



September 15, 2020

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Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**Re: Request for Information Regarding the Family and Medical Leave Act of 1993,  
85 FR 43513 (July 17, 2020), RIN 1235-AA30**

Dear Director DeBisschop:

On behalf of the Restaurant Law Center (the “Law Center”) and the National Restaurant Association (the “Association”), we appreciate the opportunity to submit our comments on the Request for Information (the “RFI”) issued by the Wage and Hour Division (“WHD”) and published in the Federal Register on July 17, 2020, regarding the regulations and subregulatory guidance WHD has issued implementing and interpreting the Family and Medical Leave Act of 1993 (the “FMLA”). We hope that sharing with you the experiences and concerns of our members will aid the WHD in formulating future compliance assistance materials.

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets

employing 15.6 million people—approximately 11 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation’s second-largest private-sector employers.

Jointly, the Law Center and the Association provide regulatory agencies and the courts with the industry’s perspective on regulatory interpretation that have the potential to significantly impact the foodservice industry. Restaurants are job creators and the nation’s second-largest private sector employer. Despite the size of the Industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses. Thus, it is especially important that WHD provide clear guidance that informs small business owners, as well as their employees, what the law allows and requires to help restaurants continue growing, creating jobs and contributing to a robust American economy.

### **Salient Characteristics of the Industry**

The compliance challenges that the FMLA can present to employers are especially acute in the restaurant industry. This is true for a number of reasons.

First, even before COVID-19, restaurants have traditionally operated with small profit margins relative to other businesses, averaging just 6.1% of sales for full-service restaurants and 6.6% of sales for limited-service restaurants, before taxes. *See* National Restaurant Association and Deloitte & Touche LLP, *Restaurant Operations Report* at 5, 10, 37 (2016 ed.). This means that businesses in the industry have very little ability to absorb increased operational costs associated with FMLA compliance, particularly costs associated with the practical business necessity of taking risk-averse positions to avoid expensive litigation in areas where the standards are ambiguous.

Second, COVID-19 has devastated the industry, and disproportionately relative to the burdens faced by other industries in these challenging times. According to U.S. Census Bureau figures, between March and June of 2020, sales at eating and drinking places, which are the primary component of the foodservice industry in the nation and historically account for 75% of total industry sales, were down more than \$116 billion from expected levels. A large percentage of the businesses in our industry have either had to limit operations substantially during the pandemic due to local governmental requirements or else shut down entirely.

And even in areas where the local authorities have allowed restaurants to remain fully open, the public has understandably been wary of venturing out and being around other people. As a result, an enormous number of restaurants have already gone out of business or are teetering on the edge of insolvency, and many other restaurants that have closed during the pandemic will ultimately not be able to reopen. Once the pandemic passes, it will take the industry months, if not years, to recover to pre-COVID levels.

As a result of the erosion of already-low profit margins stemming from COVID-19, businesses in the restaurant industry are especially ill equipped to shoulder the burdens imposed by ambiguous legal standards. In the real world of restaurant workplaces, the absence of clear guidance from WHD typically translates into acceding to an employee's request for leave in order to avoid entanglement in potentially crippling litigation. The Law Center and the Association strongly support employees' FMLA rights, and the industry strives to provide its workforce with the full protections of the law.

What restaurants object to, however, is the added layer of expense and operational inefficiency imposed by gray areas left unaddressed by WHD's FMLA guidance. Ultimately, it

is in the interests of workers to have clarity regarding FMLA rights and obligations, because clear standards that reduce unnecessary cost burdens on employers thereby allow vulnerable businesses like restaurants to remain in business and to continue to employ their workers.

### **Specific Areas of Concern in our Industry**

#### *Serious Health Concern*

Our members report that it is often very difficult to determine what is and is not a serious health condition. WHD's guidance provides some help in this regard, but a lot of gray areas remain. The practical result is that many of our members feel forced to treat every condition as a serious health condition *unless* there is WHD guidance clearly stating that a condition does *not* meet that standard.

In today's environment, for example, questions arise regarding COVID-19. Is fear of COVID for a pregnant employee a serious health condition? A pregnant employee may produce a doctor's note saying that the employee should not be working in a restaurant due to a perceived elevated risk of exposure to COVID. Is that a serious health condition?

