Waterman, Robert - WHD

From: Callie (Harman) Robinson <crobinson@nam.org>
Sent: Friday, October 04, 2019 11:30 AM
To: WHDPRAComments
Subject: Control Number 1235-0003 - National Association of Manufacturers Comment Letter
Attachments: NAM_FMLA Comment Letter_10.4.19.pdf

Good morning,

Please find the National Association of Manufacturers's comment on the "Agency Information Collection Activities; Comment Request; Information Collections: The Family and Medical Leave Act of 1993, As Amended" (Control Number 1235—0003) attached.

Should you have any difficulty accessing the document, please contact me.

Best,
Callie

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NATIONAL ASSOCIATION OF Manufacturers

Callie Harman Robinson

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October 4, 2019

Robert M. Waterman
Division of Regulations, Legislation, and Interpretation
Wage & Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Comments on "Agency Information Collection Activities; Comment Request; Information Collections: The Family and Medical Leave Act of 1993, As Amended" (Control Number 1235--0003), 84 Fed. Reg. 38061 (August 5, 2019)

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12.82 million men and women, contributes $2.38 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. We appreciate the opportunity to comment on this important notice in accordance with the Paperwork Reduction Act of 1995.

The NAM's comments are primarily focused on providing feedback to improve Draft Form WH-380-E—the form to be used by employees seeking FMLA-covered leave for their own serious medical condition. Many of these points of clarification, however, are applicable to the other proposed forms contained in the Comment Request. We urge the Department of Labor ("the Department" or "DOL") to consider these comments broadly. We do, also, provide a few additional comments to improve Draft Forms WH-380-F—the form to seek certification for FMLA leave to care for a family member with a serious medical condition—and WH-382—the form used by employers to notify employees of their FMLA certification determination. Each of these changes would improve the draft form so employers, employees, and physicians better understand their leave certification responsibilities and requirements.

I. DOL's Proposed Changes to Form WH-380-E Reduce Uncertainty and Regulatory Burden in FMLA Certification

The Department's proposed changes contained in Draft Form WH-380-E make three key improvements to the current form. First, the draft form better defines the terms and categories of serious health conditions, which will enable doctors to better report to the employer what type of leave may be needed and when. Second, the form reduces the burden on doctors by including clear questions, requiring necessary specific answers, and stating the parameters of what information is needed (e.g., doctors' best estimates of duration and length of leave) rather than calling for open-ended explanations. Third, the form specifically addresses intermittent leave and requires a best estimate of the duration and frequency of this leave to help employers

anticipate and understand how the employee may use it. These proposed changes will help employees, employers, and doctors to better understand when FMLA leave is applicable and how such leave should be managed. By clarifying these terms, the draft form will also help employers avoid situations in which they feel compelled to inquire about additional sensitive personal medical information.

II. Description of Form WH-380-E Should Align with 29 C.F.R § 825.313

DOL should amend the final sentences of the Form's description to better reflect 29 C.F.R. § 825.313 by removing the words "at least" and "unable" as they are not fully in line with the underlying regulation. The use of "at least" is also found in Section II – Health Care Provider Instructions. It should be removed in this instance as well to better reflect the regulation and ensure consistency throughout the form.

The underlying regulation permits 15 days for the employee to provide the certification absent "extenuating circumstances" for which an employer may provide additional time as appropriate. As drafted, the draft form suggests that the 15-day period is a minimum rather than the expected maximum amount of time to complete the form. Manufacturers and their employees may certainly encounter times in which a 15-day period is too short and therefore should be reasonably extended, but these extensions of time to complete the form should be the subject of a conversation between the employer and employee. Changing the expected number of allotted days under the regulation to a *minimum* number of days only increases the regulatory burden of the overall program and creates uncertainty how the timeframe to seek certification should be determined.

The word "unable" is also not supported by the underlying regulation and, as drafted, introduces unnecessary uncertainty regarding an employee's ability (whether determined objectively or subjectively) to complete the form. The underlying regulation already accounts for extenuating circumstances, so the word "unable" simply adds confusion without a countervailing benefit. This sentence should be updated for the sake of clarity and predictability.

III. Employer and Provider Instructions Should Precede the Relevant Section

The employer instructions and health care provider instructions should appear at the start of the relevant respective sections of the form. Currently, both instructions are included at the end of the employer and health care providers' respective sections. As a result, the parties are likely to have completed the form prior to seeing the "instructions" section. The current placement of the instructions also creates redundancy in the form. The one sentence instructions at the start of sections I and II (e.g., "please complete this section…" and "please provide your contact information, complete all relevant parts of this Section, and sign…") are redundant if the individual filling out the form is expected to read the full instructions first. DOL should, therefore, reformat to remove the "instruction" headers and simply include the relevant instructions at the beginning of each section.

