



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

United States Department of Labor
Wage and Hour Division
Room S– 3502
200 Constitution Avenue NW
Washington, DC 20210

September 15, 2020

**Re: Request for Information about the Family and Medical Leave Act of 1993
Regulations, RIN 1235–AA30**

The undersigned members of the Consortium for Citizens with Disabilities (CCD) thank you for the opportunity to submit comments in response to the request for information regarding the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

The FMLA is crucially important to people with disabilities and their families—according to the most recent Department of Labor (DOL) study, 51 percent of those who took leave over a 12 month period did so because of their own serious illness, 19 percent took leave to care for a FMLA-covered family member’s serious health condition and 5 percent took leave to care for someone with a serious health condition who does not meet the FMLA’s strict definition of family.¹ These data are similar to the 2012 DOL survey, which found that 55 percent of leave was taken to care for one’s own serious illness and 18 percent was taken to care for a FMLA-covered family member’s serious health condition.² And the 2018 data suggests that many of the people taking leave have chronic health conditions: 28 percent of leave was taken for an ongoing health condition and 13 percent was for “injury or illness now requiring routine scheduled care.”³

Given the leadership of the United States in disability rights, the crucial protections of the Americans with Disabilities Act, and the prevalence of people with disabilities in the United

¹ ABT ASSOCIATES FOR THE DEPARTMENT OF LABOR, EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS (2020) hereinafter 2018 FMLA Survey.

² ABT ASSOCIATES FOR THE DEPARTMENT OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT (2014) hereinafter 2012 FMLA Survey.

³ 2018 FMLA Survey, *supra* note 1.

States workforce, the FMLA is only one piece of the broader puzzle, but a very important one. Demographic changes, such as the aging of the Baby Boom generation and the current pandemic, suggest that FMLA will become even more important over the next several decades.

The CCD Paid Leave Working Group has been examining many of the current gaps in FMLA as we analyze current legislation before Congress to create paid leave, often building on the FMLA. In addition, many other CCD Task Forces have long advocated for changes to the FMLA regulations and guidance to ensure that the FMLA works for all people with disabilities and their families. This experience provides us with a comprehensive perspective to the questions that DOL is asking and our answers are below.

1) The Definition of Serious Health Condition

We believe that the statutory definition captures many important situations, but are concerned that individuals do not understand the definition to such a degree that an opinion letter was requested for something so serious as organ donation.⁴ This may be because of the complexity and occasional over-specificity of the regulations. For example, the specification that a stay in a hospital must be “overnight” as detailed in 29 Code of Federal Regulations Section 825.114. Advances in medical science mean that many serious health conditions may now result in short inpatient stays but require more lengthy recovery at home. We believe that this definition is too narrow given current medical practice. Such a circumstance might be covered under other provisions in the regulations, but it would be better if DOL’s regulations were simpler and reflected the reality of today’s health care system.

As DOL has stated before in opinion letters, the legislative history of FMLA states that the meaning of serious health condition "is broad and intended to cover various types of physical and mental conditions" and "is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery."⁵ DOL has also stated that “[s]imilar standards apply to a child, spouse, or parent of the employee who is unable to participate in school or in regular daily activities.”⁶ DOL should revise the regulations to explain the breadth of FMLA coverage to prevent the confusion that is evidenced by the requested opinion letter on organ donation and to provide greater clarity for situations related to the full range of serious health conditions. Wherever possible, DOL should defer to the judgment of the health care professional.

2) Use of Intermittent Leave

As the CCD Principles on Paid Leave highlight, people with disabilities and caregivers

⁴ U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, OPINION LETTER FMLA2018-2-A (Aug. 28, 2018), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_08_28_2A_FMLA.pdf.

⁵ See, for example, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, OPINION LETTER FMLA-87 (Dec. 12, 1996), <https://www.dol.gov/agencies/whd/opinion-letters/fmla/fmla-87>.

⁶ Opinion Letter FMLA-87, *supra* note 5.

for people with disabilities, more than others, may require intermittent use of leave over the course of a year.⁷ For example, leave should be flexible to accommodate bi-weekly physical therapy sessions following a car accident, a temporary increase in seizures in a person with epilepsy due to medication changes, or intensive mental health sessions in times of crisis. It should also allow caregivers to take their loved ones to chemotherapy or other regular appointments intermittently. This disproportionate impact is born out by the 2018 FMLA survey results which found that “[i]ntermittent leaves are most commonly characterized as being related to ongoing personal health conditions, accounting for 40 percent of employees taking intermittent leaves; 24 percent of employees take intermittent leave for a one-time health condition, and 15 percent for an injury or illness that requires routine regular care.”⁸ Changes to the intermittent leave rules will disproportionately impact people with disabilities and DOL should ensure that any modifications will not harm this population.

We would urge DOL to look closely at the 2012 and 2018 studies that the agency commissioned. In 2018, “almost one-third of employees’ most recent leaves are taken on an intermittent basis (31 percent), an increase from 24 percent of leave takers in 2012.”⁹ This may reflect technological improvements in treatments for some conditions and may also reflect changes to work methods, but is it clear that intermittent leave is important to a large segment of leave takers. If DOL is uncertain about the current intermittent leave processes, this is a question that could be examined in a future FMLA survey.

3) FMLA Notice Requirements

We believe that many employees are nervous about taking leave and are confused about the process because employers are not always explicit or clear to their employees about how FMLA leave is handled. The FMLA Poster provided by DOL, while comprehensive, is insufficient to overcome this confusion. We would urge DOL to require a notification directly to all employees when they become eligible for FMLA along with details about any forms utilized by the employer and details on how to take leave. We also would urge DOL to require more active outreach from employers to employees about how to take FMLA and how FMLA works and that DOL do such outreach directly to employees. This is particularly important right now as the new COVID emergency paid leave has created many questions about how FMLA and the new emergency leave work together. Complications from the pandemic and the complex nature of the health care system right now also demonstrate how hard it can be to schedule care ahead. We believe that DOL should emphasize, as the statute requires, that deference should be given to the treating health care provider and their judgment about what is possible in terms of notice.

