time needs to be added to account for postal mail given that it starts, as it states on the proposed WH380-F, as of "the date the certification is given to the employee."

Section I - Employer Instructions

We believe the addition of the clarification (a bolded one) that the employer cannot ask for certification for bonding is helpful as we have, in the past, seen employers confused by this distinction.

Section II – Employee

Instructions. The addition, within the instructions, of the direction to the employee that "you are responsible for making sure the medical certification is provided to your employer within the time frame requested . . ." is a good instruction. With our clients, we have often suggested that they include that information in a separate communication so that employees understand that they need to take an active, engaged role in ensuring the medical provider sufficiently completes and sends a valid certification.

Question 3(a). We support the addition of the types of assistance the employee might provide to the family member (e.g., transportation) along with checkboxes aligned to each type of response. This improves upon the current form's free form box by directing the employee to one or more (or none) of the types of care outlined by the regulations. As with many other improvements on the form, this will save the employer from having to translate an employee's free-form description into the Department's categorical definitions.

In order to facilitate the completion of these forms, we recommend that the Department articulate that the employer can ask the employee these questions themselves (e.g., in an initial face-to-face discussion or phone call) and complete that part of the form on behalf of the employee.

Question 3(b) and 4. Separating the time needed question in 3(b) from the type of care provided in 3(a) will help produce more complete answers. In both sections the emphasis on the employee providing his/her "best estimate" is helpful in fostering more complete and sufficient responses.

Section III – Health Care Provider

General comments. Many of the suggested improvements are repeated here (e.g., the addition of current and future tenses, the emphasis of “best estimate” etc.) and we similarly recommend these changes.

Part A(4): The addition of examples of the type of care (as in the employee section) will help the health care provider understand the specifics of what is being asked of him/her and putting it in the context of the FMLA. We approve of the choice to leave a freeform answer line for the health care provider—thus eliciting a narrative response to be reviewed—as opposed to the checkboxes in the employee section. The narrative response should help provide the employer with a better understanding of the request.

Parenthetical between A(4) and A(5a). The italicized parenthetical has important instructions about the categories listed below it and the reference material on page six related to the type of condition. However, with regard to formatting, in its proposed form, the instruction gets lost on the page. We recommend bolding that line, setting it apart and/or using other formatting styles to alert the health care provider about the categories and their definitions.

Questions A(5-10). We commend the use of the checkboxes—we frequently use checkboxes on our versions of the current forms—but we recommend that the boxes be made bigger and more pronounced especially because there are already boxes and text lines on the right side of the form (past the numbers). Otherwise, the boxes may get lost.

Part B. In each of the sections, we recommend creating a header so that the provider can see what each section is about. While the bolding is helpful we recommend starting each section with a header denoting continuous, planned treatment, referral to another health care provider and intermittent leave. (*See also*, our comments on Form WH 380-F, Section II, Part B below).

Part B. Question 1. Here the question asks whether the employee was/will be incapacitated and the estimated beginning and end dates. By having all three of these data points in the same question, and without clear delineation, providers may miss or skip one or more of them. We recommend separating out the incapacitation question, the begin date and the end date into three different sections or items.

Part B. Question 4. We strongly favor the addition of the duration and frequency lines. We find that providers often are not specific with the time period or amount of time requested.

Section III – Health Care Provider Instructions

We recommend renaming this section “Section IV” and calling it “reference material” or something similar. By putting “instructions” at the end of the document, it could confuse providers and detract from the clarity on the rest of the form.

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

Section I – Employer

Questions 5(a), 5(b) and 7. These questions all relate to the employee's job responsibilities and are provided to the health care provider so that he/she may understand the impact of the employee's health condition and whether the employee is unable to perform the functions of the position. While this information (job title, job description [if attached] and essential functions) is important, we recommend providing additional guidance to the employer related to these questions.

As the regulations note, the "essential functions" standard is borrowed from the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 *et seq.*, and the regulations. Many, and especially some recent, ADA cases differentiated between the true *essential* functions of the employee's position and what the much broader and inexact job description said. In those recent cases, for example, the court held that the reliance on the job description was misplaced and that such descriptions were overly broad or inapplicable. *See, e.g., Gunter v. Bemis Co.*, No. 17-6144 & 6185 (6th Cir. 10/16/18); *EEOC v. Wesley Health System, LLC*, No. 2:17-cv-126-KS-MTP (S.D. Miss. 11/14/18). Our experience is that this is common; job descriptions are often much broader in their description of duties (often for good reason) than an accounting of essential functions. For that reason, we recommend: (1) emphasizing the question on essential functions (Question 7) rather than the attached job description; and (2) while the parenthetical under Question 7 is helpful, a more descriptive definition on what is an "essential function" and how to make such determinations.

Section II – Health Care Provider

Part A: Medical Information. Questions 1 and 2. Question 1 asks about the "approximate date the condition started or will start" and Question 2 asks for "the best estimate of how long the condition lasted or will last." While Question 2 is helpful information and something that should be asked, our experience is that it is incongruent with the first question. Specifically, what is more important for more purposes of the employer is: what is the best estimate of when the condition will *end*, and even more specifically, when will the *need for leave* related to this condition end, or when will the employee no longer be incapacitated by this condition and/or be able to return to work.

