

May 31, 2011

Mary Ziegler
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210
Submitted by email to WHDPRAComments@dol.gov

Re: Comments on the Wage and Hour Division's Proposed Information Collection Request for the Family and Medical Leave Act Employee and Employer Surveys

Dear Ms. Ziegler,

The undersigned organizations appreciate the opportunity to respond to the Department of Labor's request for public comment. This letter responds to the Wage and Hour Division's proposed information collection request for the Family and Medical Leave Act (FMLA) employee and employer surveys. 76 Fed. Reg. 18254 (April 1, 2011).

We applaud the Department for undertaking this much-needed effort to collect updated information about the FMLA. The Department last conducted similar surveys eleven years ago. The results of those surveys fostered a better understanding of both employers' and employees' needs regarding family and medical leave. The information gained from the 2011 surveys will enable the Department to better fulfill its mission to promote and achieve compliance with labor standards, protect and enhance the welfare of the nation's workforce, and assure work-related benefits and rights.

The rights established by the FMLA remain critically important for Americans juggling work and caregiving duties. Congress passed the FMLA in 1993 to protect workers who need to take time off work to attend to family and medical needs. Workers have taken job-protected leave under the FMLA more than 100 million times since the law's enactment. The vast majority of mothers and fathers with children under age 18 now participate in the labor force, and millions of workers provide care for adult family members or need leave to care for their own medical needs. Without the protections of the FMLA, millions of American workers would be at risk of losing their jobs due to family or medical needs.

Unfortunately, FMLA violations remain widespread and workers may encounter significant difficulties using the FMLA. Recent studies estimate that a significant proportion of employers fail to comply with the FMLA.¹ Department statistics show that, between 2009 and

¹ See ELLEN GALINSKY, ET AL., FAMILIES AND WORK INSTITUTE, 2008 NATIONAL STUDY OF EMPLOYERS 6 (2008) (estimating that 18-21 percent of employers are non-compliant); Naomi Gertsel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege*, 21 YALE J.L. & FEMINISM 161, 178 (2009) (recalculating non-compliance from the 2008 National Study of Employers and reporting up to 43 percent non-compliance among FMLA-covered employers).

2010, the number of FMLA complaints filed with the Department jumped by 22 percent. These complaints include reports of unlawful termination, refusal to grant leave, discrimination, refusal to restore to an equivalent position, and the failure to maintain health benefits. Moreover, regulatory changes adopted in 2008 may have made it more difficult for workers to take FMLA leave.

The information collected through the surveys will have practical utility and will enhance the performance of the agency. The surveys will collect in-depth information about current workplace policies and practices related to family and medical leave. This information will enable the Department to shape future regulatory priorities, interpretive guidance, outreach and education efforts, and enforcement programs based on sound, current data, rather than on outdated data or anecdotal information.

Strong regulations, guidance, and education should be tailored to meet the specific needs of employees and employers and promote voluntary compliance with the law. In the absence of voluntary compliance, the Department can use data to identify and challenge common unlawful practices through its enforcement programs. The results may also help the Department and other agencies to understand the intersection between FMLA usage and other closely-related statutes, including the Americans with Disabilities Act and the Genetic Information Non-Discrimination Act, and enable better coordination of outreach and enforcement activities.

In addition, the survey results will provide federal, state, and local policymakers with much-needed information to guide the development of and justification for new policy proposals to meet the needs of workers and their families. By making the data file accessible to researchers and the public, the Department will foster new scholarship on the FMLA and workers' work-family needs.

The surveys will impose minimal burdens. The employee survey will target 2,000 respondents who will each be paid a \$10 honorarium; the average response time is estimated to be 26 minutes. The employer survey will target 1,800 firms with an estimated average response time of 36 minutes. The minimal burdens imposed by the surveys are justified by the benefit of obtaining current, in-depth information that will enable the Department to make the best use of limited resources to fulfill its regulatory, educational, investigative, and enforcement mission.

We are pleased to see key new areas of inquiry in the proposed surveys. This year's surveys include new questions beyond those included in prior surveys, including questions regarding medical certifications, notice requirements, employers' contact with health care providers, military leave, interaction with other forms of leave and flexible work policies, intermittent leave, and workers' concerns or experiences with retaliation. The employee survey also includes new questions about family caregiving needs to identify gaps in FMLA coverage. These questions should help the Department and the public to better understand employees' and employers' experience with family and medical leave and, where problems or misunderstandings exist, will help the Department to craft appropriate responses.

