

Waterman, Robert - WHD

From: Passantino, Alex <APassantino@seyfarth.com>
Sent: Friday, October 04, 2019 2:35 PM
To: WHDPRAComments
Cc: Passantino, Alex
Subject: Comments of Seyfarth Shaw LLP on Proposed FMLA Forms
Attachments: 2019-10-4 Letter to Honorable Cheryl Stanton re Comments to Proposed Revisions to FMLA Forms.pdf

Attached are the comments of Seyfarth Shaw LLP with respect to the Wage & Hour Division's proposed revisions to the optional FMLA forms. Please contact me with any questions.

Thank you for the opportunity to comment.

Alex Passantino

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October 4, 2019

Submitted Via E-Mail

The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210
WHDPRAComments@dol.gov

Re: Comments to Proposed Revisions to FMLA Forms WH-380-E, WH-380-F, WH-381, WH-382, WH-384, WH-385, and WH-385-V

Dear Administrator Stanton:

On behalf of the international law firm of Seyfarth Shaw LLP, we submit this response to the Department's proposal to revise seven forms, including WH-380-E, WH-380-F, WH-381, WH-382, WH-384, WH-385, and WH-385-V (collectively, the "Proposed Forms"), which are available to the public to use in the administration of the Family and Medical Leave Act ("FMLA"). We do not make these comments on behalf of any specific client that we represent. Rather, our comments are informed by feedback we have received from, as well as our experience representing, thousands of employers across most of the industries that comprise the United States economy.

Seyfarth Shaw is a global, full-service law firm with eleven U.S. offices and approximately 400 attorneys who represent national and international businesses in labor and employment matters. Among this group are a number of lawyers who regularly counsel and defend employers in matters concerning compliance with the FMLA and its state law analogues. Our vast team of labor and employment lawyers practicing in this space have assisted thousands of businesses across virtually every major industry in this regard.

We pride ourselves on how we listen to and collaborate with our clients. We work hard to explore the unique challenges each of them faces and understand how those challenges impact the objectives they strive to meet. We tailor thoughtful solutions that align with their goals. This simple but powerful approach to client service has earned us recognition by *Law360* as an "Employment

Practice Group of the Year” for eight years in a row, and our employment lawyers continue to be heralded regionally, nationally, and internationally by *Chambers*, *The Legal 500*, *U.S. News & World Report*, *The National Law Journal*, and *BTI Consulting Group*.

We applaud the Department for undertaking the effort to streamline and clarify the information critical to FMLA administration and compliance sought in the Proposed Forms. We also appreciate the Department’s focus on creating efficiencies for employers, employees, and health care providers, with the overall goal of making compliance with the FMLA easier for all stakeholders. In that regard, it is our view that the additional level of detail, more expansive definitions, and reorganized format provided in the Proposed Forms will help to achieve these goals. There are, however, portions of the Proposed Forms that we believe warrant further revision to avoid creating confusion among employers, employees, and/or health care providers using and completing the forms. To this end, we provide our comments as to each of the seven Proposed Forms, broken into separate sections below.

I. Form WH-380-E

We appreciate that, in many ways, the layout and style changes to Form WH-380-E (and all of the Proposed Forms) improve overall readability. The color coding of the sections, the changes in font size, and the increased use of headings make the proposed form easier to follow than the current form. We also welcome the additional definitions and information provided throughout the form, such as the definition of “serious health condition,” and “continuing treatment” added to the end of the form.

A. At Least 15 Calendar Days Language. We believe it is helpful to include the language that the “employer must give the employee **at least 15 calendar days**, absent unusual circumstances, to provide the certification,” at the top of the form, as well as the indication that a failure to do so may result in the denial of the FMLA leave request.