IV. Section II, Part A: Medical Information

a. Clarify Chronic Conditions Category Explanation in Number 6

DOL's decision to break out the six categories of serious health conditions will substantially increase the likelihood that medical providers select the proper category associated with the specific health reason that qualifies for FMLA leave. Additionally, with these

categories, a medical provider will also be able to identify whether the condition is something that does not fit within a category and therefore not appropriate for FMLA certification.

DOL should amend the explanation of the chronic conditions category as it appears on page 3 of the form to further clarify the category and increase ease of proper certifications. By adding "(*e.g. diabetes, asthma, epilepsy, or migraine headaches*)" doctors will be able to more quickly identify which category is most appropriate for a specific serious health condition. This change would be similar in appearance to the descriptions of permanent or long-term conditions and conditions requiring multiple treatments.

b. Clarify the Information Sought in Number 9: Appropriate Medical Facts

Number 9, as drafted, seeks information that may or may not be related to the condition for which an employee seeks certification under the FMLA, and should be clarified so that healthcare providers better understand what they should include in their answer. As currently worded, the question asks healthcare providers to "describe other appropriate medical facts," but there is little context for what constitutes an "appropriate fact." DOL should update this question to make clear that a healthcare provider should only include information that is directly related to the FMLA leave and is relevant to determining whether the condition at-issue qualifies under the law. This limitation would better protect employee privacy by reducing the likelihood that too much medical information may be included. This will also reduce the burden on employers and employees and the necessary information will be included and follow-up information is less likely to be required.

V. Section II, Part B: Amount of Time Needed

a. Remove "Not Otherwise Captured in Part A" From Part B's Instructions

DOL should delete "not otherwise captured in Part A" from the instructions for Section II, Part B. This instruction is confusing and misleading. Doctors should provide their best estimates of leave in Part B, without wondering if they should add or subtract additional time for incapacitations predicted in Part A. Part A's purpose is to discuss the relevant medical information and category that qualifies an individual for FMLA leave. Part B's purpose is to estimate the amount of leave needed. As such, this part should provide doctors and employers the entire universe of expected leave-time, with the necessary information self-contained in Part B. Clarifying the purpose of each Part will reduce the reporting time burden for doctors and employers, who should not have to scour the form to find necessary facts to evaluate FMLA frequency and duration for an entitlement determination.

b. Provide Specific Fields for Beginning and End Date Estimates

Part B, Question 1 should be clarified to list separate answer fields for "beginning date" and "end date." The draft form currently has one line for the doctor to "estimate the beginning and end date for the period of incapacity." Human resource professionals' experiences show that responses on FMLA forms are often not complete. Providing two separate answer fields (as seen in Part B, Question 5) will increase the likelihood that medical providers list a complete response for this estimate of incapacity.

For this same reason, DOL should also provide sperate answer fields for beginning and end dates of treatment and recovery duration estimated in Part B, Question 3b. As the employee may require multiple treatments, the question should seek information that provides

the medical professional's best estimate of the total duration of treatment, the best estimates for treatment time related to specific treatments or episodes, and the estimated recovery time involved for a particular treatment or episode. In addition, the question should provide two separate answer fields, like in Part B, Question 5. In many cases, there may be multiple treatments that result in a period of incapacity. Recognizing this reality, DOL should include an opportunity to note these best estimates for each individual period of possible incapacity, allowing the employee the opportunity to work, if able, between multiple treatment and recovery periods.

c. Clarify What Information is Required for Intermittent Leave Qualification

Manufacturers believe FMLA intermittent leave is important. At the same time, internal data shows that improper FMLA intermittent leave certifications are increasing in the manufacturing workplace. This increase has amplified the administrative and recordkeeping burdens associated with the form. DOL should replace Question 4 with more useful sub-questions to help employers and employees better understand when intermittent leave is proper and how the medical provider predicts it will be used. Greater clarity here will allow employers to understand and plan for the possibility that an employee may need to leave work on an intermittent basis, enabling the employer to better support the employee and know whether a specific absence or late arrival is or is not related to their FMLA leave.

