

DOL Proposing Substantial Changes to Seven FMLA Forms

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On August 5, the Department of Labor (DOL) published a notice in the Federal Register soliciting comments concerning a proposed revision of seven FMLA forms. The DOL's intent is to improve the understandability and usefulness of the FMLA forms. Employers who want to comment on the proposed forms have until October 4, 2019 to submit their comments (information on where and how to send comments is below).

Although some of the changes are relatively minor and involve only modifying how information is requested, other changes are substantial and will require more employer and employee (and healthcare provider) involvement. Following are a few examples of significant changes:

Form WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition

The current Form WH-380 requests a modest amount of employer information in the first section – the employer's name and contact information, the employee's job title and regular work schedule, and the employee's essential job functions. The proposed new form requests the same information (although in a slightly different format), and also requires the employer to include three specific dates: (1) the date the employer learned of the employee's need for leave, (2) the date leave is to begin, and (3) the date by which medical certification must be provided.

Similarly, the second section - the healthcare provider section - has been redesigned and additional information required. For example, the provider is asked to indicate if the employee has a chronic condition, a permanent or long term condition (such as Alzheimer's), and/or a condition requiring multiple treatments (such as chemotherapy). Changes are being proposed for the section where the provider describes the amount of leave the employee will need.

Form WH-380-F Certification of Health Care Provider for Serious Health Condition of the Family Member

Significant changes are made in proposed Form WH-380-F. Similar to Form WH-380-E, the first section of the current form only requires the employer to provide its name and contact information. The new proposed form has a separate employer section where the employer is to provide information about when it learned of the need for FMLA, the date FMLA leave is to begin, and the date on which medical certification must be returned.

The employee section of the proposed form has been expanded to collect specific information such as a description of the type of care that the employee will provide to the family member. For example, there are check boxes for the employee to indicate if they will provide assistance with medical, hygiene, nutrition, or safety needs; transportation; physical care; and/or psychological care. The current form only asks the employee to describe the care. In addition in the proposed form, if a reduced work schedule is needed, the employee is asked to provide an estimate of the dates and amount of time estimated for the reduced work schedule.

Similar to Form WH-380-E, the healthcare provider section asks the healthcare provider to provide more information about the patient's medical condition and the employee's need for leave.

Form WH-381 Notice of Eligibility and Rights & Responsibilities

The current form is two pages using small font, whereas the proposed form is six pages. Even though the font is larger in the proposed form and some of the changes are reformatting intended to make the form more user-friendly (e.g., checkboxes are used), the proposed form contains substantially more instruction and requests more information. For example, there is a section called "Additional Information Needed." This new section, which is to be completed by the employer, is more specific about the certification forms to be provided and what could be reasonable documentation of the relationship between the employee and a family member. The proposed form also requests employer contact information. Section 3 – Notice of Rights and Responsibilities -- substantially expands upon the current Part B – Rights and Responsibilities for Taking FMLA Leave. The proposed form contains considerably more detail describing the employee's rights and responsibilities, such as a discussion of the "substitution of paid leave." It also has a Part C – Maintain Health Benefits – that tells the employee whom to contact about making arrangements to continue coverage along with general information about grace periods for paying required contributions. There is new material about other employee benefits such as pension.

Form WH-382 Designation Notice

The current 1-page form (small font) would be replaced by the proposed form (somewhat larger font) of 2 ½ pages. The proposed form requires the employer to provide more information such as checking a box to indicate the reason for which FMLA has been requested. The section requesting additional information to review an FMLA leave request has been reformatted and more explanation provided. The information provided for an approved FMLA leave has been reformatted and expanded. For example, the proposed form contains a series of checkboxes that the employer would use to indicate if the leave will be unpaid, if the employee is requesting to substitute paid leave, if the employer is requiring the substitution of paid leave, and if the FMLA

leave will be used at the same time as other types of leave such as workers' compensation leave. A checkbox would be used to report return-to-work requirements.

