



September 15, 2020

Submitted via regulations.gov

The Honorable Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Family and Medical Leave Act of 1993; Request for Information (RIN 1235-AA30) (29 CFR Part 825)

Dear Ms. DeBisschop:

SHRM's mission is to create better workplaces where employers and employees thrive together. SHRM's 300,000+ HR professional and business executive members impact the lives of more than 115 million workers and families. Our members are responsible for designing and implementing benefit policies, including leave under the Family and Medical Leave Act (FMLA). On a daily basis, HR professionals must determine whether or not an employee is entitled to FMLA leave pursuant to the Act and its implementing regulations. HR professionals must also track an employee's FMLA leave and determine how to maintain a satisfied and productive workforce during the employees' FMLA leave-related absences.

SHRM supports the spirit and intent of the FMLA and our members are committed to ensuring that employees receive the benefits and job security afforded by the Act. While it has been more than 25 years since the FMLA was enacted, SHRM members continue to report challenges in interpreting and administering the FMLA, specifically with regard to the definition of a serious health condition, intermittent leave, and medical certifications.

SHRM commends the Department for its solicitation of information regarding the current FMLA regulations. The Society, however, continues to urge the Department to make additional changes to the proposed regulations as recommended in these comments.

As is its practice, SHRM has taken a multi-faceted approach to obtain feedback from its members. The following comments reflect SHRM member input and address those issues which SHRM considers to be the most challenging for HR professionals in administering and granting leave pursuant to the Family and Medical Leave Act.

COMMENTS ON THE DEPARTMENT’S SPECIFIC REQUESTS FOR INFORMATION

1. What, if any, challenges have employers and employees experienced in applying the regulatory definition of a serious health condition?

SHRM members reported challenges with applying consistently the regulatory definition of a “serious health condition.”

Continuing Treatment By a Health Care Provider

“[C]ontinuing treatment by a health care provider” as it is currently defined in 29 C.F.R. § 825.115 creates uncertainty for SHRM members on how to treat an absence of more than three consecutive days. If there is not “continuing treatment,” then it does not constitute a “serious health condition” under 29 C.F.R. § 825.133(a). However, if the employee does receive additional treatment, it’s not clear whether these initial three absences are related to a serious health condition. One member reported that “[d]ue to the lack of guidance in this area, if [an] employee stays overnight in the hospital or out for more than 3 days and under continuous care of a doctor, I call all of these instances a serious health condition. I don’t question it.”

To illustrate the problem, assume an employee is incapacitated for a brief period, such as four days, and then returns to work. At this point, the employee has only seen his/her health care provider on one occasion and has not received a regimen of continuing treatment. Accordingly, the condition does not qualify for FMLA under the incapacity in excess of three consecutive days plus treatment provision. Assume further that this absence is the employee’s final “occurrence” under an attendance program, which would subject him/her to discharge. Under the current regulation, the employer’s hands are tied for 30 days, which creates uncertainty for all parties — both with respect to the absence at issue and any subsequent absences. SHRM instead proposes a time frame of one week from the initial visit. Further, the regulation should state that the follow-up visit is at the direction of the health care provider, to avoid situations where an employee simply schedules a follow-up visit to satisfy the FMLA’s regulatory requirements.

Days of Incapacity

Several SHRM members have suggested increasing the time period of incapacity, indicating they spend a lot of time processing employee certifications for missing four days that they believe more readily falls under sick time or paid time off. As in prior comments to the Department, SHRM continues to recommend that the number of consecutive days of incapacity be increased. The current requirement that an employee or covered family member need only be incapacitated for a period exceeding three consecutive calendar days has played a significant role in converting otherwise minor medical conditions into those that satisfy the definition of a serious health condition. SHRM urges the Department to reconsider the recommendation by SHRM that the incapacity continue for at least seven consecutive calendar days to satisfy the definition. By extending the period of incapacity, many of the minor illnesses that currently receive FMLA protection would no longer qualify. The use of a seven-day period is consistent with the waiting period employed in most employer short-term disability plans. That is, before an employee is eligible to receive short-term disability benefits, he/she must be incapacitated for a minimum of seven consecutive calendar days. In the alternative, SHRM recommends that the

period of incapacity be either seven consecutive calendar days or five consecutive scheduled work-days, whichever is longer. SHRM believes that this clarification will instill some rigor in the definition of a serious health condition and preclude some minor illnesses from being covered by the Act, as Congress intended.