First, DOL should add Question 4a to request an estimate of the starting date and ending date of certification for intermittent leave due to episodic flare-ups, again with separate answer fields for each date. Better clarity around the expected duration of an intermittent leave certification will help employers plan for additional staffing needs. At the same time, the end date—selected by the doctor—would create an appropriate time upon which an employee should revisit the doctor if experiencing continued flare-ups. As defined under the statute, chronic conditions necessarily require employees to visit their doctor at least twice per year, so it would not be unduly burdensome to ask an employee to seek a reevaluation of their need for intermittent leave during such a visit. Without these estimates, there is no way to determine the length of certification for flare-ups.

With the addition of a beginning and end date for the intermittent leave certification, the check boxes next to "it was," "it is," or "it will be" become redundant as the start and end date estimates will show that the intermittent leave is ongoing. Leave may have already been taken due to a flare-up prior to or while the employee is seeking certification. The separate check boxes are unnecessary and misleading.

Second, DOL should add Question 4b to separate the best estimate of duration and frequency of the intermittent leave episodes from the estimate of the length of the overall certification. The draft form currently list instructions above two columns where doctors may insert their best estimates of duration and frequency. The new format is an improvement over the current form, but further clarification is needed. DOL should also amend the instructions to this specific question (4b, currently 4) to make clear that physicians should write a number beside one, and only one, choice under each column. This clarification will improve consistency in Form responses for all employees, because, as drafted, it is unclear if the doctor should provide estimates for each possibility of how the flare-up may occur—e.g., x hour(s) per x day(s), x day(s) per x week(s), *and* x week(s) per x month(s). By clarifying how long a flare-up may last, doctors will enable employers to more accurately predict and plan for the employee's medical needs.

d. Clarify that Reduced Schedule Certification is Based on the Number of Hours an Employee is Able to Work

Part B, Question 5's best estimate of the "reduced work schedule an employee *needs*" (emphasis added) is improper. An employee's doctor is typically not well-positioned to determine an employee's work hours, particularly in cases where their estimate may exceed the hours that the employee is actually scheduled to work. As stated, Question 5 seeks the minimum number of hours an employee can work. It should, however, seek the maximum number of hours an employee may work. Question 5 would be better presented as follows: "... Provide your best estimate of the *number of hours the employee is able to work*" (emphasis added). With this information, the employer can schedule the employee up to the threshold set by the medical provider for the duration of the employee's reduced work certification. This clarification will dramatically reduce confusion and burden hours associated with the Form.

VI. Section II, Part C: Essential Job Function Questions

An employee's serious medical condition will often result in an employee's inability to perform one or more job functions (e.g., mobility is impaired in the days following certain surgeries). With time, however, an employee may be able to return to work on a limited basis even while still unable to perform some essential job functions. The current draft form does not account for the recovery process and how an employee's ability to perform certain essential job functions may change over time. As such, DOL should amend Part C to seek information that identifies start and end dates for when the medical professional believes, in their best estimate, that the employee may be unable to perform specific essential job functions. Part C should also solicit information that may help the parties identify when *each* essential job function may be impaired to account for cases where the employee's condition may affect their ability to perform different functions in different ways or for different durations. Finally, Part C should request the healthcare provider's best estimate as to when an employee will be able to resume all their essential job functions, as described in Section I.

These changes would help employers to properly administer leave by making an employee's certification more specific and informative in terms of what job functions they may perform and when they may be unable to provide advance notice of an absence. The added information would decrease burdens on both employers and employees by reducing conflicts and increasing predictability, and it would enable employers to better estimate temporary staffing needs or the assignment of additional shifts to cover the gap in work. Finally, these changes would lead to increased worker safety and privacy by providing clear notice to an employer about an employee's capabilities on the manufacturing floor in a way that minimizes an employers' need to ask additional clarifying questions of the employee or their doctor regarding the certified condition.

VII. Updating the Description of the Definitions Chart

DOL's inclusion of the "Definition of a Serious Health Condition" chart on page 6 of the draft form is a positive change that will reduce confusion for medical professionals because the chart will help them to more accurately select the proper category for FMLA qualification and preliminarily determine whether the FMLA does in fact cover the particular medical condition. DOL should also include specific references to the underlying regulation to ensure proper alignment between the definitions in the chart and the underlying regulation. This can be accomplished by simply adding "as stated in 29 C.F.R § 825.113-115" to the sentence preceding the chart.

