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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1235-AA30

Family and Medical Leave Act of 1993

AGENCY: Wage and Hour Division, U.S. Department of Labor.

ACTION: Request for information.

SUMMARY: The Department of Labor (Department) is seeking information from the public regarding the regulations implementing the Family and Medical Leave Act of 1993 (FMLA or the Act). The Department is publishing this Request for Information (RFI) to gather information concerning the effectiveness of the current regulations and to aid the Department in its administration of the FMLA. The information provided will help the Department identify topics for which additional compliance assistance could be helpful, including opportunities for outreach to ensure employers are aware of their obligations under the law and employees are informed about their rights and responsibilities in using FMLA leave.

DATES: Submit written comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To facilitate the receipt and processing of written comments on this RFI, the Department encourages interested persons to submit their comments electronically. You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA30, by either of the following methods:

Electronic Comments: Follow the instructions for submitting comments on the Federal eRulemaking Portal <http://www.regulations.gov>.

Mail: Address written submissions to Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: This RFI is available through the Federal Register and the <http://www.regulations.gov> website. You may also access this document via the Wage and Hour Division's (WHD) website at <http://www.dol.gov/whd/>. All comment submissions must include the agency name and Regulatory Information Number (RIN 1235-AA30) for this RFI. Response to this RFI is voluntary and respondents need not reply to all questions listed below. The Department requests that no business proprietary information, copyrighted information, individual medical information, or personally identifiable information be submitted in response to this RFI. Submit only one copy of your comment by only one method (e.g., persons submitting comments electronically are encouraged not to submit paper copies). Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal or medical information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this RFI; comments received after the comment period closes will not be considered. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period. Electronic submission via <http://www.regulations.gov> enables prompt receipt of comments submitted as the Department continues to experience delays in the receipt of mail in our area. For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this RFI may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1 (877) 889-5627 to obtain information or request materials in alternative formats.

Questions concerning enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or visit WHD's website at <http://www.dol.gov/whd/america2.htm> for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

Administering the FMLA while responding to the COVID-19 public health emergency is an ongoing priority for the Department. Workplace flexibility ensured by job-protected leave is essential to American prosperity. Workers are more productive and more likely to remain employed if they do not have to choose between taking care of themselves or their loved ones and keeping their jobs. Likewise, businesses attract and retain the best talent when they give their workers flexibility that encourages productivity and retention.

In keeping with these principles, the FMLA, 29 U.S.C. 2601 *et seq.*, entitles eligible employees of covered employers to take up to a total of 12 workweeks of job-protected, unpaid leave, or to substitute accrued paid leave, during a 12-month period for the birth of the employee's child; for the placement of a child with the employee for adoption or foster care; to

care for the newborn or newly-placed child; to care for the employee's spouse, parent, son, or daughter with a serious health condition; when the employee is unable to work due to the employee's own serious health condition; or for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty. *See* 29 U.S.C. 2612(a)(1). An eligible employee may also take up to 26 workweeks of FMLA leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. *See* 29 U.S.C. 2612(a)(3).

FMLA leave may be taken in a block or, under certain circumstances, intermittently or on a reduced leave schedule. *See* 29 U.S.C. 2612(b). In addition to providing job-protected leave, employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. 2614.

The Department issued an initial interim final rule after the FMLA became law in 1993, 58 FR 31794, and issued final FMLA regulations in 1995, 60 FR 2180. The Department published significant revisions to the FMLA regulations in 2008, 73 FR 67934, which were informed, in part, by a 2006 Request for Information, 71 FR 69504. The Department next changed the FMLA regulations in 2013 to implement statutory amendments affecting military family leave provisions and airline flight crew eligibility. 78 FR 8834. The FMLA regulations were last updated in 2015 to update the definition of spouse. 80 FR 9989.¹

¹ Additionally, the Department has regularly sought employer and employee feedback on the administration and use of the FMLA through surveys designed to understand the range of perspectives on the FMLA in the U.S. The Department has commissioned four series of these

On August 5, 2019, the Department published a Federal Register notice seeking public comment on proposed revisions to its optional-use FMLA forms. 84 FR 38061. The Department created forms—WH-380-E, WH-380-F, WH-381, WH-382, WH-384, WH-385, and WH-385-V—to assist employers and employees in meeting their FMLA notification and certification obligations. The Department’s proposed revisions to the forms were based on feedback from employees, employers, and health care professionals and are designed to reduce administrative burden, increase compliance with regulatory requirements, and improve customer service. We received 139 comments from employers, industry associations, individual employees, worker advocacy groups, law firms, and other interested members of the public during the notice and comment process and made additional revisions to incorporate this feedback. Additional revisions to incorporate that feedback are in the process of being finalized.

