Waterman, Robert - WHD

From:	Mary Lou Savage <mlsavage@cwa-union.org>
Sent:	Tuesday, October 01, 2019 1:40 PM
To:	WHDPRAComments
Subject:	Comments on Proposed FMLA Forms from AFA-CWA, AFL-CIO
Attachments:	AFA DOL Comments on proposed FMLA Forms, signed by Sara Nelson 9.30.19.pdf; AFA DOL Comments on proposed FMLA Forms, signed by Sara Nelson 9.30.19.pdf

Dear Sir or Madam,

Attached to this email is a letter signed by Sara Nelson, International President of the Association of Flight Attendants, CWA, providing AFA's comments on the proposed FMLA Forms, which comments the Wage and Hour Division solicited by notice on August 5, 2019.

Please let me know if you require or would like any follow up or clarification of our position and commentary on the proposed FMLA forms and the administration of FMLA, particularly in the aviation industry.

Very truly yours,

Mary Lou Savage

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Mary Lou Savage
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September 30, 2019

Submitted electronically to WHDPRAComments@dol.gov

Division of Regulations, Legislation, and Interpretations
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Proposed Revision of the Information Collection Request (ICR) titled, The Family and Medical Leave Act of 1993, As Amended

Control Number 1235-0003

Ladies and Gentlemen:

The Association of Flight Attendants – CWA, AFL-CIO ("AFA") is pleased to submit these comments on the Proposed Revision of FMLA Forms, Information Collection Request (ICR) under the Family and Medical Leave Act of 1993, as amended ("FMLA Forms") issued by the Department of Labor, Wage and Hour Division

About AFA

AFA is the only Flight Attendant union organized by Flight Attendants for Flight Attendants.

AFA represents approximately 50,000 Flight Attendants at 20 airlines. We work every day to improve the lives and working conditions of Flight Attendants, who are aviation's first responders. Equally important to our mission and goal of full, fair, and vigorous representation of our members, is AFA's commitment to work with our flying partners and all others who work to assure the health and safety of the flying public. To achieve this end, AFA partners with airline pilots and air traffic controllers unions, and other aviation unions in the United States and works in solidarity with other flight attendant unions around the world through the International Transport Workers Federation.

In the aircraft cabin, Flight Attendants are the first defenders of airline health and safety and that mission is paramount. AFA works tirelessly to assure that Flight Attendants are able to perform this critical job on each and every flight within the United States and throughout the world. To accomplish that, AFA negotiates contracts that provide the best available training, good wages,

benefits, and working conditions. We provide representation, advocacy, and support for our members by enforcing the terms of our contracts and upholding the rights of our members to avail themselves of the rights and benefits to which they are entitled under state, local, and federal law.

Significant among these laws is the Family Medical Leave Act ("FMLA", the "Act").

AFA's Advocacy and the FMLA

For many years following the passage of the FMLA, Flight Attendants effectively were excluded from exercising the rights that most other workers at large employers were granted under the Act. This was due to the unique work schedules typical in the aviation industry. The full-time flying schedule of a Flight Attendant fell short of the minimum work hours needed for leave eligibility under the FMLA.

AFA was able to negotiate a parallel leave program at many carriers as a contract right. But this substitute was not as universal nor did it enjoy the regulatory guidance and enforcement mechanisms available to those workers who, because of their more typical schedules, could establish eligibility under the FMLA.

Years of concerted effort and advocacy by AFA culminated in the Family and Medical Leave Act Airline Flight Crew Technical Amendments (the "Technical Amendments") in 2009. These amendments addressed the special work schedules typical in the aviation industry and established appropriate and achievable standards for FMLA eligibility for flight crews.

In the decade following the passage of the Technical Amendments, AFA through its members, local leaders and benefits and grievance chairpersons, and professional staff have experienced chronic issues and problems in utilizing FMLA leave and have developed a significant level of expertise is advocating for our members to be able to freely exercise the rights provided to all eligible workers under the Act.

