



5 Most Likely FMLA Changes That Could Be On The Horizon, Per DOL Information Request

Insights

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The Department of Labor just provided employers a sign that it might be open to altering the Family and Medical Leave Act regulations and guidance, perhaps resolving some of the more difficult aspects of the law that cause the most administrative and implementation headaches. In [a July 16 release](#), the DOL published a request for information seeking public input about the way it interprets and implements the federal leave law so it can “provide a foundation for examining the effectiveness of the current regulations in meeting the statutory objectives of the FMLA.” What are the top five changes that could be on the horizon?

1. “Serious Health Condition” Definition

First, the DOL acknowledged 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. Therefore, it asked for input about the kinds of challenges that employers have experienced in applying the regulatory definition of a serious health condition. “For example,” the agency asked, “what 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?”

The agency also keyed in on an issue that often vexes employers trying to comply with the law: chronic conditions. The DOL asked for input about the kinds of difficulties employers have experienced in determining when an employee has a chronic condition that qualifies as a serious health condition under the regulations.

2. Intermittent And Unplanned Leave

Perhaps no area of FMLA compliance creates more difficulty for employers than managing intermittent or unplanned leave. And it appears the DOL is well aware of this concern. It noted that unscheduled leave, particularly unplanned intermittent or episodic leave, had been identified by employers as sometimes disruptive to the workplace. It asked for input about specific challenges or impacts employers experience when an employee takes FMLA leave on an intermittent basis or on a reduced leave schedule.

“For example,” the DOL asked, “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 agency also said it wants information from employers and employees on best practices and suggestions to improve implementation of these intermittent leave provisions.

3. Leave Request Process

The agency requested information from employers about the specific challenges they experience when employees request leave or provide leave notification of their need for leave. The request seeks to determine whether employees convey sufficient information to notify employers that they may have an FMLA-qualifying reason for leave or that they are requesting FMLA leave.

4. Medical Certification Process

The DOL also said it was interested in better understanding the challenges employers experience with the medical certification process that are not addressed by pending proposed revisions to the optional-use forms employers and employees may use to meet their FMLA notification and certification obligations. For example, the agency requested information about the types of challenges employers have 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.

5. Formal Guidance On Specific Opinion Letters

Finally, the DOL noted that it had resurrected the practice of issuing non-binding opinion letters to employers, and had issued seven such letters in the past two years alone. The agency asked whether it would be helpful to provide additional guidance regarding the interpretations contained in any of these opinion letters through the formal regulatory process. To recap, the opinion letters touched on:

- 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;
- no-fault attendance policies that allow points to drop off over a specified time period, freezing the drop off of points previously incurred during a continuous FMLA leave and resuming once the employee returns to work;
- whether organ donation can be a qualifying serious health condition if it requires inpatient care or continuing treatment as defined by the FMLA regulations;
- whether an employer can delay designating an employee's leave as FMLA leave if the circumstances qualify as such, even if the employee prefers to delay the designation;
- a parent's need to attend an Individualized Education Plan meeting addressing the educational and special medical needs of a child with a serious health condition and whether that is considered a qualifying reason for taking intermittent FMLA leave; and
- whether a combined general health district must count the employees of the entire county in which it is located for purposes of determining employee eligibility to take FMLA leave.

What's Next?

At this point, the agency is simply gathering information to determine the next steps it should take. The next steps could come in the form of interpretive guidance (which wouldn't have the force of law) or formal rules (which would). [According to Bloomberg Law](#), the DOL has yet to determine what it will do with the information it will receive, but will make that decision once it sees what the public has to say. The due date for comments and input is September 15, 2020, and we will be in a better position to assess the changes that could be imminent once this period closes.

We will continue to monitor further developments and provide updates regarding this issue, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney.

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