The Department notes that the new Families First Coronavirus Response Act (FFCRA), Public Law 116-127 (Mar. 18, 2020), which was passed in response to the public health emergency caused by COVID-19 and ensures that workers are not forced to choose between their paychecks and the public health measures needed to combat the coronavirus, includes temporary amendments to the FMLA.² The amended FMLA protections provided under the

surveys; the fourth is currently underway. Information about the Wave 4 FMLA surveys may be found at <https://www.dol.gov/asp/evaluation/currentstudies/Family-and-Medical-Leave-Act-Wave-4-Surveys.htm>. Further, the results from the prior Wave 3 FMLA survey (referred to as the 2012 FMLA survey elsewhere in this document) may be found at https://www.dol.gov/asp/evaluation/completed-studies/Family_Medical_Leave_Act_Survey/TECHNICAL_REPORT_family_medical_leave_act_survey.pdf.

² The FFCRA amended the FMLA to permit certain employees to take up to ten weeks of paid expanded family and medical leave if the employee is unable to work because the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19. This expanded family and medical leave entitlement, which became effective on April 1, 2020, will expire on December 31, 2020. The Department’s regulations implementing paid leave under the FFCRA appear at 29 CFR part

FFCRA are not addressed in this Request for Information, and the Department does not seek comment on them here. The most up-to-date information about the FFCRA is available at <https://www.dol.gov/agencies/whd/ffcra>.

II. *Request for Public Comment*

The Department is aware that its regulations need to be regularly reviewed to explore how such regulations can remain current with workplace and demographic changes. Further, the Department understands the need for compliance assistance, in particular in the form of written informational materials that provide the public with up-to-date information about the protections and requirements of the law in plain language.

Extensive compliance assistance regarding the FMLA is currently available. In particular, the Department's FMLA web pages, which received more than 5 million views over the last year, contain a wealth of material including Frequently Asked Questions, Fact Sheets, Employee Guides, interactive online tools, and a comprehensive Employer's Guide developed for human resource managers and other leave administrators. Additionally, while the requirements of the FMLA are set by statute and regulations, as part of the administration of the Act, interested parties may seek an opinion (*i.e.*, an official written explanation) of what the FMLA requires in fact-specific situations. Opinion letters serve as an important means by which the public can develop a clearer understanding of what FMLA compliance entails. The Department has issued seven opinion letters³ on FMLA-related topics since 2018.

826; all references in this document to FMLA regulations refer to those that appear at 29 CFR part 825.

³ FMLA2020-1-A (Jan. 7, 2020), available at https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/2020_01_07_1A_FMLA.pdf; FMLA2019-3-A (Sept. 10, 2019), available at https://www.dol.gov/whd/opinion/FMLA/2019/2019_09_10_3A_FMLA.pdf; FMLA2019-2-A (Aug. 8, 2019), available at https://www.dol.gov/whd/opinion/FMLA/2019/2019_08_08_2A_FMLA.pdf; FMLA2019-1-A (Mar. 14, 2019), available at

Nevertheless, the results of employee and employer surveys continue to show an ongoing need for education and awareness in the administration and use of FMLA leave. Information from the public on what is and is not working well in the administration of the FMLA can further inform and guide the Department in issuing modernized tools to aid in understanding and applying the FMLA. As such, the Department seeks input from employers and employees on the current FMLA regulations, specifically:

- What would employees like to see changed in the FMLA regulations to better effectuate the rights and obligations under the FMLA?
- What would employers like to see changed in the FMLA regulations to better effectuate the rights and obligations under the FMLA?

The Department invites interested parties who have knowledge of, or experience with, the FMLA to submit comments, information, and data to provide a foundation for examining the effectiveness of the current regulations in meeting the statutory objectives of the FMLA. The Department suggests the following questions to frame the responses. These questions are not intended to be an exclusive list of issues for which the Departments seeks information.