DOL also should clarify the definition of "chronic conditions" as listed in the proposed chart because it does not currently align with the examples and definitions in 29 C.F.R § 825.115(c). As part of this clarification, DOL should remove the first sentence that provides examples of types of chronic conditions. These examples—"diabetes, asthma, epilepsy, or migraine headaches"—are more appropriately placed at the beginning of Part A, Category 6—similar to the references to Alzheimer's and Chemotherapy examples in Categories 7 and 8. The rest of the description should directly align with the actual regulation (29 C.F.R § 825.115(c)) which requires that three conditions be met for certification of FMLA leave under the chronic conditions category: periodic visits (at least twice per year) for treatment by a healthcare provider (or nurse under the direct supervision of a health care provider), a serious health condition that continues over an extended period of time, *and* periods of incapacity that are episodic rather than continuous.

By clarifying the "chronic conditions" definition, DOL will reduce confusion and the possibility for the misapplication of FMLA requirements. In particular, noting that a nurse must be under the *direct* supervision of a health care provider, and making clear that all three listed conditions must be met, will dramatically reduce burdens for medical professionals and employers, while reducing employee misunderstandings.

VIII. Form WH-380-F

DOL also seeks comments on Draft Form WH-380-F—the certification form that provides FMLA-covered leave to employees providing care for a family member with a serious health condition. Most of the suggestions above would apply equally to Form WH-380-F and should be incorporated to the extent they are applicable. Draft Form WH-380-F should also be updated per the additional specific suggestions below.

DOL should make three additional improvements to Form WH-380-F that are specific to that form. First, DOL should revise the reference to son or daughter on page 2, question 2b to refer to a child, including children for whom the employee acts *in loco parentis*. Broadening this reference ensures that all employees who may need to care for their child are covered and makes employees aware of their right as a caretaker to take protected leave. This change is not an expansion of the law, but more clearly aligns the form with current practice.

Second, DOL should remove Question 3b, found in Section II, on page 2 of the Form. The question asks for the employee's best estimate of the necessary amount of leave. This question is ambiguous and unnecessary. Part III, which is completed by the health care provider, includes sufficient information about the physician's best estimates of the length of the condition and the amount of leave required. The employer and employee should rely on the doctor's medically informed estimates about the necessary amount of leave instead of placing the burden on the employee to guess this number. Removing the question will also reduce uncertainty for HR professionals who track leave because they will have a clear reference to one best estimate instead of two competing estimates.

Third, Question 4, found in Section II, on page 2, should be relocated to Section III, page 5 of the form and renumbered as Question 5. Question 4, as currently located, requires the employee to provide his or her best estimate of the time and duration of a reduced work schedule. The need for a reduced work schedule directly relates to the care and treatment of the patient and the patient's need for the employee's support and assistance. As such, the medical provider, knowing the needs of the patient, is better positioned to provide this best

estimate than the employee. The question, therefore, should appear in the medical provider's section of the form.

IX. Manufacturers Urge DOL to Remove Designation Notice Related to Pay on Form WH-382.

Finally, DOL should amend Draft Form WH-382 to make optional any reference to if an employee may or may not be paid while they are taking FMLA leave. Under "Section III – FMLA Leave Approved," the Form currently lists four options for the employer to check (if applicable) related to pay during time periods allocated as FMLA leave (see page 3). The employer should be able to check boxes related to other means of pay if applicable, but they should also be free to not check a box. Option 1 is misleading because an employer may believe they should select this option if the employee will not be paid when taking FMLA leave because no other accrued paid leave policy applies or runs concurrently. FMLA leave, however, is—as stated in the statute—*unpaid* leave. Employees may receive pay through a sick leave, vacation, or short term disability plan, for example, but the underlying statutory protection afforded by FMLA is still unpaid leave and time taken for purposes of FMLA will still count against an employee's remaining available FMLA eligibility. As such, Option 1 is unnecessary and should be removed from the form. Options 2-4, however, should remain. Maintaining Option 1, as currently drafted, creates unnecessary opportunities for inconsistency and may even expose employers to claims that FMLA leave is generally paid despite the underlying statute or contrary workplace policies. DOL, as such, should remove Option 1 from the final Form.

X. Conclusion

The NAM appreciates the opportunity to provide comments on the proposed changes to the Draft Form WH-380-E as well as the other forms in DOL's Information Collection Request notice under Control Number 1235-0003. The proposed changes discussed above will help ensure that all information necessary for a complete certification determination is supplied by the relevant medical professional in the first instance. This will lead to quicker and smoother FMLA certifications and administration of leave where appropriate, as well as decrease the costs of administration and streamline regulatory burdens. We look forward to working with DOL as the Department improves the FMLA certification forms and pursues broader necessary changes to the regulations to ensure more efficient access to, and administration of, FMLA leave.

Sincerely,

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National Association of Manufacturers