Some of the issues and problems our members encounter likely are shared with all workers seeking to attain FMLA leave. We do believe, however, that the rigid scheduling and time sensitive nature of aviation industry jobs, especially for the flight crew, create chronic problems and invite significant levels of abuse by employers and the Third Party Administrators ("TPAs") to whom most leave programs have been delegated by employers. This is particularly true when the Flight Attendant has a need for intermittent leave.

Our comments on the proposed forms, set out below, highlight some of the chronic problems and abuse we and our members encounter frequently and the ways in which we believe the proposed FMLA Forms address and alleviate them. We also provide suggestions for further improvement.

The Proposed FMLA Forms

We are focusing on Forms WH-380-E and WH-380-F, which initiate the employee's request for FMLA leave for the employee's own serious health condition or that of a family member, because they are the cause of most of our problems and instances of abuse. In addition, we note items on other Forms that might be improved. In general, AFA believes the proposed forms are an improvement and will curtail many abuses and promote more timely responses and completion by medical professionals.

Specific items in the Forms and our comments follow here:

1. **Check Boxes to Establish the Serious Health Condition. No Diagnosis Required.**

The use of check boxes to establish the elements of a "serious health condition" will focus the medical providers' attention on the factual findings needed for the eligibility criteria required under the Regulations. This process should diminish the frequent demand from HR personnel or the TPA for a diagnosis. The demand for a diagnosis and conditioning leave approval on one are common abuses.

If a diagnosis is coerced or even when given freely, too often this knowledge is used against the employee. We have seen numerous cases where the diagnosis is the basis for monitoring and the beginning of a path to discipline and even termination. We have had instances of extreme abuse involving demands for diagnoses and harassment of Flight Attendants in the process of demanding such information. Perhaps the most egregious cases involved one airline pulling Flight Attendants off imminent trips, flying them to corporate headquarters, and grilling the Flight Attendant about the details of the medical condition, down to questions of how did the employee "feel" when experiencing certain symptoms, and challenging the veracity of claiming the condition. Some employees resigned immediately rather than even get on the airplane to go to the demanded appointment and face such harassment and humiliation.

We believe the affirmative statement that a diagnosis is not required and the caution of requiring a diagnosis being illegal under many state statutes will reinforce a correct understanding of the regulations on this issue and AFA's steadfast position.

2. **Additional "No" or "NA" Check Boxes for Clarity**

Although we believe that the Proposed Forms are a significant improvement over existing forms, especially for the clarity on the elements of a "Significant Health Condition", we suggest adding, where apt, the option for the medical provider to check a "No" or "Not Applicable", "NA" box. This may curb inadvertent and perhaps inconsistent boxes being checked out of uncertainty or a belief that a box must be checked for every option.

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We suggest that the information set out on the third line in "Section II – Health Care Provider," which requests that a health care provider identify the "type of practice/medical specialty", can result in an unintended disclosure of the diagnosis, e.g., an Oncologist discloses a cancer diagnosis; an Addiction Specialist discloses a substance use disorder. We believe that the identification of the terminal health care-related degree or License nomenclature, e.g., DO, MD, PhD, or LCSW, may as easily satisfy the authority and standing of the Provider to opine about the medical facts presented and the expected treatment and duration.

4. **Time to Complete Forms/Typical Encounter Length**

While the new format should promote clarity about the information needed to establish a "Serious Heath Condition", and therefore FMLA eligibility, if other factors are present, we suggest that efforts be made to streamline the process and utilize even more efficient layout and presentation of the section for the Medical Provider.

According to the Department's statement, completion of the FMLA paperwork is expected to take 15 minutes on average. According to a 2007 study on Time Allocation in Primary Care office Visits, the median visit length was 15.7 minutes. "Medscape Physician Compensation Report 2016" found that most physicians spend between 13 minutes and 16 minutes with each patient. Given these statistics, even slight changes that reduce the time to complete the paperwork will advance the Department's goal of reducing the time and paperwork burden on the Medical Provider and others involved in the FMLA certification process.

5. **Control of Access to Forms and Undue Burdens on Applications**

We have had chronic problems at some airlines because the airline or TPA will not allow use of the DOL form. The employee is required to use the Company form but access to the form is restricted. Some airlines will not post their form online nor allow it to be downloaded and

printed. Access to the "approved" form is tightly controlled. In one case, at least, an airline requires that the employee trigger a sick call to even get the FMLA application form. This is true for both intermittent and a foreseeable leave.