#### *Intermittent Leave*

Probably the number one issue raised by our members regarding FMLA deals with intermittent leave. By its very nature, intermittent FMLA leave, particularly when it is unforeseen or unplanned, is harder for employers to track and becomes an even bigger challenge when an employee forgets to report intermittent leave taken as FMLA, which happens often. Sometimes, the employee might mention it to a supervisor and the supervisor fails to inform Human Resources.

A separate form for employees to submit for FMLA intermittent leave might be useful. Once the reason for the FMLA leave has been approved and documented, the employee could be provided with the appropriate form to submit for each instance of intermittent leave to eliminate the guess work or trying to fix issues after the fact. A separate intermittent FMLA leave form might also make it easier for employees to remember to provide the right reason and information for such leave.

This could also help alleviate instances where employees purposely ignore mandatory shift reporting procedures, and then report the absence as FMLA-qualifying after-the-fact with no additional reason provided. The employer might still be unable to verify that an unscheduled absence is in fact caused by a chronic serious health condition, but a box stating the reason, such as “treatment” or “flare-up,” would help document the FMLA leave taken. This would be particularly helpful when a doctor’s note substantiating the need for intermittent leave only says “as needed.”

As stated earlier, scheduled unpaid leave does not create the same issues as intermittent leave. When an employee and her manager have an opportunity to discuss the situation and prepare a plan of action that takes into consideration both the employee’s and employer’s needs our experience shows us that these leaves can be effectively given. On the other hand, unplanned intermittent leave, creates a significantly greater burden on the employer and other employees.

#### Medical Certifications

One challenge our members face is what happens after they require an employee to provide a certification issued by a health care provider, particularly when an employee reports a

need to care for a family member. Here, restaurants raise two specific areas of concern, i.e., cost and time.

First, health care providers get to charge for completing the certification forms. With reports of doctors charging on average \$25 to \$30 dollars, but some much more than that, it is our members view that some employees might not be seeking the necessary forms to avoid the extra cost. If possible, the agency might want to consider capping the cost for completing these forms closer to the \$5 to \$10 range to make them more affordable for our workforce—many of which are part-time workers that still meet the FMLA threshold for eligibility.

Second, as to timing, health care providers often delay completing the required form, if they complete them at all. In many instances, the employee provides little or no advanced notice of the need for the leave. Practically speaking, the default often ends up being to take the employee's word for it and to hope that the employee can eventually produce a certification. Our members would appreciate a mandatory time frame for health care providers to complete the certifications.

Restaurants rely on employees to get the certifications within a reasonable time frame. An employee that is already dealing with a situation that required her/him to take FMLA should not have to add hounding a health care provider for a certification. Thus, health care providers should be held to a mandatory reasonable time standard to help the workers complete the process in an orderly fashion with their employers.

On an unrelated related note, the employee is often not the only individual in a household who can provide care to a family member with a serious health condition. May an employer consider this fact in deciding whether to approve FMLA leave? May employers at least discuss

with the employee whether other arrangements are possible that could minimize the disruption in the workplace? This situation is especially challenging for our members when they are already aware of others in the household who do not work and who are able to provide the necessary care for the relative, but the employee nevertheless wants time off.

### Return from Leave

A recurring issue for our members is what to do about scheduling an employee who returns from FMLA leave. Must the restaurant provide the employee with exactly the same schedule as the employee had before the leave, or is there flexibility—and, if so, how much—regarding which specific days, shifts, and total hours the employee receives?

Our members normally aim to put the returning employee into the same schedule as the employee had before the leave, but many restaurant employees do not have a fixed and recurring weekly schedule, and instead have shifts and hours that change from week to week. On top of that, it is common in restaurants for employees to trade shifts from time to time. In that circumstance, what is the employer's obligation with respect to scheduling the returning employee?

These are just a few suggestions as well as areas of concern that our members have regarding FMLA compliance. Any assistance and additional clarity WHD can provide regarding how to manage these issues, or best practices WHD can suggest, would provide much needed assistance to our members in meeting their FMLA obligations while remaining a going concern.

### **In Closing**

We appreciate the opportunity to provide feedback on the regulations and subregulatory guidance WHD has issued implementing and interpreting the FMLA. On behalf of the

Amy DeBisschop  
Re: RFI on the FMLA, RIN 1235-AA30  
September 15, 2020

Restaurant Law Center, the National Restaurant Association, and the industry we represent, we thank you for the opportunity to submit our comments and thank you for your attention to this matter.

Sincerely,



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\*We would like to thank outside counsel for his assistance in drafting these comments:

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