Form WH-384 Certification of Qualifying Exigency for Military Family Leave

Similar to the other forms, this form requires the employer to include the employee's name and to provide three dates: (1) when the employer learned of the need for leave, (2) when the leave is to begin, and (3) when the certification form must be returned. The current form only requires the employer's name and contact information. The new form expands the employee section and reformats the form to make it more user-friendly. Additional text, such as a paragraph explaining "in loco parentis" is included in the proposed form. The section where the employee indicates the reason for the qualifying exigency leave is expanded and uses checkboxes and short blank spaces where the employee may provide specific information such as the military event and related activity if the leave is related to military service. The current form simply asks the employee to describe the reason for the leave in a paragraph form. The section where the employee indicates the amount of leave needed and when has been reformatted with additional information requested such as starting and ending dates for a reduced schedule.

Form WH-385 Certification for Serious Injury or Illness of a Current Servicemember for Military Leave

The proposed form has been reformatted and includes additional explanatory text intended to make it easier for employees to use. For example, in the employee information section "next of kin" and "in loco parentis" are defined for the employee. In the current form, the section "Care to be Provided to the Servicemember" simply asks the employee to describe the care to be provided. The proposed form uses checkboxes to ask the employee what type of care – such as assistance with basic medical or safety needs, physical care or transportation – and also asks the employee to give an estimate of the amount of leave that will be needed. The employee is also asked to provide additional information if a reduced work schedule will be necessary. The medical information section to be completed by the healthcare provider has also been expanded.

Form WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

The current form has a "notice to the employer" at the beginning, but no section for the employer to complete. The proposed form has a section for the employer to complete. The information is not extensive, but it is more than employers have needed to do in the past. The new employer section requires the employee's and employer's name and

three dates: (1) the date the employer learned of the employee’s need for leave, (2) the date leave is to begin, and (3) when certification must be returned. In the proposed form, the employee section is expanded to explain terms such as “next of kin” and “in loco parentis.” The section “Care to be Provided to the Veteran” would be changed from two blank lines that the employee uses to describe that care to three questions that include checkboxes. The proposed form also requires the employee to provide an estimate of the amount of leave needed and information if a reduced work schedule will be needed. Interestingly, the proposed form would eliminated about ½ page of instructions to the healthcare provider. The information required from the provider is similar, but reformatted and expanded somewhat.

Current and Proposed Forms

The new proposed forms represent a very significant change from the forms currently in use. They will require employers, employees, and healthcare providers to adjust to a new format and in most cases provide more information than has been provided in the past. As a result, employers may want to look at the current and proposed forms and provide their comments to the DOL. In order to make it easier to find both sets of forms, we have included a chart with links to each one.

Form Number	Current Version	Proposed
WH-380-E (May 2015)	https://www.dol.gov/whd/forms/WH-380-E.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-380-E.pdf
WH-380-F (May 2015)	https://www.dol.gov/whd/forms/WH-380-F.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-380-F.pdf
WH-381 (Feb 2013)	https://www.dol.gov/whd/forms/WH-381.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-381.pdf
WH-382 (Jan 2009)	https://www.dol.gov/whd/forms/WH-382.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-382.pdf
WH-384 (Feb 2013)	https://www.dol.gov/whd/forms/WH-384.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-384.pdf
WH-385 (May 2015)	https://www.dol.gov/whd/forms/WH-385.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-385.pdf
WH-385-V (May 2015)	https://www.dol.gov/whd/forms/wh385V.pdf	https://www.dol.gov/whd/fmla/forms/2019/WH-385-V.pdf



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How to Submit Comments

Employers may submit comments identified by **Control Number 1235-0003**, by either of the following methods:

- Email – WHDPRAComments@dol.gov
- Mail, hand delivery, or courier Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210

Employers are asked to submit comments by only one method. **All submissions must include the agency name and Control Number indicated above. All comments must be received on or before October 4, 2019.**

The intent of this article is to provide general information on employee benefit issues. It should not be construed as legal advice and, as with any interpretation of law, plan sponsors should seek proper legal advice for application of these rules to their plans.