These and other abuses we describe are intended to limit a Flight Attendant's ability to apply for FMLA leave and to utilize it even when it is granted, too often after unreasonable time delays and harassments.

The Department and the Division should act to correct and limit such abuses. Requiring that a properly filled out DOL form must be accepted would be a positive step.

6. **Intermittent Leave Issues**

AFA understands that the use of intermittent leave by flight crew members presents special challenges in the aviation industry because of the need for rigid scheduling. There are built-in protections within the system to accommodate changes in personnel assigned to flights, e.g., flight crew assigned to a reserve status to assure immediate availability, as needed.

Notwithstanding these safeguards, there is a strong bias against approving applications for intermittent leave and for allowing it once approved. This is a widespread and persistent problem. At some airlines, the same type and amount of documentation is required for every instance of the condition for which intermittent leave was approved. The information required is excessive and not authorized under existing regulations. And, if the Medical Provider does not provide an estimate of the occurrence of the condition requiring intermittent leave with exact precision, any additional time outside the estimate will be denied. The "estimate" is treated as a "promise etched in stone" and no variation is tolerated.

In this case and others we have described, cautionary and explanatory statements could be added to the forms that would caution against interpretations, requirements, and actions that are inconsistent with the intent of the FMLA and the regulations.

7. **Timing of Notices and Excessive Delays by the Employer or TPA**

Some airlines enforce rigid notice requirements in order for an unscheduled leave to be coded as FMLA. Some notice periods imposed on employees are as short as two days. Depending on the facts of the case and the time and place of the serious health conditions' occurrence, such a short time frame can be impossible with which to comply.

While the time frames imposed on the employees tend to be short and inelastic, the time taken for approvals, requests for additional information, and even requests for the FMLA forms themselves can be quite long and taken without explanation. Requests for calculation of hours worked in order to determine eligibility can take upwards of a week and often are incorrect, requiring Union intervention to correct and ensure eligibility.

In order to ameliorate the difficulties imposed on Flight Attendants seeking to exercise their rights under the FMLA, AFA asks that the Department and the Division consider adding to the new forms guidance about the time frames involved for actions required of the applicant and responses from the employer and its TPA.

8. **Confusion Created by Different Sources of Forms and Sequence of Application Steps, Layout and Type Size**

a. Our members across many airlines may access FMLA forms from the Employer, the TPA, AFA, or online. While ease of access may be an issue in its own right, a more general concern is that the language on the forms assumes that FMLA Forms are always received or generated by the Employer so that instructions such as appears in Section 1 of Form 380-E: "Please complete this section before giving the form to the employee" may be inapt and confusing. It would help if the Forms acknowledged that the forms may be accessed by and completion initiated by the employee. A caption such as: "The employee may also complete Section 1" might be helpful and reduce confusion.

b. The statement in Section 1, line (3) also causes confusion about who starts the application process and how it proceeds. Because the employee often is the one who originates the use of Form 380-E, it might be clearer and more fitting to move the statement about when the employer learned of the initiation of the FMLA leave process to Form 382.

c. The insertion of the return date in Section 1, line (4) may, in those instances when the Form does not originate with the employer, be inapt and out of sequence. Perhaps this information might be moved to a section providing general instructions.

d. In Section II, Part A, line (2), the Health Care Provider is asked to give an estimate of the duration of serious health condition for which leave is requested. In our experience, Providers can be hesitant to provide a definitive enough answer to satisfy the Regulations and/or the Employer. We suggest that adding a statement reminding the Provider that an FMLA certification, regardless of any estimate of duration of the condition is valid for no longer than 12 months.

e. With the changes made to the Form that require the Provider to check those elements of the regulation's definition of a "serious health condition" and the express mention that a diagnosis is not needed and, in fact, illegal to require in some jurisdictions, we wonder about the necessity and utility of the request in line (9) "Briefly describe other appropriate medical facts, if any, related to the condition for which the employee seeks FMLA leave." We are concerned that this is an invitation for the employer to require more information than is needed and to quibble about the meaning and adequacy of the information that may be provided, thereby having a basis, whether legitimate or not to return the Form for clarification or to demand more information if that line is not filled in. We ask that you consider deleting this line, providing an example of useful information, or adding a caution that providing additional information is not necessary to establish a serious health condition.

