

## Waterman, Robert - WHD

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**From:** Maria L. Reed <MReed@fhsolutionsgroup.com>  
**Sent:** Friday, October 04, 2019 11:59 PM  
**To:** WHDPRAComments  
**Subject:** Comments to Federal Register Notice | Control Number 1235-0003  
**Attachments:** Comments to Federal Register Notice 08052019.pdf

Dear Mr. Waterman,

Please see the attached comments to the Federal Register Notice, Control Number 1235-0003.

Regards,

Maria Reed | Manager, Absence Management Services

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October 3, 2019

Mr. Robert M. Waterman  
Division of Regulations, Legislation and Interpretation  
Wage and Hour  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, N.W.  
Washington, DC 20210

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

Dear Mr. Waterman:

This letter sets forth F&H Solutions Group's comments on the proposed revision of the information collection request titled, "The Family and Medical Leave Act, As Amended." F&H Solutions Group ("FHSG") is a national labor relations consulting firm with clients in the private and public sectors. FHSG administers leave of absence claims under the Family and Medical Leave Act ("FMLA") on behalf of eight clients that employ approximately 20,000 workers in the airline, finance, manufacturing, and nonprofit sectors. Its clients have a significant interest in the proposed changes to the optional use forms.

FHSG has carefully reviewed the Department of Labor's August 5, 2019, Federal Register Notice as well as the proposed optional use forms. These comments focus on achieving enhanced utility and clarify of the information collected to effectively determine whether or not employees qualify for leave under the FMLA with minimal burden to the employee.

#### Proposed Changes to the Optional Use Form WH-380-E

The Department of Labor ("DOL" or "Department") proposes changes to the optional use form WH-380-E to support the need for leave for the employee's health condition. FHSG agrees with the Department's modifications from past tense to both past and future tenses. However, FHSG disagrees with the Department's elimination of the health care provider's obligation to list the date(s) the health care provider treated the employee for his/her health condition.



The DOL's own definition of a "chronic serious health condition" is one that "requires periodic visits (defined as at least twice per year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider." 29 C.F.R. § 825.115(c)(1) (emphasis added). FHSG contends that if the Department's definition does, in fact, require treatment visits twice per year, the health care provider should list the dates of treatment to demonstrate that the patient employee is, in fact, treated twice per year. Without the requirement to list dates of treatment, the health care provider is likely to certify the employee has a chronic condition because the condition warrants treatment twice per year, but not because the employee receives treatment twice per year. This is a crucial distinction that affects the employee's ability to qualify for intermittent FMLA leave. According to the 2017 Littler survey, 65 percent of respondents stated they have difficulty managing intermittent FMLA leave.<sup>1</sup> If the Department removes the requirement to list dates of treatment, employers will determine that employees whose conditions do not meet the definition of a "chronic serious health condition" will erroneously qualify for FMLA leave. The DOL should add the requirement under the proposed optional use form, just as the Department added blank lines for the health care provider to list dates of admission for inpatient care and dates of treatment for incapacity plus treatment. FHSG also suggests the Department add "in-person" to the optional use form to differentiate between telemedicine versus the requirement of in-person treatment. "The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider.." 29 C.F.R. § 825.115(a)(3).

The Department removed all reference to "symptoms, diagnosis, or any regimen of continuing treatment" currently requested in question four of the WH-380-E form. FHSG disagrees with the Department's changes as it prevents the employer from confirming that the condition certified is the condition for which the employee is taking leave. The FMLA regulations require the employee to "specifically reference the qualifying reason for leave or the need for FMLA leave." 29 C.F.R. § 825.302(c). The regulations further state, "When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed." 29 C.F.R. § 825.302(c). By eliminating the requirement for the health care provider to list the symptoms or diagnosis, the Department makes it more difficult for employers to administer intermittent FMLA leave because the employer cannot conclusively determine the condition has been certified.

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<sup>1</sup> The Littler Annual Employer Survey, May 2017.

[https://www.littler.com/files/2017\\_littler\\_executive\\_employer\\_survey.pdf](https://www.littler.com/files/2017_littler_executive_employer_survey.pdf)

## Conclusion

FHSG appreciates the opportunity to comment on the proposed revisions to the optional use forms. FHSG urges the Department to adopt the revisions in accordance with the points made herein. FHSG is happy to discuss the comments or answer any questions.

Respectfully submitted,

Maria L. Reed  
Manager, Absence Management Services  
F&H Solutions Group