HR Professionals Struggle over FMLA Compliance, SHRM Tells the DOL

SHRM recommends fixes for wage and hour issues

By Stephen Miller, CEBS
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In a Sept. 15 letter to the U.S. Department of Labor (https://advocacy.shrm.org/wp-content/uploads/2020/09/September-15-2020-FMLA-RFI-Response-Final.pdf) (DOL), the Society for Human Resource Management (SHRM) highlighted many of the challenges and frustrations that confront HR professionals as they comply with the federal Family and Medical Leave Act (FMLA).

"SHRM supports the spirit and intent of the FMLA, and our members are committed to ensuring employees receive the benefits and job security afforded by the act," wrote Emily M. Dickens, SHRM's corporate secretary, chief of staff and head of Government Affairs. "While it has been more than 25 years since FMLA was enacted, SHRM members continue to report challenges in interpreting and administering the FMLA."

The letter, developed with input from SHRM members, was in response to a request for information (https://www.federalregister.gov/documents/2020/07/17/2020-14873/family-and-medical-leave-act-of-1993) issued by the DOL's Wage and Hour Division on July 17. The DOL solicited comments and data "to provide a foundation for examining the effectiveness of the current regulations in meeting the statutory objectives of the FMLA."

According to Ada W. Dolph, a partner at Seyfarth Shaw who practices labor and employment law in Chicago, “SHRM’s comments echo what we are hearing from clients in terms of their challenges in implementing FMLA leave, particularly now with the patchwork of additional state and local leave requirements that have emerged as a response to COVID-19."

She added, "Our experience shows that regulatory gray areas add significant costs to the administration of the FMLA and impact the consistency with which the FMLA is applied to employees. We are hopeful that [the DOL] will implement SHRM’s proposed revisions, which provide much-needed clarity for both employers and employees."

Wide-Ranging Challenges

In its comment letter, SHRM addressed several issues its members have reported:

CHALLENGES WITH CONSISTENTLY APPLYING THE REGULATORY DEFINITION OF A SERIOUS HEALTH CONDITION

"Continuing treatment by a health care provider" as currently defined in federal regulations creates uncertainty for SHRM members on how to treat an absence of more than three consecutive days, according to SHRM's letter. "If there is not 'continuing treatment,' then it does not constitute a 'serious health condition' under the regulations," the letter explained. "However, if the employee does receive additional treatment, it's not clear whether these initial three absences are related to a serious health condition."

SHRM pointed out that several members "have suggested increasing the time period of incapacity, indicating they spend a lot of time processing employee certifications for missing four days that they believe more readily falls under sick time or paid time off."

Further guidance, including criteria and examples of when employers may obtain second and third medical opinions, "would be helpful, as many SHRM members reported declining to challenge an employee's certification at all because the conditions under which they may challenge those certifications are unclear or cumbersome," SHRM said.

Members also reported that obtaining documentation from health care providers on the need for employees to take leave to care for a family member with a serious health condition was difficult, and that doctors were often vague about identifying how the employee fits into the caregiving equation.

CHALLENGES WITH INTERMITTENT LEAVE

SHRM members reported that intermittent leave-taking is the most likely FMLA leave to be abused by employees.

"Employees are permitted to take incremental leave in the smallest increment of time the employer pays, as little as .10 of an hour, which members reported allowed employees to use the time to shield tardiness or other attendance issues," the letter read. "SHRM strongly urges [the DOL] to increase the minimum increment of intermittent or reduced schedule leave that is unforeseeable or unscheduled, or for which an employee provides no advance notice." SHRM suggested several alternative approaches.

For instance, the DOL could:

- Require that employees take unforeseeable or unscheduled intermittent or reduced schedule leave in half-day increments, at a minimum.
- Establish a smaller increment, such as two hours, that automatically applies in any instance in which an employee takes unscheduled or unforeseeable intermittent or reduced schedule leave.