Minor changes to the surveys could enhance the quality, utility, and clarity of the information to be collected. There are several areas in which we believe additional questions or

additional question categories would yield information that would serve the Department's education, outreach and enforcement activities. We list the most important areas here and provide specific additional suggestions in the addendum that follows.

- Questions should be added to assess employer and worker awareness about the full panoply of legal rights and obligations provided by the FMLA. The responses to these questions would be used to identify common misperceptions about the law. This information would enable the Department to provide targeted education to workers who may be unaware of their rights and to facilitate targeted compliance assistance outreach to employers.
- The surveys should uncover whether FMLA absences, including scheduled FMLA absences, lead to “points,” “demerits,” or other negative consequences under an employer’s attendance policy. The current surveys ask about “unscheduled” absences (Q15 of the employer survey) and absences in general (E8 of the employee survey) and these questions could be easily modified. The possibility that “points” or “demerits” might influence leave-taking and leave-needing could also be included among the options in B15 in the employee survey.
- For new mothers, questions should be added that ask about the initiation and duration of breastfeeding. Past research has shown a correlation between leave and breastfeeding rates and duration and a relationship between longer duration of breastfeeding and infant health. It would be helpful to know whether and how FMLA leave correlates with breastfeeding.

We urge the Department to consider key demographic and geographic factors in its coding and analysis. Although we understand that state-by-state analysis is not feasible, we urge the Department to include a code in the data file to permit aggregate analyses of differences in workers’ and employers’ experiences with FMLA when state law provides workers greater FMLA rights or provides paid leave through paid family leave insurance or state disability insurance systems. Additionally, we urge the Department to conduct rigorous analyses of leave-taking (and barriers to leave-taking) among workers of color, lower-income workers, unionized workers, and workers who identify as gay, lesbian, or bisexual.

We appreciate this opportunity to submit comments about these important surveys. We support this information collection effort, which will enable the Department to better meet the needs of employers and workers and enhance compliance with the FMLA. If you have any questions, please contact Sarah Crawford or Vicki Shabo of the National Partnership for Women & Families at 202-986-2600.

Sincerely,

The National Partnership for Women & Families
9to5 Atlanta National Association of Working Women
9to5, National Association of Working Women
A Better Balance: The Work and Family Legal Center

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County and Municipal Employees (AFSCME)
Alabama Women's Commission
American Association of People with Disabilities
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Federation of Teachers, AFL-CIO
Arkansas Interfaith Alliance
Arkansas Interfaith Committee for Worker Justice
Association of Flight Attendants - CWA
Break the Chain Campaign at the Institute for Policy Studies
Business and Professional Women's Foundation
Caring Economics Campaign of the Center for Partnership Studies
Center for American Progress Action Fund
Center for Law and Social Policy (CLASP)
Children First for Oregon
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Coalition on Human Needs
Contra Costa Commission for Women
Easter Seals Southern Georgia
Economic Opportunity Institute
Economic Policy Institute
Equal Rights Activists
Family Caregiver Alliance, National Center on Caregiving
Family Values @ Work: A Multi-State Consortium
Feminist Majority
Georgia Job Family Collaborative
GFWC Service Guild of Covington
Greater New York Labor-Religion Coalition
Interfaith Worker Justice
International Association of Machinists & Aerospace Workers
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW
Iowa Commission on the Status of Women
Labor Notes
Labor Project for Working Families
Latino Council
Lawyers' Committee for Civil Rights Under Law
Labor Council for Latin American Advancement (LCLAA)
Legal Aid Society – Employment Law Center
Legal Momentum
Maine Women's Lobby
Maryland Commission for Women
Massachusetts Paid Leave Coalition
MomsRising