B. Date the Medical Certification is Received Language. Section I, question 2 on the proposed form asks the employer to provide the “date the [medical] certification [is] requested from the employee.” Section I, question 4 then requires that the employer provide a precise date by which the employee must return the form, but the instruction then states the employer should, “List date the certification is due, which must be at least 15 days from the date the certification is given to the employee.” (emphasis added). We believe Section I, question 2 and the instruction in Section I, question 4 creates confusion, especially with respect to the word “given” in the instruction in Section I, question 4, as the date the employee receives the certification form is the relevant date from which the 15 calendar days is calculated. While the date “given” to the employee may be the date the employee actually receives the medical certification form and would be straightforward in a scenario in which the employer hands the form to the employee in-person, this is not always the case. For instance, when an employee is already taking leave, the employer may be required to mail or e-mail the form to the employee. In such situations, which are not uncommon, the critical date is when the employee receives the form. We recommend that the Department eliminate entirely the date and instruction in Section I, question 2 as well as the current instruction in Section I, question 4 and instead, have an instruction that states, “List date the

certification is due, which must be at least 15 calendar days from the date the certification form is received by the employee."

C. Check Box Format. As noted above, we agree with the intent to simplify and streamline the process of completing the form. With regard to Section II, Health Care Provider, Part A: Medical Information, we believe the "check-the-box" approach of the new form will eliminate confusion in certain situations, such as the need for follow-up questions based on difficulty interpreting handwriting. We do, however, have some concerns with this approach. The proposed form highlights the different definitions of "serious health conditions," allowing the health care provider to "check a box," without providing detail as to the underlying medical condition. This creates the risk that a health care provider will feel obligated to check one of the boxes on the Proposed Form, even where an employee may not have a serious health condition. Such an approach arguably requires a health care provider to make a legal conclusion as to whether the employee has a serious health condition, rather than providing information necessary for the employer to ascertain that the condition is FMLA-qualifying. It also eliminates the ability for the employer to question the employee's condition or seek clarification. Although this may simplify the process, it may also lead to certification of conditions that do not in fact fall under the FMLA's definition.

A recommended alternative is to first have the health care provider answer a slightly revised question 9 in this section before checking the boxes which states, "*Describe the relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment).*" This proposed question is the same question as is on the current Form WH-380-E. By first having the health care provider answer this narrative question and then check a box, the employer will get better information regarding whether the employee has a qualifying serious health condition. We also suggest that the provider be given the option to check a box that states "None of the above."

D. Best Estimate Language. In Section II, Part B, we recommend that the Department eliminate the portion of the initial instruction that informs the health care provider to provide the best estimate of the amount of additional leave "not otherwise captured in Part A" because Part A does not ask the health care provider to indicate the length of leave or frequency and duration. As a result, a health care provider may not understand the need to also complete Part B and as such, this part of the instruction is confusing and should be eliminated.

We suggest including an additional question following question 2 in Section II, Part B, similar to question 3(b) asking the health care provider to "*Provide the best estimate of the duration and frequency of the planned medical treatment.*" The proposed revision requests only the date of any planned medical treatment, but does not request any detail about the duration of the treatment.

E. Duration and Frequency Language. We are aware that the FMLA permits employees to take small increments of FMLA leave and that an employer cannot require an employee to take more FMLA leave than needed. As a practical matter, and based on what we have

observed representing clients addressing FMLA issues, relatively few employees are certified to take FMLA leave in less than full days for incapacity. In Part B, question 4, rather than state as an example “2 hours each episode, 1 time per week,” we recommend keeping the language that is in the current form: “1 episode every 3 months lasting 1-2 days.”

II. Form WH-380-F

A. **Reorganization.** The comments above relating to form WH-380-E apply equally to our proposed revisions to form WH-380-F. The reorganization and additional definitions included within the form would help to decrease confusion and inefficiencies associated with filling out the form. But as with the form above, the check-the-box approach risks creating confusion for those completing and reviewing the form. For instance, Section II, question 2a could suggest to the employee that she/he is obligated to select one of these options identifying the relationship of a family member, even if the family member does not fit into one of these categories (and may not qualify for FMLA protection).