⁷ Consortium for Citizens with Disabilities, Principles for Paid Leave (Feb. 11, 2020), http://www.c-c-d.org/fichiers/FINAL_CCD-Paid-Leave-Principles_2-11-20.pdf.

⁸ 2018 FMLA Study, *supra* note 1.

⁹ *Id.*

4) Health Care Provider Certification

We are concerned that DOL does not mention the crucially important privacy needs of people with serious health conditions in this discussion of health care certifications. For example, the suggested examples for health care providers to “describe other appropriate medical facts” in Form WH-380-E are use of a nebulizer and dialysis.¹⁰ No employee should have to disclose use of dialysis or a nebulizer in order to access leave and we do not believe that this example should be used. We would urge DOL to seriously consider the privacy rights of employees when drafting these forms and when considering any changes to the notice process.

5) FMLA Opinion Letters

We greatly appreciate DOL’s August 8, 2019 opinion letter that found participation in Individualized Education Program (IEP) meetings for an employee’s children qualified for FMLA. Specifically, DOL determined that the employee’s need to attend her children’s IEP meetings “addressing the educational and special medical needs of [her] children – who have serious health conditions as certified by a health care provider – is a qualifying reason for taking intermittent FMLA leave.” The DOL explained that attendance at the IEP meetings was essential to her ability to provide appropriate physical or psychological “care for” her children.

Unfortunately, IEP meetings are far from the only things that occur during standard work hours that parents of children with significant disabilities must attend to on a regular basis. For instance:

- Parents of children with behavioral challenges frequently are called to pick their children up early from school when they act out.
- Parents of children with disabilities who receive self-directed home and community based services are involved in the recruitment and supervision of direct support staff. With average annual turnover of such staff at over 51%, this can present significant time burdens on parents.¹¹

We would request that DOL conduct rulemaking to provide details on additional qualifying events for intermittent leave that are necessary for the care of children and adults with serious health conditions that are outside of purely medical contexts.

6) Other Comments

¹⁰ U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE’S SERIOUS HEALTH CONDITION UNDER THE FAMILY AND MEDICAL LEAVE ACT, OMB CONTROL NUMBER: 1235-0003 (2020), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-E.pdf>.

¹¹ National Association of State Directors of Developmental Disabilities Services and Human Services Research Institute, National Core Indicators Staff Stability Survey Report (2018), <https://www.nationalcoreindicators.org/upload/core-indicators/2018StaffStabilitySurveyReport.pdf>.

We will take this opportunity to also raise another issue that affects many people with disabilities and their family members. As the recent 2018 survey data says, “[m]ore than half (56 percent) believe that FMLA covers more situations than it does (e.g., care for a sibling or grandchild with a serious health condition generally does not qualify).” This suggests that many siblings and grandparents are taking caregiving roles, something that our experience also confirms. It is clear from the statute that Congress intended for those who take on substantial responsibility caring for another to be included, since the statute covers caregivers who stand “in loco parentis.” Siblings, grandparents, domestic partners, and others would be eligible when they act “in loco parentis” - that is, when they assume the obligations of a parent to a child with a serious health condition.

We urge DOL to provide greater clarity regarding the in loco parentis standard. DOL’s July 2015 fact sheet provides useful information, but falls short in addressing the duration of the in loco parentis role. The fact sheet explains that persons in this role include those with “day-to-day responsibilities” of caring for or financially supporting the child, implying that persons without such responsibilities could also be eligible. In addition, the fact sheet states that “The fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent an employee from standing in loco parentis to that child.” Yet, the three brief examples provided which mention “ongoing responsibility,” “assuming responsibility”, and “co-parenting”¹² give the impression that the employee would have to have full time responsibility for the child. Therefore, we urge the DOL to provide additional examples which address situations that are common in the disability community. For instance, we believe these circumstances would meet the in loco parentis standard:

- An employee plans a three week leave to fly home to provide care to her sibling with Down syndrome because her aging mother who is the primary caregiver has been injured and is unable to provide care.
- An employee takes three weeks of unplanned leave to provide care to a cousin who is undergoing a mental health crisis.
- An employee must step in and care for a grandchild with a disability’s needs while the child’s primary caregiver parent is unavailable.

We urge DOL to conduct rulemaking to clarify that these circumstances and similar ones are covered by the FMLA.

Thank you for the opportunity to comment on these important issues. Please contact Bethany Lilly (lilly@thearc.org) or Annie Acosta (acosta@thearc.org) with any questions or for additional details.

¹² U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #28B: FMLA LEAVE FOR BIRTH, PLACEMENT, BONDING, OR TO CARE FOR A CHILD WITH A SERIOUS HEALTH CONDITION ON THE BASIS OF AN “IN LOCO PARENTIS” RELATIONSHIP (July 2015), <https://www.dol.gov/agencies/whd/fact-sheets/28B-fmla-in-loco-parentis>.

Sincerely,

American Music Therapy Association
Autism Society of America
Autistic Self Advocacy Network
Autistic Women and Nonbinary Network
Center for Public Representation
CommunicationFIRST
Easterseals
Epilepsy Foundation
Lutheran Services in America -- Disability Network
National Alliance for Caregiving
National Association of Councils on Developmental Disabilities
National Council on Independent Living
National Down Syndrome Congress
National Respite Coalition
Paralyzed Veterans of America
RespectAbility