1. A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider. *See* 29 U.S.C. 2611(11); 29 CFR 825.113-.115. The regulations outline several types of serious health conditions involving continuing treatment by a health care provider: (1) incapacity and treatment, with specific definitions and time-frames for the incapacity and the treatment;

https://www.dol.gov/whd/opinion/FMLA/2019/2019_03_14_1A_FMLA.pdf; FMLA2018-2-A (Aug. 28, 2018) available at https://www.dol.gov/whd/opinion/FMLA/2018/2018_08_28_2A_FMLA.pdf; FMLA2018-1-A (Aug. 28, 2018), available at https://www.dol.gov/whd/opinion/FMLA/2018/2018_08_28_1A_FMLA.pdf; FLSA2018-19 (Apr. 12, 2018), available at https://www.dol.gov/whd/opinion/FLSA/2018/2018_04_12_02_FLSA.pdf.

(2) pregnancy or prenatal care; (3) chronic conditions, which require, among other things, at least two visits for treatment by a health care provider per year; (4) permanent or long-term conditions; and (5) conditions that require multiple treatments. *See* 29 CFR 825.115. Several opinion letters issued by the Wage and Hour Division address questions related to the definition of serious health condition. For example, FMLA2018-2-A, issued on August 28, 2018, clarified that organ donation can qualify as a serious health condition when it involves either inpatient care or continuing treatment as defined by the FMLA regulations. While information provided in the 2012 FMLA survey indicates that most employers report that complying with the FMLA imposes minimal burden on their operations, the Department is aware that the medical certification process used to support the existence of a serious health condition can, at times, present challenges to both employers and employees.

What, if any, challenges have employers and employees experienced in applying the regulatory definition of a serious health condition? For example, what, if any, conditions or circumstances have employers encountered that meet the regulatory definition of a “serious health condition” but that they believe the statute does not cover? What, if any, difficulties have employers experienced in determining when an employee has a chronic condition that qualifies as a serious health condition under the regulations? Conversely, what, if any, conditions or circumstances have employees experienced that they believe the statute covers, but which their employer determined did not meet the regulatory definition of “serious health condition”? What, if any, difficulties have employees experienced in establishing that a chronic condition qualifies as a serious health condition under the regulations? The Department welcomes information that will further its understanding of FMLA serious health conditions so it can better effectuate the purposes of the Act.

2. An employee may take FMLA leave on an intermittent basis (*i.e.*, taking leave in separate blocks of time for a single qualifying reason) or on a reduced leave schedule (*i.e.*, reducing the employee's usual weekly or daily work schedule) due to his or her own serious health condition, to care for an immediate family member who has a serious health condition, or to care for a covered servicemember with a serious illness or injury when such leave is medically necessary. *See* 29 U.S.C. 2612(b); 29 CFR 825.202-.205. Information provided in the 2012 FMLA employer survey indicated that unscheduled leave, particularly unplanned intermittent or episodic leave, was sometimes disruptive to the workplace.

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? For example, what, if any, specific challenges do employers experience when the timing or need for intermittent leave is unforeseeable? Similarly, what, if any, challenges do employees seeking or taking intermittent leave or using a reduced leave schedule experience? For example, do employees find it difficult to request and use intermittent leave in their workplaces? The Department also seeks information from employers and employees on best practices and suggestions to improve implementation of these intermittent leave provisions. The Department welcomes information that will further its understanding of FMLA leave usage so it can better effectuate the purposes of the Act.

3. The requirements regarding the notice that an employee must provide to an employer of his or her need for FMLA leave are set out at 29 U.S.C. 2612(e) and 29 CFR 825.302-.304. An employee seeking to use FMLA leave is required to provide 30-days advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable fewer than 30 days in advance, the employee must notify the employer as soon as

practicable—generally, either the same or next business day. When the need for leave is not foreseeable, the employee must notify the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual circumstances, an employee must comply with the employer’s usual and customary notice and procedural requirements for requesting leave. An employee must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. When an employee seeks leave for an FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, however, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave.

What, if any, specific challenges do employers and employees experience when employees request leave or notify their employers of their need for leave? For example, do employees convey sufficient information to notify employers that the employee may have an FMLA-qualifying reason for leave or that the employee is requesting FMLA leave? Similarly, are employees aware of and able to comply with their employers’ specific procedural requirements for providing such notice? Are they aware of the specific information they need to provide? The Department welcomes suggestions of how to better assist employers and employees in understanding their rights and obligations under the FMLA regulations. The Department also specifically seeks input on additional tools the Department could provide to facilitate FMLA compliance.

