

Waterman, Robert - WHD

From: Freeman, Daris N. <DFreeman3@UNUM.COM>
Sent: Wednesday, October 02, 2019 8:00 AM
To: WHDPRAComments
Subject: DOL Forms - Comments
Attachments: DOL proposed forms - Unum comments.pdf

Please see the attached for Unum's comments regarding the proposed form and notice changes. Thank you for the opportunity to comment. Please let us know if there are any questions or if we can provide any additional information.

Thank you.

Daris N. Freeman

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October 2, 2019

VIA EMAIL

U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue, N.W.
Washington, DC 20210
WHDPRAComments@dol.gov

RE: 29 CFR Part 825, The Family and Medical Leave Act of 1993; Proposed Forms Revision

To Whom It May Concern:

This letter is in response to your request for comments on the FMLA proposed forms revisions. My name is Michelle Boucher and I am the Senior Vice President of Benefit Operations at Unum Group. Unum Group, through its insurance company subsidiaries, sells insurance products to both individuals and employer groups. We sell disability products, life, long term care, etc.

One of the non-insurance products we offer for sale to employers is the administration of FMLA and all state leave requests of its employees. Our service is comprehensive in that we take the initial phone call on a request for leave, handle all the paperwork and follow-up calls, as well as provide reports to each employer on each leave request, pending leaves, etc. As of August 2019, we had more than 750 customers located throughout all 50 states, administering leaves for a total employee population of 2.5 million lives.

I am detailing some of our year to date statistics for your information:

New leaves processed: 236,679

Total leaves requiring an Eligibility and Rights and Responsibilities Notice be sent.

Medical certifications processed: 193,686

Total medical certifications forms reviewed and responded to with either designation or a cure process.

Incidence rate: 16%

This is the number of leaves requested and processed for FMLA as a percentage of the total employee population; Individual intermittent absences reported under a single intermittent leave are not counted in the incidence rate.

Intermittent leaves: 33%

Leaves with an intermittent schedule; individual intermittent absences reported under a single leave are not counted in the incidence rate. From a medical certification perspective, intermittent leaves are the most challenging in understanding the provider's intent for certifying the employee's need for leave.

The following comments are for your review based on our unique perspective as an administrator of the FMLA and state leave laws. Unum Group as an employer may submit comments under separate cover based on its experience as an employer (Unum Group is a customer of the LMC).

WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition

As a general comment, we have concerns regarding the length of the medical certification form. Many health care providers charge employees by the page for completion of forms. In addition, our experience has been that providers are more responsive when a form is short and concise, appearing "easy" to complete. When a form is long, with significant instructions to read, health care providers tend to delay in completing the form. Both the potential cost to complete and delays in completion negatively impact an employee needing to take leave during a difficult time.

One of the biggest changes to the new forms is the addition of checkboxes for the health care provider to select the category of serious health condition. This is reminiscent of some of the earlier medical certification forms. Unfortunately, this approach has not been effective in the past as providers frequently check a particular category but provide contradictory medical information. If information is complete to support another category of serious health condition, it's not a problem. But more often, the information provided doesn't support any category and the form is returned to the employee as insufficient. The issue is that what is requested in the cure process is information specific to the category selected by the provider. If that category is incorrect, the cure process becomes confusing as the employer is asking for information that may not be relevant to the employee. For example, if the provider selects Incapacity Plus Treatment but doesn't provide information to support more than three consecutive days of incapacity, that information will be requested in the cure process. If the employee actually has a chronic condition and there has been no continuous period of incapacity, the process will be delayed and the parties frustrated by asking for unnecessary information. Our recommendation is that the form request the medical information and the employer (or third-party administrator) use the information to determine if a serious health condition is supported. This is the approach the current forms take and our experience has found it to be effective. In addition to the issues already pointed out, this also makes the completion of the form easier on the provider. The provider views their role as strictly clinical – providing the medical information relevant to their

patient. They should not have to make a legal analysis of how that medical information translates into the regulatory definition of serious health condition. In addition, this change shortens the form (supporting our recommendations in the paragraph above).