Serious Health Condition For a Family Member

Many of SHRM's members reported that obtaining documentation of the need for leave to care for a family member with a serious health condition proved even more difficult than for the employee. One employer remarked that "the health care providers are often way too vague about identifying the needs of the family member and how our employee fits into the equation." The employer remarked that "it's necessary to make several attempts to get more specific and defined information, which frustrates us as employers as well as upsetting the employee and their family member."

The Impact of COVID-19 Diagnoses

Several members reported struggling with how to effectively reconcile FMLA with other leave laws enacted in the wake of the COVID-19 pandemic. Some employers remain unsure when to designate a COVID-19 absence as FMLA eligible. Others report that employees' inability to see doctors as promptly as usual and the length of time it takes to conduct diagnostic tests is slowing the FMLA process considerably.

Subsequent Medical Opinions

Additionally, further guidance, including criteria and examples, regarding when employers may obtain second medical opinions (29 C.F.R. § 825.307(b) "reason to doubt") and third medical opinions (29 C.F.R. § 825.307(c) (if first and second opinions "differ")) would be helpful, as many SHRM members reported declining to challenge an employee's certification at all because the conditions under which they may challenge those certifications are unclear or cumbersome.

2. What, if any, specific challenges or impacts do employers and employees experience when an employee takes FMLA leave on an intermittent basis or on a reduced leave schedule?

By far, SHRM members reported the greatest challenge with intermittent leave is tracking the leave, and reported the belief that it is the FMLA leave most likely to be abused by employees. One member estimated that "staff spends twice the amount [of] time tracking intermittent FMLA th[e]n continuous FMLA." Others reported that the complexity requires them to dedicate benefits specialists to tracking intermittent FMLA alone. Another member described that "[t]he unpredictable nature means we often do not have advance notice and find ourselves with less staff than to run the operation on any given day." Yet another noted that "I work in a hospital and having staff out at literally a moment[']s notice is a real challenge and does challenge patient care."

Increments of Leave for Intermittent or Reduced Schedule Leave

Employees are permitted to take incremental leave in the smallest increment of time the employer pays, as little as .10 of an hour, which members reported allowed employees to use the time to shield tardiness or other attendance issues.

SHRM strongly urges the Department to increase the minimum increment of intermittent or reduced schedule leave that is unforeseeable or unscheduled, or for which an employee provides no advance notice. SHRM suggests several alternative approaches to this issue.

First, the Department could require that employees take unforeseeable or unscheduled intermittent or reduced schedule leave in half-day increments, at a minimum. Thus, if an employee's scheduled workday normally is eight hours, then the increment for unscheduled or unforeseeable intermittent or reduced schedule leave would be four hours; if an employee's normal workday was ten hours, then the increment would be five hours. Such leave increments would facilitate employer tracking of employee FMLA leave usage, and is consistent with Congress's expressed intent to provide 12 weeks – no less but no more – of job-protected leave per year. This also would dissuade employees who use their intermittent leave to sidestep their employer's attendance policies – to avoid disciplinary action for arriving late to work – and encourage them to be more selective about when they take their leave. A variation on this recommendation is to establish a smaller increment, such as two hours, that automatically applies in any instance in which an employee takes unscheduled or unforeseeable intermittent or reduced schedule leave.

Alternatively, the Department may permit an employer to require that its employees take unforeseeable or unscheduled intermittent or reduced schedule leave in half-day increments only if the employer includes language in the eligibility notice stating that the increment of any unscheduled or unforeseeable intermittent leave or reduced scheduled leave taken by an employee will be measured based upon one-half of the employee's normal workday. This could be accompanied by requiring that an employer have a clearly written policy stating that the increment for any unforeseeable or unscheduled intermittent leave is a half-day of an employee's normal or usual workday (or a two-hour increment) and communicate such policy to employees.