B. **In Loco Parentis.** We agree with the Department’s inclusion of the definition of “in loco parentis” within the form. We do, however, believe that the definition could benefit from further clarification with regard to the age or disability status of the child, by indicating that this situation applies to an individual who assumes the role of parent for a child who is under 18, or who is 18 years of age or older and incapable of self-care because of mental or physical disability. We believe specifying these parameters would increase clarity.

C. **Adult Child.** Much confusion has been generated over which adult children are children for purposes of FMLA. We recommend that the form include the information from 29 CFR § 825.122(d) for the provider to fill out if the child is 18 or older.

III. Form WH-381

As with the other Proposed Forms, form WH-381 has a format that is easier to follow and read through. It more clearly lists some important information, such as the date that any additional information may be required by the employer. While moving from a two-page form to a six-page form creates more voluminous records, it does have the benefit of increased clarity.

We appreciate the Department’s inclusion of a section noting that certain paid and other leaves will run concurrently with leave taken under the FMLA. We believe this will help to clarify this point for employees and lessen the burden on employers to do so.

IV. Form WH-382

A. **Format.** The new proposed format of this form provides increased clarity and utility. We agree with the changes made by the Department in creating separate sections for FMLA leave requests that are approved, and those where additional information is needed. The specific referral to these sections (Section III for approved leave, and Section II where additional information is needed), will help to clarify and streamline the process for both the employer and the employee.

Further, the inclusion of an explanation of a certification that is “incomplete” and a certification that is “insufficient” is helpful to illuminate this distinction for employees.

B. Details on Intermittent Leave. In Section III, we recommend that the language be changed to allow the employer to be specific as to the anticipated duration and frequency of the FMLA leave approved, and suggest the following language: *“Your request for unscheduled intermittent leave is approved and your current approval is _____. You have the right to request information on how much FMLA leave you have taken once in a 30-day period if leave was taken in this period.”*

V. Form WH-384

The comments to the above forms apply in large part to form WH-384. The formatting is, in many ways, easier to follow and improves readability. The check-the-box approach, though potentially more streamlined in some cases, creates the risk that an employee or third party completing the form may check boxes indicating qualifying information that would not have been present in the narrative approach of the current form.

The revised form moves much of the instruction detail from the current form to the last two pages of the revised form, in a lengthy section titled “Employee Instructions.” While we do appreciate the thoroughness of the information in this section, the format of the revised form is not as reader-friendly as portions of the current form. For instance, the current form has a detailed description of the type of third party information it requests that is not included in Part D of the revised form. Although it is included in Section II on the following page, it is at the bottom of a lengthy set of instructions and therefore more difficult to access.

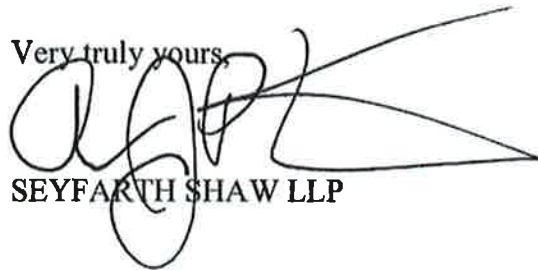
VI. Form WH-385 / Form WH-385-V

In addition to applicable comments made above, we find helpful the inclusion of the definition of “next of kin” within these proposed forms. Additionally, the forms’ specification of specific examples for the employee to select related to the care to be provided to the family member will create efficiencies in some cases. The risk is that an employee checks a box that may not be applicable out of obligation; however, the final section entitled “other” may lessen this risk as it allows the employee the opportunity to provide a narrative where none of the stated options apply.

* * * *

We appreciate the opportunity to respond to the Proposed Forms and look forward to working with the Department on this important issue.

Very truly yours,

A handwritten signature in black ink, appearing to be 'AGP', is written over the typed name 'SEYFARTH SHAW LLP'. The signature is stylized with a large, sweeping 'S' and a long horizontal line extending to the right.

SEYFARTH SHAW LLP