If the serious health condition checkboxes are retained, we recommend eliminating asking for duplicate information. For example, Section II, Part A (4a) requests dates of incapacity. Dates of incapacity are also requested in Section II, Part B (1). Asking this information twice can lead to conflicting information which has to be clarified through the cure process or with the provider if authorized by the employee. Each piece of information needed to support a serious health condition should only be requested one time, reducing the risk of conflicting information as well as the overall length of the form.

In Section II, Part B (4), we recommend reformatting the frequency/duration “chart” as the current format is difficult to decipher how to complete. Based on our experience in drafting our own forms over the years, we recommend the following format as it has been the most successful in obtaining accurate and complete information from providers.

- Flare-ups are estimated to occur ____ times per day/week/month (choose one), and are likely to last ____ hours/day (choose one)

The referral to other health care provider question in Section II, Part B (3a) assumes that the employee’s general practitioner is completing the form. Often the form is being completed by a specialist (e.g. surgeon) – the provider to whom the employee was actually referred. It can be very helpful when reviewing the form to know that the specialist is completing it as they often don’t have the full picture of the employee’s condition (e.g. when the condition began); they only have the information relevant to the treatment they are providing. We recommend rewording this question to accommodate either scenario (primary care or specialist completing the form):

- Due to the condition, the patient was/will be seen by other health care provider(s) for evaluation or treatment. State the nature of such treatments (e.g. physical therapy):

We also recommend consistency in formatting for dates. Currently, some sections provide “estimate the beginning and end date” (Section II, Part B (1)) while others say “the patient is expected to be incapacitated from ____ to ____” (Section II, Part A (4a)). In our experience, the “from ____ to ____” format is the most effective as both starting and ending dates are more consistently provided.

It would also be helpful if the instructions for section were placed immediately before the section being completed. Currently, instructions are placed at the end. Our experience is that providers and employees do not read the entire form first; they start at the beginning and work their way through. Having the instructions first would ensure they are read prior to completion of the form.

WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition

In Section II (2a), we recommend an “Other” category added to the relationship of the family member section. Although a definition of in loco parentis has been added, the average employee likely won’t understand that it means they should check “child” when they are requesting leave to care for their niece (even though the relationship may meet the definition for in loco parentis). We also recommend adding the age requirements for the definition of child to (2b) where date of birth is requested. Most employees won’t know why the date of birth is needed or important. By providing a definition up front, it helps set appropriate expectations regarding what’s required for the leave to qualify under the FMLA.

In Section II (4), the employee is able to indicate their need for a reduced schedule leave. However, there is no place in Section III, Part B for the health care provider to support this schedule. We recommend adding this to allow health care providers to specify a specific schedule if needed to care for the patient.

In addition, all comments above relative to the WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition also apply to the family member certification.

WH-381 Notice of Eligibility of Rights & Responsibilities

On the first page of the form, we recommend an “Other” category be added to the relationship of the family member sections for the reasons outlined above.

In Section III, Part B regarding the “substitution” of paid leave, the multiple options here go beyond what is required under the regulations. There are frequently situations where an employee may not have made a decision yet about their substitution of pay (e.g. leave is significantly in the future). In addition, many employers use third party administrators for FMLA administration. Most of the time, the administrator does not get involved in the employee’s pay preferences. Rather, administrators provide the employee with their employer’s policy regarding substitution of pay (as required under 825.300(c)) and refer them back to the appropriate resource for more information or to make their selections (e.g. HRIS platform, HR contact). Lastly, the employee may not be the one making the initial request for leave, especially in emergency situations. Whoever reports the leave on their behalf (e.g. family member) will not know what pay decisions the employee may want to make. We recommend a more generic notice that can accommodate the variety of scenarios that may occur.

In the fourth check box on Page 5, stating “Your FMLA leave will be used at the same time as:” we recommend an “Other” box be added in light of possible additional options (e.g. paid parental leave).