A final possibility would be to increase the increment of intermittent or reduced schedule leave only when an employee fails to provide an employer with at least a minimum number (such as seven or five) days' notice in advance of a need for intermittent or reduced schedule leave; the current regulation on the size of an increment of leave would continue to apply where an employee provides more than the seven or five work days advance notice.

Obviously, other variations and alternatives, or combinations thereof exist. SHRM urges the Department to be proactive and innovative on this issue so that the regulations are reasonable and workable for employers and employees alike.

Intermittent and Reduced Scheduled FMLA Leave -- Transfer of Employee to Alternative Position

Additionally, when an employee takes intermittent or reduced FMLA for certain reasons under the FMLA, an employer may transfer an employee to an alternative position. The regulation

(29 C.F.R. § 825.204) explains that an employer may only require such a transfer when the leave taken is for “a planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember or for the birth of a child or for placement of a child for adoption or foster care.” Given the potential burden and hardship that intermittent and reduced schedule leave have on employers, SHRM believes that an employer should be permitted to temporarily transfer an employee on intermittent or reduced schedule leave to an alternative position, regardless of whether the leave is foreseeable or unforeseeable or whether it is scheduled or unscheduled.

SHRM members also reported the following challenges:

- Employees who are certified for intermittent leave during consecutive years and, based on the rolling 12-month entitlement period, and then continue to regularly exhaust and replenish their 12-week FMLA entitlement. Combined with the Americans with Disabilities Amendments Act (ADAA) requirements to accommodate absences under some circumstances, these unrelenting absences become unreasonable and unduly burdensome to employers.
- Similarly, many SHRM members reported being frustrated that there weren't more mechanisms to challenge potential abuses of intermittent leave (e.g., employees who take every Friday or Monday off).

3. What, if any, specific challenges do employers and employees experience when employees request leave or notify their employers of their need for leave?

As noted above, SHRM members reported significant frustration with employees not providing sufficient notice of the need for leave and difficulties obtaining documentation supporting the leave from employees' treating physicians.

Notice Before Foreseeable Leaves

It is widely reported by SHRM members that many employees provide notice of even foreseeable leaves *after* the leave has already begun. Accordingly, SHRM recommends that notice of foreseeable leave should be required *prior to* the commencement of leave not “as soon as practicable.” *See, e.g.,* 29 C.F.R § 825.302(a). We suggest that a more definitive requirement be imposed so that employees understand clearly that they must provide notice of leave prior to beginning leave. If an employee does not give advance notice, it should be the employee's burden to articulate why it was not practicable to provide such notice prior to the start of the leave. If they are unable to meet this burden, the regulation should permit and specify the consequences. For example, an employee whose family member suffers from a condition that causes them to be hospitalized may be a circumstance in which prior notice is not practicable. That said, the regulations should clarify that in most situations, *i.e.,* in a typical pregnancy, or in connection with a serious health condition that requires treatment which is known in advance (e.g. chemotherapy sessions), prior notice must be provided to minimize disruption to the employer's business operations.

An Employee's First Leave Request

Under 29 C.F.R § 825.302(c), “[w]hen an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.” This failure to require an employee to specifically invoke FMLA protection yet place the burden of identifying that need on the employer has resulted in confusion, particularly in the current environment in which there may be multiple state and local leave protections that apply. Consistent with efforts to provide clarity to employers administering the FMLA, SHRM believes the regulation should be modified to require that such a specific statement (i.e., mention of the “FMLA” or need for “FMLA leave”) must be made to trigger an employer’s obligations *as long as* sufficient information concerning an employee’s obligations has been communicated to employees in advance.

There remains uncertainty on the part of SHRM members as to when their FMLA obligations have been triggered. Under the current regulation, “sufficient” information may include “that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee’s family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in § 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known.” If employees are charged with understanding that they need to communicate all of this information, SHRM believes it is equally appropriate, and would improve the communication process, to require employees to specifically request FMLA leave. Because the general notice contains information enabling employees to understand what they need to communicate, there is no reason why an employee can’t be charged with this obligation.