f. Form 380-F, Section II, line (4), in addition to "reduced work schedule" should include a reference to "intermittent leave". Also, the option to indicate the frequency of "days

per month" and/or an option to indicate "days per occurrence." The ability to indicate "days per occurrence" is especially important for Flight Attendants because of the unique work schedule they have. We have seen numerous instances where the family member's serious health condition may flare or require treatment for "one day per occurrence" but the Flight Attendant family member providing care must miss an entire trip of several days in order to be available for the one day of treatment. In such a case, the airline may and has questioned the need for the Flight Attendant to drop a trip and denied what it deems to be an excessive amount of leave requested. The need for reasonable flexibility is necessary to accommodate complicated aviation industry schedules. We also ask that the phrase "for the family member" be added to the first sentence in Part III. This should reduce the confusion we've encountered when the serious health condition of the family member is of a full time nature such as cancer treatment, recovery from orthopedic surgery, or other such condition but the Flight Attendant caregiver is requesting intermittent leave to assist in providing care but not on a full time basis.

g. Form 381 – Notice of Eligibility. We have two specific revisions that we urge you to make to this Form because of the problems we routinely encounter in maintaining FMLA leave for Flight Attendants. The first is to add the word "duty" to modify "hours" (to read " work or been paid for at least 504 **duty hours**") in the second category of those employees who are not eligible for FMLA leave, fourth box describing the hours needed for airline flight crew members.

"Duty time" is the time from when an airline crewmember reports for the beginning of his or her prescribed duty period, i.e., their work day, and ends at the conclusion of their duty period; prior to any prescribed legal rest at the conclusion of the duty day. All hours between the start and end of a Flight Attendant's duty day includes flight time hours as well as the time periods between flights when waiting for aircraft, boarding passengers, and deplaning passengers. "Duty time" excludes periods of legal rest at home or on layover in between each prescribed duty period.

As you can see from the above description of "Duty Time" for a Flight Attendant, the calculation of 504 duty hours required to determine eligibility under the Flight Crew Technical Corrections amendment to the FMLA Regulations is a complicated task. And, one which is rife with errors, which creates the need for vigilance and monitoring by Flight Attendants and their AFA representatives. For this reason, we strongly urge that you include in Form 382 the specific 12 month period the airlines uses to determine the eligibility of each Flight Attendant applying for FMLA leave. One of our member groups recently had to require their airline to recalculate more than two years of "duty time" and eligibility calculations causing hundreds of Flight Attendants to be uncertain

about whether they were then or when they would be eligible for FMLA leave. The duty hours calculations were implicated in this record keeping error as well as the time periods during which those eligibility hours were calculated. Requiring the airline to keep current accurate records for identifiable time periods would promote the kind of record keeping the regulations require.

h. Lastly, we suggest that the Forms would be more easily identifiable if the Form title were place both in a header and a footer and appeared in larger font and bolded.

Challenges Remain

From our comments above, we hope you see that for Flight Attendants, applying for and taking FMLA leave can be a very challenging and stressful experience.

We think that the proposed new forms will address some of the most common problems and we applaud the efforts of the Department and the Division to make these improvements.

We hope, too, that you share our belief that, in our industry, at least, there still are pervasive difficulties for employees trying to exercise their FMLA rights and that more can be done to alieve those difficulties.

Additional commentary, drawn from existing regulations and language in the Act, added to the forms could help.

Finally, we ask that local enforcement offices be alerted to the entrenched and systematic problems that AFA members face and that assistance for them for reported violations be more readily available. At the same time, such education, cautionary alerts, and enforcement actions as are needed should be brought to bear on employers whose clear intentions are to limit the use of FMLA leave among their workforce.

In Conclusion

AFA appreciates the opportunity to comment on the Proposed FMLA Forms and we urge the Department to include our suggestions in the final versions of the Forms. If you have any questions about these comments or need any additional information, please do not hesitate to contact me.