WH-382 Designation Notice

On the first page of the form, we recommend an “Other” category be added to the relationship of the family member sections for the reasons outlined previously.

We recommend the Designation Notice include the specific dates of leave being approved. It is common for the employee’s original request to change or the medical to support something other than what was requested. Providing specific dates of approval allows the employee to know exactly what their status is for a given period of time. In addition, it is common that the medical information will only support a portion of the leave being requested (e.g. employee requests ten weeks of leave but the medical only supports six). Having space to specify dates allows the employer to approve what they can (e.g. six weeks) and apply the cure process to the portion of leave not supported.

In Section III, regarding the “substitution” of paid leave, we recommend the same changes outlined above for the Eligibility and Rights and Responsibilities Notice.

WH-384 Certification of Qualifying Exigency for Military Family Leave

We recommend moving the employee instructions to the beginning of this form. Specifically, it needs to be clear up front that deployment overseas is required. Many employees do not understand this and will not read the instructions unless they had issues completing the questions already asked.

We also suggest removing the majority of employee instructions. They are extremely long and consist of legal jargon that the employee will likely not read or understand. As mentioned earlier in this document, the most common request we receive related to forms and notices is that they should be shorter and simpler. We recommend reducing the instructions to the key pieces of information the employee needs to know with “plain English” terminology.

In the instructions, we recommend rewording the statement “Your response is required to obtain a benefit.” The reference to “benefit” may be misleading as a benefit is typically thought of as pay. “Leave” could be used as an alternate term. Or this section could refer to “the benefits and protections of the FMLA” as that terminology is used in some of the other forms.

With regard to Section II, Part C (4), qualifying exigency events do not typically require frequency/duration estimates. The nature of a qualifying exigency is that it is typically an urgent or immediate need rather than something scheduled or somewhat predictable, with the exception of counseling. We recommend rephrasing and reformatting this question.

There is some inconsistency in terminology on the medical certification forms. The employee and family member forms use “child” whereas the military certifications say “son or daughter of any age.” We recommend retaining the term “child” for all forms. It’s more concise but also eliminates any issues related to gender identity.

WH-385 Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave

We recommend moving Health Care Provider Instructions to Section III, prior to the Health Care Provider Section.

In Section II, Part C (3), the employee is able to indicate their need for a reduced schedule leave. However, there is no place in Section III, Part C for the health care provider to support this schedule. We recommend adding this to allow health care providers to specify a specific schedule if needed to care for the patient.

We recommend retaining the term “child” rather than “son or daughter” for the reasons outlined above.

WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

We recommend that the form present the dishonorable discharge question first as this is a disqualifying question. If yes, the form can simply be signed and completed.

We recommend retaining the term “child” rather than “son or daughter” for the reasons outlined above.

General comments

We suggest removing any language that is reflective of “leave jargon,” even in parentheses as simplicity is essential. As an example, in the WH-380-E form, Section II, Part B (4) is currently worded as:

- Due to the condition, [it was][it is][it will be] medically necessary for the employee to be absent from work on an intermittent basis (periodically), including for any foreseeable or unforeseeable episodes of incapacity (i.e. episodic flare ups).

This could be simplified to:

- [It was][It is][It will be] medically necessary for the employee to be absent from work periodically due to episodic flare ups of their condition.

Health care providers frequently express their frustration at not understanding the terms used in the FMLA. Although using parentheses to define terms is one solution, it lengthens the questions and the form. Asking the question as simply as possible increases the provider’s understanding and likelihood of a complete and timely response. This is just one example but the recommendation applies to all the forms whether in the questions posed or in the instructions provided. As mentioned, the shorter and more understandable the forms can be, the more likely the provider and employee will read them completely and understand what’s required.

As an Administrator of the FMLA and state leave laws, we appreciate the ability to provide comments to the DOL. Please feel free to contact us if there are questions regarding our comments or if we can be of any further assistance.

Sincerely,

Michelle Boucher
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