



**College and University Professional
Association for Human Resources**

September 15, 2020

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Amy DeBisschop
Director, 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

**Re: RIN 1235-AA30; Request for Information Regarding the Regulations Implementing
the Family and Medical Leave Act of 1993**

Dear Director DeBisschop:

We write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) in response to the above referenced Request for Information (RFI) issued by the U.S. Department of Labor (DOL). CUPA-HR serves as the voice of human resources in higher education, representing more than 31,000 human resources professionals and other higher education leaders at more than 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 57 percent of all bachelor's institutions and nearly 600 two-year and specialized institutions. Colleges and universities employ approximately 4 million workers nationwide, and there are institutions of higher education located in all 50 states.¹ The Family and Medical Leave Act of 1993 (FMLA or the Act) and similar state laws cover many of these employees.

We thank the Department for its interest in examining the effectiveness of the current FMLA regulations. As part of our response to the RFI, we surveyed CUPA-HR members, which yielded

¹ See *Enrollment and Employees in Postsecondary Institutions, Fall 2017; and Financial Statistics and Academic Libraries Fiscal Year 2015*, Institute of Educational Services National Center for Educational Sciences (January 2019), at page 4, accessed on September 8, 2020 at <https://nces.ed.gov/pubs2019/2019021REV.pdf>.

input from 59 Chief Human Resources Officers (CHROs). The comments below summarize the survey results and respond to the questions posed in the RFI.

Comments

Below we provide answers to the RFI questions relevant to our collective membership. Our answers are informed by an August 2020 survey by CUPA-HR of 59 CHROs at both public and private institutions of higher education (2020 CHRO Survey), which CUPA-HR conducted in response to the RFI.

1. 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?

Fifty-four percent of the 2020 CHRO Survey respondents found determining whether an employee has a qualifying serious health condition to be challenging. Of the 54%, 40% found identifying a qualifying serious health condition as somewhat challenging, while 14% said it was mostly or extremely challenging.

Many respondents said they would benefit from a clearer regulatory definition of serious health condition, particularly with respect to the intersection between the Americans with Disabilities Act (ADA) and the FMLA. There are many situations where an employee may qualify for leave under ADA, but not under the FMLA, which can be confusing for HR and employees. To help minimize this confusion, some respondents felt DOL should provide examples of conditions that do NOT count as a qualifying serious health condition.

In addition to creating a clearer definition of qualifying serious health condition, respondents also believed that DOL should standardize medical certifications to simplify the process for employees, employers and medical professionals and to bring greater consistency, reliability and fairness to the process.

Some respondents provided anecdotes of situations where an employee may abuse the uncertainty of identifying a qualifying serious health condition in order to take job-protected time off. Respondents emphasized that standardized medical certifications might help clarify the parameters around appropriate leave use, which would reduce instances of possible abuse.

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? For example, what, if any, specific challenges do employers experience when the timing or need for intermittent leave is unforeseeable?

An overwhelming majority of CHROs responded that tracking intermittent leave is a challenge. Ninety-five percent of respondents found it challenging, including 29% who found it extremely challenging and 38% who found it mostly challenging.

When asked to identify any changes to the FMLA that would make tracking intermittent leave less challenging, many respondents stated that creating a universal system or tool, potentially from DOL, to track intermittent leave would be very useful to aid in their abilities to track intermittent leave. Another popular response was allowing employers to require intermittent leave to be taken in half-day or whole-day increments.

3. 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?

Survey respondents identified unforeseeable FMLA leave as a top concern, with employees sometimes requesting leave with little prior notice, despite the fact the FMLA technically requires employees provide notice of leave as soon as practicable. This makes it difficult for institutions to manage unscheduled absences and staff appropriately. When asked to identify the level of challenge institutions face when managing unscheduled absences, 88% of respondents stated that they faced at least some challenge in managing them. Forty percent of respondents answered that this task is mostly challenging, and 23% answered that it is extremely challenging.

Respondents proposed several changes DOL could make to make it easier for employers to manage requests for unforeseeable leave and related unscheduled absences easier. Some respondents suggested a minimum time required to provide notice, such as 24 hours. Others said DOL should consider adding a limit on how much unscheduled time-off an employee can take.

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. 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?

When asked to identify the level of challenge an institution faced in obtaining proper medical certification for an employee taking FMLA leave, 70% of respondents stated that they were challenged by this task. Forty-six percent of respondents said that this was only a slight challenge, though, while 14% said it was mostly challenging and 6% said it was extremely challenging.

Respondents offered a variety of changes to FMLA that would make obtaining medical certification easier for employers, but there were two frequently discussed answers. First, many respondents expressed an interest in DOL creating a simplified and standardized medical certification form to make paperwork less cumbersome and more straightforward for employers, employees and medical providers. One respondent stated that certificates often come back with blank responses or details not specific enough for the employer to determine how much leave is needed.

Additionally, respondents believed there needed to be more regulatory accountability for medical providers to give timely and accurate information on an employee's condition to employers. Many respondents said that doctors often take a long time to get back to employers on the status of an employee's condition. They offered some solutions to this issue, including allowing health care providers to email or fax certifications to employers, as well as creating a potential DOL database that employers and health care providers can access for medical certificates.

CONCLUSION

We hope DOL finds our input helpful. Please contact us with any questions or concerns.

Respectfully Submitted for:

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