National Alliance for Caregiving
National Association of Commissions for Women
National Association of Mothers' Centers
National Coalition for LGBT Health
National Consumers League
National Council of Jewish Women
National Council for Research on Women
National Employment Law Project
National Hospice & Palliative Care Organization
National Military Family Association
National Women's Conference Committee
National Women's Law Center
NETWORK, A National Catholic Social Justice Lobby
New Jersey Citizen Action
New Orleans Interfaith Worker Justice
New York State Paid Leave Coalition
OWL-The Voice of Midlife and Older Women
Partnership for Prevention
PathWays PA
Progressive States Network
Project Single Moms Worldwide, Inc.
San Joaquin County Commission on the Status of Women - California
Service Employees International Union (SEIU)
The Massachusetts Committee for Interfaith Worker Justice
The National Employment Law Project
The National Infertility Association
The Partnership for Working Families
Turning Anger into Change
U.S. Women's Chamber of Commerce
United Church Outreach Ministry (UCOM)
United Food and Commercial Workers International Union
United Steelworkers
Voices for America's Children
Wider Opportunities for Women
Wisconsin Alliance for Women's Health
Women Employed
Women's Law Center of Maryland, Inc.
Women's National Democratic Club
Worker's Center of CNY
Workers Defense Project
Zero to Three

ADDENDUM

Recommended Changes to the Employee Survey:

A4. The first sentence of the question appears to ask how many different times the respondent took leave from work for a single reason, while the last sentence appears to ask about the number of different FMLA-type reasons the person had for taking leave. Clearer wording could eliminate the confusion: “We are interested in the number of reasons or conditions for which you took leave from work, regardless of whether you took time off for each reason or condition all at once or in separate blocks of time. So, for how many TOTAL reasons or conditions did you take leave from work since...?”

A5, B6. These questions ask for the reasons for which an employee took or needed leave. Leave arising from a service member’s deployment (“qualifying exigency” leave) is not included among the options here, although it is included in the screening questions for the survey (S11, S12). To establish a complete understanding of leave-taking, qualifying exigency leave should be included in A5 and B6.

A21. This question asks about the categorization of FMLA leave as sick, vacation, FMLA or other. It is possible that leave could be counted in combination. To accommodate that, the respondents should be allowed to provide more than one response or an answer choice such as “combination of vacation/sick/Family and Medical Leave” should be available.

A23. This question asks respondents who took leave whether they experienced a number of negative impacts. For this group, A23c would appear to make more sense if phrased “Did you have difficulty affording unpaid leave” rather than the current wording, “Were you unable to afford an unpaid leave.” The latter might not make sense when asked of people who took leave that may indeed have been unpaid.

A43. This question is embedded in a series of questions about notice so presumably rules about notice is what A43 is asking about. The question itself, however, does not mention notice. Consider inserting words to clarify that this question is asking about rules regarding notice by inserting the capitalized text: “Did you satisfy your employer’s standard rules about GIVING NOTICE BEFORE taking leave?”

A46. This question asks about the sources of pay a worker received while on leave. To establish a clear understanding, “disability leave” should be included here.

Questions following A59 and B20. Questions about breastfeeding or the expression of breast milk such as the following could be included here and asked of women who took leave to recover from childbirth and care for a newborn: “Did you breastfeed or express breast milk for your child?” If yes: “For how many weeks following the child’s birth did you breastfeed or express breast milk for your child.”

A62. This question asks about the reasons the employee returned to work after leave. To ensure that A62d captures both informal and formal sources of “pressure” to return to work, add an “if

necessary” probe to A62d to clarify that “feeling pressured” can include informal pressure or formal penalties such as being given points under an absence control policy.

B15. This question asks those who needed leave but did not take it for the reasons they failed to take leave. The following modification and addition should be considered:

- To B15h: To make clear that “personal information” also means “medical” information, add the capitalized text: “You were worried about revealing personal information AND PRIVATE MEDICAL information about yourself, your care recipient, or family relationships.
- Add new items to assess whether fear of retaliation played a role: “You knew someone who was treated differently or retaliated against after that person took leave for a health condition or to care for a family member” and “You were worried that you would be treated differently or retaliated against for taking leave.”

Questions following E4. The survey questions at the beginning of Section E ask general questions about FMLA awareness, but more detailed information would be helpful in guiding Department outreach and education. Consider inserting questions such as:

“To your knowledge, are employees covered by the federal FMLA law entitled to take leave....?”
(Yes/No/Don’t know)

For the care of a newborn?

For an employee’s own serious health condition?

For the care of a child with a serious health condition?

For the care of a spouse with a serious health condition?

For the care of a parent with a serious health condition?

For the care of himself/herself due to a serious health condition?

For the care of a grandparent with a serious health condition?

For the care of a grandchild with a serious health condition?

For the care of a sibling with a serious health condition?