Response Deadlines

Many SHRM members reported difficulties obtaining timely responses from employees and their physicians to support the requested leave. For example, if an employee fails to provide sufficient information to demonstrate that the employee may seek FMLA leave, then the employee can be required to provide additional information “to determine whether an absence is potentially FMLA-qualifying.” 29 C.F.R. § 825.303(b). However, there is no deadline by which the employee must provide this clarifying information, resulting in extensive, continued delays and continued administrative burdens. SHRM recommends tightening this time frame to seven days or a similar timeframe. SHRM also recommends that the Department endeavor to provide firmer and clearer deadlines and notice requirements throughout the regulations. *See, e.g.*, 29 C.F.R § 825.302(e) (no requirement that employee initiate discussions with employer regarding planned medical treatment); 29 C.F.R § 825.302(f) (employee not required to explain why intermittent leave is necessary except upon request).

4. The Department is interested in understanding what, if any, challenges employers and employees have experienced with the medical certification process that are not addressed by those proposed revisions.

Forms WH-380-E and WH-380-F

Overall, SHRM members expressed satisfaction with the recently updated forms. However, SHRM members continue to report that the information received from medical providers is often unclear and they struggle to determine whether the reported condition constitutes a “serious health condition.” While the proposed revisions do add further clarity, SHRM notes that the new forms do not account for the possibility that an employee simply does not qualify for FMLA under 29 C.F.R. § 825.112(a)(4) because “the employee [is not] unable to perform the functions of the employee’s job.” As such, we suggest that the medical provider be given the option to indicate that an employee does not meet this requirement.

Online Form Options

In light of the on-going pandemic, many members suggested that the Department facilitate an online form completion process, to speed processing times and reduce the administrative burdens of processing FMLA leave.

Eliminate Medical Provider Fees for Completing FMLA Certifications

Many members reported that provider fees for completing paperwork often slowed or halted the certification process and asked whether there could be implemented limitations on providers’ ability to impose these fees.

5. The Department has issued seven opinion letters on FMLA topics since 2018, including: FLSA2018-19, FMLA2018-1-A, FMLA2018-2-A, FMLA2019-1-A, FMLA2019-3-A, FMLA2019-2-A and FMLA2020-1-A.

FMLA 2018-1-A.

At this time, SHRM does not believe any further guidance or clarification is necessary as to this opinion letter.

FMLA 2018-2-A.

At this time, SHRM does not believe any further guidance or clarification is necessary as to this opinion letter.

FMLA 2019-1-A.

At this time, SHRM does not believe any further guidance or clarification is necessary as to this opinion letter.

FMLA 2019-3-A.

At this time, SHRM does not believe any further guidance or clarification is necessary as to this opinion letter.

FMLA 20120-1-A.

At this time, SHRM does not believe any further guidance or clarification is necessary as to this opinion letter.

6. Please provide specific information and any available data regarding other specific challenges that employers experience in administering FMLA leave or that employees experience in taking or attempting to take FMLA leave.

Refine the Definition of Equivalent Position Found in 29 CFR § 825.215(a).

The regulations define equivalent position as one that is “virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status” and require that an equivalent position involve “the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.” There is only a limited exception for “*de minimis*, intangible, or unmeasurable aspects of the job.” This requirement is a significant challenge to employers, particularly smaller employers, who may be unable to return an employee to the same position the employee previously held. SHRM proposes that the Department modify the regulations to a more specific list of factors that can be used to define whether it constitutes an “equivalent position.”

Similarly, SHRM requests clarification of the circumstances under which “equivalent pay” (29 CFR 825.215(c)) requires a merit increase to be processed upon the employees return from a continuous FMLA leave if the employer does so for other leaves, or if a merit increase must be processed when it would have gone into effect during the FMLA leave.

CONCLUSION

The Society for Human Resource Management appreciates the opportunity to submit these comments on the current FMLA regulations. SHRM looks forward to continuing to work with the Department of Labor to provide education and outreach regarding the FMLA.

Sincerely,



Emily M. Dickens
Corporate Secretary, Chief of Staff &
Head, Government Affairs
Society for Human Resource Management