The challenge with Question 2 is that the condition itself may last much longer than the need for leave for it; the latter being the relevant information for the employer. For example, an employee may need time off for surgery (the leave) related to lifelong, chronic condition (the condition) that will not otherwise keep the employee out of work. We recognize the end date information is captured later in the form (e.g., Question 4(a)) but we recommend including an additional question here asking the health care provider for his/her best estimate on an end date of the need for leave.

Questions 3(a) through 8, generally. As with the checkboxes included in the proposed form for family members, we support this structural change and also repeat our suggestion the checkboxes and headers be made bigger or more prominent.

Question 6 – Chronic Conditions. Here, we suggest adding examples after the header as the Department did with Question 7 on permanent or long-term conditions (the parenthetical including Alzheimer's, etc.). The examples can be

lifted straight from the reference material at the end of the form: “diabetes, asthma, migraine headaches.” While health care providers generally understand what a chronic condition is, it is a nuanced distinction within the terms of art in the FMLA, particularly with the “permanent or long-term conditions” category. In addition, we were curious why the Department did not offer a line for dates of treatment as it did with the “Incapacity plus Treatment” section in Question 4(b).

Part B: Amount of Leave Needed. General comments. We support the addition of these instructions but would suggest, as the Department has in other places, that “best estimate” be bolded, especially because the health care provider’s best estimate, in the end, is what certifies the leave.

In our comments above concerning the analogous part 3(b) of the certification for a family member, we mentioned that headers could be useful to the health care provider so that he/she can see the different types of leave in which the patient’s request could be categorized. We repeat that suggestion here. In addition, we ask whether it might make sense to reconsider the sections currently. The sections 1 through 5 relate to:

1. continuous leaves,
2. planned treatment,
3. appointments referred to other providers ,
4. intermittent leaves, and
5. reduced schedule leaves.

Since the regulations generally talk about leaves as continuous, intermittent or reduced schedule, (just those three categories) we suggest reorganizing these categories as:

1. continuous leaves,
2. (planned) reduced schedule leaves,
 - a. planned treatment,
 - b. appointments to other providers, and
3. (unplanned) intermittent leave.

In our experience, many questions about the provider’s intent come from information being included in the wrong place. By having the proposed question/sections 2, 3 and 5 all deal with planned occasional leave, we suspect this could create some of those mistakes and could be easily solved with the same questions, organized differently.

Question B(4) – Intermittent. We suggest adding the phrase “for the same condition(s)” after the words “intermittent basis (periodically).” We have seen some employees and their health care providers believe that the approval for intermittent leave for one condition means the approval to take FMLA intermittently for any (including unrelated) conditions.

Revisions to the Notice of Eligibility and Rights & Responsibilities (Form WH-381)

General comments. We repeat our point of view on the checkboxes. They provide more clarity for what's been requested.

Section I – Notice of Eligibility

Ineligibility due to hours. The addition of “1,250” to the hours of service requirement is a simple but good addition, however the space for the employer to include the actual hours worked as of the date the letter is sent creates more work for the employer (even though this information should be available from calculating the ineligibility).

Section III – Notice of Rights and Responsibilities

The 12-month method – a “rolling” 12-month period measured backward. The addition of these definitions of the 12-month methods is helpful to the employee in understanding how his/her leave will be calculated. However, the proposed definition for “rolling backward” could be confusing. In particular, the last sentence says “Each time an employee takes FMLA leave, the remaining leave is the balance of the 12 weeks not used during the 12 months immediately before the FMLA leave is to start.” (emphasis added). While this sentence is a useful description when the “start” of the leave is continuous, it is not necessarily true for an intermittent leave. For intermittent leaves, the time is measured from each day the leave is used, not from the start of the approved leave period. We recommend using the definition used in Section 825.200(a)(4) of the regulations: “a ‘rolling’ 12-month period measured backward from the date an employee uses any FMLA leave.”

Revisions to the Designation Notice (Form WH-382)

Section I – Employer

“Your FMLA Leave request is Not Approved” Section. The addition of “Other” is helpful a helpful catch-all for employers to use.

Section II – Additional Information Needed

Incomplete or Insufficient Certification Section. The titling of the section is an improvement over “Additional Information is needed . . .” as “additional information” connotes that *more* information is needed than what was initially required whereas the actual request is to cure or provide what had already been requested in the eligibility notice. Also, the inclusion of the definitions of “insufficient,” (in addition to “incomplete”) should be helpful to employees in helping them understand not only what information needs to be cured on the form but also *how*.

Section III– FMLA Leave Approved

General comments. One element that would help is to include start and end dates of the approval. Often the certification from the doctor will approve the requested leave, but only a portion of it. In those cases, the employer will need more than a binary approved or denied option in conveying the decision to the employee.

In closing, ComPsych thanks the Department for the opportunity to provide our thoughts on the proposed revisions to the FMLA forms. If you would like to discuss any of our responses with us, please contact us at (312) 983-3692 or via the email address listed below. We look forward to the publication of the final forms.

Sincerely,

ComPsych Corporation

Matthew Hoffer Morris

mmorris@compsych.com

ⁱ The Department of Labor's Supporting Statement referenced the hope to "improve customer service, increase compliance and reduce the burden on the public."