For the care of an adopted child or foster child?

To care for a military service member?

For reasons related to the deployment of a military service member?

“To your knowledge, are employees covered by the federal FMLA law entitled to take leave for 4 weeks, 8 weeks, 12 weeks, 16 weeks?”

E7. This question asks employees about the benefits offered by their employer. None of the answer choices touch on leave offered by employers to care for elders or sick family members. The question should clarify that E7d (“paid family leave”) is only for caregiving related to new children and add another item that asks about paid time off that can be used for eldercare and other types of family caregiving. Alternatively, the parenthetical probe attached to “paid family leave” could be expanded to include a broader range of family caregiving responsibilities.

E8. This question asks about penalties for absences but does not distinguish between scheduled and unscheduled absences. Consider restructuring the question to provide information regarding different types of absences.

“Does your employer have an attendance policy that includes penalties for –

- Unscheduled absences, including absences that occur due to illness
- Scheduled absences, including absences that occur due to medical conditions or health needs
- Absences taken under the Family and Medical Leave Act or FMLA law.

After E9. Add a demographic question regarding workers' eligibility for overtime. Combined with the question about whether the worker is paid hourly or is salaried in E9, this information would permit analysis of how FLSA exempt versus non-exempt workers' experiences with the FMLA and access to workplace leave.

Recommended Changes to the Employer Survey:

Q15 and suggested follow-up. This question asks employers about penalties for unscheduled absences, but it is also possible that employers penalize employees for scheduled absences, including absences covered by the FMLA. Consider modifying this question to ask about all absences, rather than just unscheduled absences by asking: "Does your company policy use a point, demerit system, or "no-fault absence policy" that tracks an employee's absences?"

For respondents that answer "yes," ask "Are employees assessed points for taking FMLA leave?"

After Q17. The survey assesses employers' compliance with various facets of the FMLA but never directly tests the employer's awareness of what the FMLA provides or of whether separate state laws exist. Such information would help the Department target employer education and outreach. Consider inserting questions such as:

"To your knowledge, are employees covered by the federal FMLA law entitled to take leave...:"
(Yes/No/Don't know)

For the care of a newborn?

For an employee's own serious health condition?

For the care of a child with a serious health condition?

For the care of a spouse with a serious health condition?

For the care of a parent with a serious health condition?

For the care of himself/herself due to a serious health condition?

For the care of a grandparent with a serious health condition?

For the care of a grandchild with a serious health condition?

For the care of a sibling with a serious health condition?

For the care of an adopted child or foster child?

To care for a military service member?

For reasons related to the deployment of a military service member?

"To your knowledge, are employees covered by the federal FMLA law entitled to take leave for 4 weeks, 8 weeks, 12 weeks, 16 weeks?"

"To your knowledge, does the law in [STATE] provide employees with different rights to take leave for family and medical reasons than the federal FMLA law provides?"

Q45. This question is assessing the frequency with which the employer does not count FMLA-qualified leaves as leave under the FMLA. The term “this reason” in the last line is unclear. Consider re-wording the question slightly to refer here to “FMLA reasons”.

After Q45 add a question on designation of FMLA leave. To better understand whether employers’ practices of designating FMLA leave are in accordance with the law, consider asking “How do you determine whether leave is counted as FMLA leave”

- FMLA-qualified absences are counted as FMLA leave only if employees specifically requests FMLA leave.
- Employees are advised of the right to take FMLA leave, even if the employee does not mention the FMLA.

Q46. This question asks about suspected FMLA misuse. The current wording may lead respondents to over-report misuse. Consider inserting, “if any” into the second sentence so that the sentence reads, “How many of these leaves, IF ANY, do you suspect were misused....” Another approach would be to ask two separate questions: “Do you suspect any of these leaves were misused...?” (Yes/No/Not sure) and a second that asks “In how many cases do you suspect leaves were misused?”

Q51a. This question is asking about categories of employees that are not eligible for FMLA leave. The question appears to be missing a “not” and should likely read, “In your entire organization, what types of employees do you consider NOT to be eligible for FMLA leave?”

Q67. This question asks employers about the ease or difficulty of dealing with different types and lengths of employee absences. To be consistent across types of leave, consider breaking out Q67E into two choices to mirror Q67A and Q67B: “unscheduled leave of a long duration for a family or medical reason” and “unscheduled leave of a short duration.”