Very truly yours,

/s/ Sara Nelson

International President
Association of Flight Attendants – CWA, AFL-CIO

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f. Form 380-F, Section II, line (4), in addition to "reduced work schedule" should include a reference to "intermittent leave". Also, the option to indicate the frequency of "days

per month" and/or an option to indicate "days per occurrence." The ability to indicate "days per occurrence" is especially important for Flight Attendants because of the unique work schedule they have. We have seen numerous instances where the family member's serious health condition may flare or require treatment for "one day per occurrence" but the Flight Attendant family member providing care must miss an entire trip of several days in order to be available for the one day of treatment. In such a case, the airline may and has questioned the need for the Flight Attendant to drop a trip and denied what it deems to be an excessive amount of leave requested. The need for reasonable flexibility is necessary to accommodate complicated aviation industry schedules. We also ask that the phrase "for the family member" be added to the first sentence in Part III. This should reduce the confusion we've encountered when the serious health condition of the family member is of a full time nature such as cancer treatment, recovery from orthopedic surgery, or other such condition but the Flight Attendant caregiver is requesting intermittent leave to assist in providing care but not on a full time basis.

g. Form 381 – Notice of Eligibility. We have two specific revisions that we urge you to make to this Form because of the problems we routinely encounter in maintaining FMLA leave for Flight Attendants. The first is to add the word "duty" to modify "hours" (to read " work or been paid for at least 504 **duty hours**") in the second category of those employees who are not eligible for FMLA leave, fourth box describing the hours needed for airline flight crew members.

"Duty time" is the time from when an airline crewmember reports for the beginning of his or her prescribed duty period, i.e., their work day, and ends at the conclusion of their duty period; prior to any prescribed legal rest at the conclusion of the duty day. All hours between the start and end of a Flight Attendant's duty day includes flight time hours as well as the time periods between flights when waiting for aircraft, boarding passengers, and deplaning passengers. "Duty time" excludes periods of legal rest at home or on layover in between each prescribed duty period.

As you can see from the above description of "Duty Time" for a Flight Attendant, the calculation of 504 duty hours required to determine eligibility under the Flight Crew Technical Corrections amendment to the FMLA Regulations is a complicated task. And, one which is rife with errors, which creates the need for vigilance and monitoring by Flight Attendants and their AFA representatives. For this reason, we strongly urge that you include in Form 382 the specific 12 month period the airlines uses to determine the eligibility of each Flight Attendant applying for FMLA leave. One of our member groups recently had to require their airline to recalculate more than two years of "duty time" and eligibility calculations causing hundreds of Flight Attendants to be uncertain

about whether they were then or when they would be eligible for FMLA leave. The duty hours calculations were implicated in this record keeping error as well as the time periods during which those eligibility hours were calculated. Requiring the airline to keep current accurate records for identifiable time periods would promote the kind of record keeping the regulations require.

h. Lastly, we suggest that the Forms would be more easily identifiable if the Form title were place both in a header and a footer and appeared in larger font and bolded.

Challenges Remain

From our comments above, we hope you see that for Flight Attendants, applying for and taking FMLA leave can be a very challenging and stressful experience.

We think that the proposed new forms will address some of the most common problems and we applaud the efforts of the Department and the Division to make these improvements.

We hope, too, that you share our belief that, in our industry, at least, there still are pervasive difficulties for employees trying to exercise their FMLA rights and that more can be done to alieve those difficulties.

Additional commentary, drawn from existing regulations and language in the Act, added to the forms could help.

Finally, we ask that local enforcement offices be alerted to the entrenched and systematic problems that AFA members face and that assistance for them for reported violations be more readily available. At the same time, such education, cautionary alerts, and enforcement actions as are needed should be brought to bear on employers whose clear intentions are to limit the use of FMLA leave among their workforce.

In Conclusion

AFA appreciates the opportunity to comment on the Proposed FMLA Forms and we urge the Department to include our suggestions in the final versions of the Forms. If you have any questions about these comments or need any additional information, please do not hesitate to contact me.

Very truly yours,

/s/ Sara Nelson

International President
Association of Flight Attendants – CWA, AFL-CIO