4. An employer may require an employee to provide a certification issued by a health care provider to support the need for leave for a serious health condition of the employee or the

employee's immediate family member. *See* 29 U.S.C. 2613; 29 CFR 825.305-.308. The employer must allow the employee at least 15 calendar days to obtain the medical certification. If the employer determines the certification is incomplete or insufficient, the employer must advise the employee in writing of the additional information needed and allow the employee a reasonable opportunity to cure the deficiency. *See* 29 CFR 825.305.

As noted above, the Department recently published in the Federal Register proposed revisions to the optional-use forms employers and employees may use to meet their FMLA notification and certification obligations. 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. For example, what, if any, challenges have employers encountered in determining whether a certification establishes that the employee or employee's immediate family member has a serious health condition under the FMLA and the amount of leave needed? Similarly, what, if any, challenges have employees encountered in obtaining a certification that contains sufficient information to establish the existence of a serious health condition and the amount of leave needed? The Department welcomes suggestions regarding strategies to address challenges with the certification process.

5. As indicated above, the Department has issued seven opinion letters on FMLA topics since 2018. The first, FLSA2018-19, issued on April 12, 2018, concerned the compensability of frequent 15-minute rest breaks under the Fair Labor Standards Act when the breaks are necessary due to a serious health condition under the FMLA and concluded that such short periods of FMLA-protected leave may be unpaid. The letter noted, however, that employees are entitled to compensation for rest periods of short duration on the same basis as co-workers who take non-FMLA leave breaks during a work shift. FMLA2018-1-A, issued on August 28, 2018, addressed

an employer's no-fault attendance policy which effectively froze, throughout the duration of an employee's FMLA leave, the number of attendance points that the employee accrued prior to taking his or her leave. The letter concluded that such a policy does not violate the FMLA, provided it is applied in a nondiscriminatory manner. As noted above, FMLA2018-2-A, also issued on August 28, 2018, stated that organ donation can be a qualifying serious health condition if it requires inpatient care or continuing treatment as defined by the FMLA regulations.

Two letters addressed designation of FMLA leave. FMLA2019-1-A, issued on March 14, 2019, stated that an employer may not delay designating an employee's leave as FMLA leave if the circumstances qualify for FMLA leave, even if the employee prefers to delay the designation. The letter also stated that, while nothing prevents an employer from providing more generous leave policies than those established in the FMLA, doing so does not expand an employee's FMLA entitlement. Therefore, an employer may not designate more than 12 weeks of leave as FMLA leave. FMLA2019-3-A, issued on September 10, 2019, similarly stated that an employer may not delay designating an employee's leave as FMLA leave if the circumstances qualify for FMLA leave, in this case, even if a collective bargaining agreement provides that an employee may exhaust paid leave before using unpaid FMLA leave. However, the letter noted that the paid leave could be substituted (*i.e.*, run concurrently) with the FMLA leave. This letter also stated that if an employer provides for the accrual of seniority when employees use paid leave, it must also permit employees to accrue seniority when they substitute FMLA leave for paid leave. FMLA2019-2-A, issued on August 8, 2019, concluded that a parent's need to attend an Individualized Education Plan meeting addressing the educational and special medical needs of his or her child who has a serious health condition is a qualifying reason for taking intermittent

FMLA leave. FMLA2020-1-A, issued on January 7, 2020, addressed whether a combined general health district must count the employees of the County in which it is located for purposes of determining employee eligibility to take FMLA leave.

The Department requests comments about whether it would be helpful to provide additional guidance regarding the interpretations contained in any of these opinion letters through the regulatory process.

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. The Department welcomes any information on the administration and effectiveness of the current regulations and suggestions regarding specific strategies to address such challenges. The Department also welcomes information concerning best practices employees and employers may have experienced in using or administering the FMLA.

III. *Conclusion*

The Department invites interested parties to submit comments and data during the public comment period and welcomes any pertinent information and data that will provide a basis for analyzing the effectiveness of the current regulations in meeting the statutory objectives of the FMLA.

List of Subjects in 29 CFR Part 825

Administrative practice and procedure, Airmen, Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Penalties, Reporting and recordkeeping requirements, Teachers

Signed at Washington, D.C. this 6th day of July, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

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