Additionally, when an employee takes intermittent or reduced FMLA leave, an employer may transfer an employee to an alternative position. However, under current regulations, employers may only require such a transfer when the leave taken is for "a planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery...."

"Given the potential burden and hardship that intermittent and reduced-schedule leave have on employers, SHRM believes that an employer should be permitted to temporarily transfer an employee on intermittent or reduced-schedule leave to an alternative position, regardless of whether the leave is foreseeable or unforeseeable or whether it is scheduled or unscheduled," SHRM told the DOL.

[Need help with legal questions? Check out the new SHRM LegalNetwork (www.shrm.org/ResourcesAndTools/business-solutions/Pages/LegalNetwork.aspx)*.]*

CHALLENGES REGARDING EMPLOYEES WHO ARE CERTIFIED FOR INTERMITTENT LEAVE FOR CONSECUTIVE YEARS

Employees continue to regularly exhaust and replenish their 12-week FMLA entitlement, based on the rolling 12-month entitlement period, SHRM members reported.

"Combined with the Americans with Disabilities Act Amendments Act requirements to accommodate absences under some circumstances, these unrelenting absences become unreasonable and unduly burdensome to employers," SHRM commented.

Similarly, many SHRM members reported being frustrated that there weren't more mechanisms to challenge potential abuses of intermittent leave (e.g., when employees take every Friday or Monday off).

FRUSTRATION WITH EMPLOYEES NOT PROVIDING SUFFICIENT NOTICE OF THE NEED FOR LEAVE

Many employees provide notice of even foreseeable leaves *after* the leave has begun, noted SHRM, which recommended that notice of foreseeable leave be required prior to the commencement of leave and not "as soon as practicable."

SHRM also suggested that "a more definitive requirement be imposed so that employees understand clearly that they must provide notice of leave prior to beginning leave," and that "if an employee does not give advance notice, it should be the employee's burden to articulate why it was not practicable to provide such notice prior to the start of the leave. If they are unable to meet this burden, the regulation should permit and specify the consequences."

[SHRM members-only content: FMLA Checklist for Individual Leave Request (www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/fmlaquestionnaire.aspx)*]*

DIFFICULTIES OBTAINING TIMELY RESPONSES FROM EMPLOYEES AND THEIR PHYSICIANS TO SUPPORT THE REQUESTED LEAVE

If an employee fails to provide sufficient information to demonstrate that he or she may seek FMLA leave, then the employee can be required to provide additional information "to determine whether an absence is potentially FMLA-qualifying," SHRM explained. "However, there is no deadline by which the employee must provide this clarifying information, resulting in extensive, continued delays and continued administrative burdens."

SHRM recommended tightening this time frame to seven days and that the DOL "endeavor to provide firmer and clearer deadlines and notice requirements throughout the regulations."

SHRM members also reported that health-provider fees for completing paperwork often slowed or halted the certification process and asked whether providers' ability to impose these fees could be limited.

Additional Concerns

SHRM commented on other issues, as well:

- SHRM members reported struggling with how to effectively reconcile FMLA with other leave laws enacted in the wake of the COVID-19 pandemic.
- Overall, SHRM members expressed satisfaction with recently updated FMLA forms (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/guide-new-fmla-forms.aspx). However, members continue to report that the information received from medical providers is often unclear and that they struggle to determine whether the reported condition constitutes a serious health condition.
- The new forms do not account for the possibility that an employee does not qualify for FMLA because the employee doesn't meet the requirement of being unable to perform the functions of his or her job. "As such, we suggest that the medical provider be given the option to indicate that an employee does not meet this requirement," SHRM wrote.
- Many members suggested that the DOL allow completion of online forms to speed processing times and reduce the administrative burdens of processing FMLA leave.

[Visit SHRM's resource page on the Family and Medical Leave Act (www.shrm.org/ResourcesAndTools/Pages/Family-and-Medical-Leave-Act.aspx)*.]*

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