

Waterman, Robert - WHD

From: Christine Dinan <cdinan@abetterbalance.org>
Sent: Friday, October 04, 2019 3:45 PM
To: WHDPRAComments
Cc: Dina Bakst; Elizabeth Gedmark
Subject: Control Number 1235-0003; Department of Labor, Wage and Hour Division Agency Information Collection Activities; Comment Request; Information Collections: The Family and Medical Leave Act of 1993, As Amended
Attachments: ABB Comments re Proposed Changes to FMLA Model Forms 10.4.19.pdf

To Whom it May Concern:

Please see the attached comments submitted on behalf of A Better Balance.

Thank you.

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October 4, 2019

Via E-mail

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
WHDPRAComments@dol.gov

Re: Department of Labor, Wage and Hour Division Agency Information Collection
Activities; Comment Request; Information Collections: The Family and Medical
Leave Act of 1993, As Amended, Control Number 1235-0003

To Whom it May Concern:

On behalf of A Better Balance: The Work and Family Legal Center, we are writing in response to the Notice 84 FR 38061 published in the Federal Register on August 5, 2019, which seeks comment regarding the proposed revisions to the model forms pertaining to the Family and Medical Leave Act of 1993, as amended ("FMLA"), which are published by the Wage and Hour Division of the Department of Labor ("WHD").

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family through policy advocacy, outreach, and direct legal services. As part of its core mission, A Better Balance leverages the power of the law to ensure that no worker has to make the impossible choice between their job and their family. We are leading advocates for policies that help workers and their families, including paid sick time, paid family and medical leave, fair and predictable scheduling, pay equity, inclusive family definitions, and pregnancy and caregiving nondiscrimination.

Based on our mission and our experience advocating for workers seeking to exercise their FMLA rights, we are writing to urge you to include additional information about the law's protections against interference and retaliation, particularly as they pertain to no fault attendance policies, in the model notice of rights and responsibilities. We believe that providing this information to

workers is critical to ensuring that they are able to exercise their FMLA rights and consistent with the WHD's goal of increasing compliance with the FMLA.

A Better Balance operates a free, confidential legal helpline to help workers around the country understand their rights related to paid sick time, family and medical leave, and pregnancy and parenting in the workplace. In doing this work, we hear regularly from workers who need FMLA leave to care for themselves or their family members. Too often, these workers face adverse consequences – including harassment from managers, reduced wages, transfers to a less desirable position, and termination – for taking such leave, in contravention of the law. Although the FMLA explicitly prohibits both interference with workers' FMLA rights and retaliation against workers who have exercised their rights,¹ too few employees are aware of these protections and too many employers continue to violate them.

One type of FMLA interference that we are particularly concerned about is the use of no fault attendance policies by employers to punish employees for absences protected by the FMLA. Under these policies, workers receive points (sometimes referred to as “demerits” or “occurrences”) for each absence, regardless of the reason. Those points can subject them to discipline, loss of pay, and/or termination. Federal regulations make clear that punishment for FMLA-qualifying leave under a no fault attendance policy is unlawful FMLA interference,² but unfortunately this has not prevented employers from assessing points against workers who take FMLA leave.

Through our helpline, we have heard from countless workers in retail, food service, healthcare, and manufacturing jobs across the country who have been subjected to punitive attendance policies that inadequately protect their leave rights. Indeed, we described the ways in which a no fault attendance policy at Walmart, the nation's largest private employer, has been used to punish workers for lawful absences, including FMLA-qualifying absences, in our ground-breaking 2017 report, *Pointing Out: How Walmart Unlawfully Punishes Workers for Medical Absences*.³

The impact of no fault attendance policies on FMLA rights has also been the subject of several recent federal court decisions – many finding evidence that employers' policies may have interfered with employees' FMLA rights⁴ – which further highlights both the salience of this issue and its significant impact on workers.

¹ 29 U.S.C. §§ 2615(a)(1)-(2).

² 29 C.F.R. § 825.220(c) (“[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies.”)

³ DINA BAKST, ELIZABETH GEDMARK & CARA SUVALL, *POINTING OUT: HOW WALMART UNLAWFULLY PUNISHES WORKERS FOR MEDICAL ABSENCES* (2017), <https://www.abetterbalance.org/wp-content/uploads/2017/05/Pointing-Out-Walmart-Report-FINAL.pdf>.

⁴ See, e.g., *Dyer v. Ventra Sandusky, LLC*, No. 18-3802, 2019 WL 3729494 (6th Cir. Aug. 8, 2019) (finding that employer's policy of denying a point reduction benefit to employees who had

We urge the WHD to fill the information gap and ensure that this critical information is contained in its model forms. Specifically, we propose that a new subsection be added to Section III of the model notice of rights and responsibilities, titled “Protection Against Interference and Retaliation,” which contains the following language:

You have the right to take your FMLA leave free from interference and retaliation. This means that we cannot discriminate or retaliate against you because you have taken FMLA leave, and we cannot use the fact that you have taken FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions. This also means that your FMLA leave cannot be counted against you under a “no fault” or other attendance policy, meaning that you cannot be given “points” or “occurrences” for absences that are covered by the FMLA.

Thank you for the opportunity to share these comments.

Sincerely,

Dina Bakst
Elizabeth Gedmark
Christine Dinan

A Better Balance

used FMLA leave under its no fault attendance policy could constitute FMLA interference); *Bullard v. Fedex Freight, Inc.*, 218 F. Supp. 3d 608 (M.D. Tenn. 2016) (denying summary judgment for defendant on plaintiff’s FMLA interference and retaliation claims, where plaintiff with serious health condition had been terminated for excessive absences); *Weinstein v. Autozoners, LLC*, No. 2:11-cv-00591-LDG, 2014 WL 898081 (D. Nev. Mar. 6, 2014) (granting summary judgment to plaintiff who had been terminated for FMLA-qualifying absences under employer’s no fault attendance policy); *Chaney v. Eberspaecher North America*, 955 F. Supp. 2d 811 (E.D. Mich. 2013) (denying summary judgment for defendant on plaintiff’s FMLA interference claim, where plaintiff had been assessed points for absences that she claimed were FMLA-qualifying); *Smith v. Aptar Grp., Inc.*, No. 12 C 8630, 2013 WL 1290213 (N.D. Ill. Mar. 28, 2013) (finding that plaintiff had successfully pled an FMLA interference claim where she alleged that she had been terminated for FMLA-qualifying absences under employer’s attendance policy).