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Guide

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Guide to the New FMLA Regulations

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On January 16, 2009, the U.S. Department of Labor's (DOL) revised regulations interpreting the Family Medical Leave Act (FMLA) took effect. These regulations substantially overhaul the original regulations and require covered employers – those with 50 or more employees – to adopt significant changes to their FMLA policies immediately to avoid violations of employee rights. This guide highlights the major regulatory revisions and provides critical guidance to ensure your company's compliance with these new requirements. All DOL posters and forms referenced in this guide are available at the DOL's website, www.dol.gov/esa/WHD/forms.

I. NEW EMPLOYER NOTICE REQUIREMENTS

Under the revised regulations, employers must now provide three notices to employees concerning FMLA rights: 1) a General Notice; 2) an Eligibility and Rights & Responsibilities Notice; and 3) a Designation Notice. Although employers are free to devise their own notice forms, we generally recommend employers utilize the prototype forms issued by the DOL to ensure compliance with the new regulations. When circumstances warrant, additional employer requirements and information may be addressed in an accompanying document provided to the employee.

- A. The General Notice:** Covered employers must post *and* distribute to all employees a general notice of FMLA rights, but the new regulations impose the following additional requirements:
- i. Posting:** The DOL poster issued in 1995 is no longer compliant with the regulations' notice requirements. Notably, the DOL's revised **Notice to Employees of Rights Under FMLA, Form WH-1420**, incorporates the Military Family Leave entitlements now available under the FMLA. This notice (or a substantive equivalent) must be physically or, if all employees have electronic access, electronically posted.
 - ii. Distribution through Employee Handbooks:** Employers are now required to include the general notice of FMLA rights in an employee handbook or policy manual. If the employer does not maintain a handbook/policy manual, the notice must be provided to new employees at the time of hire.

Practice Tip: The New Jersey Family Leave Act (NJFLA) also requires the posting and/or distribution of a general notice of rights under the NJFLA. While the FMLA and NJFLA provide similar leave rights, there are important eligibility and coverage differences in these statutes. To comply with both statutory obligations, New Jersey employers should incorporate US DOL Form WH-1420, pertaining to FMLA rights, and the New Jersey Family Leave Act poster (available at <http://www.nj.gov/oag/dcr/posters.html>), pertaining to NJFLA rights, into their employee handbooks and FMLA policies. However, inclusion of these notices does not negate the need to develop a customized family/medical leave policy to reserve important employer rights, address administrative requirements (e.g., the process for submitting a leave request), and explain the interrelationship between the FMLA, NJFLA and other statutes and policies.

B. The Eligibility and Rights & Responsibilities Notice: Absent extenuating circumstances, a notice of eligibility must be provided by the employer to its employee *within five business days* (compared to two days under the prior regulations) of a leave request. If the employee is deemed ineligible for leave, the employer must provide *at least one* reason for the ineligibility; e.g., the employee is ineligible for FMLA leave because he/she has not been employed for at least 12 months.

The notice of eligibility must now be accompanied by a notice of employee rights and responsibilities under the FMLA. The DOL's **Notice of Eligibility and Rights & Responsibilities, Form WH-381**, contains the following information that must be included in the notice:

- whether a medical certification is required;
- the employee's continuation of health premium contributions and the employer's right to reimbursement if the employee fails to return to duty;
- the option or requirement to substitute paid time off benefits during the leave;
- whether periodic reports are required during the leave;
- the applicable statutory leave entitlement (12 or 26 weeks);
- reinstatement rights.

C. The Designation Notice: Once an employer has sufficient information to determine whether the employee qualifies for FMLA, absent extenuating circumstances, the employer has *five business days* (compared to two business days under prior regulations) to provide written notice that the leave has been designated as FMLA leave *or* notice specifying what additional information is needed to make the determination. The DOL's **Designation Notice Form WH-382** contains the following information that must now be included in the notice:

- If required by employer policy, a statement that employee will be required to substitute paid leave during the FMLA leave period.
- The amount of time that will be credited towards the employee's 12 week FMLA entitlement or, if the amount of leave time is indefinite or unscheduled, notice of the employee's right to request this information once in a 30-day period.
- If a fitness-for duty certification is required upon return from leave, a statement to that effect *along with a* list of the employee's essential job duties for presentation to the certifying physician.

D. Retroactive Designation of FMLA Leave: The revised regulations permit employers to retroactively designate a leave of absence as FMLA *unless* the employee demonstrates actual harm from the employer's failure to make a timely designation.

II. THE EMPLOYEE'S NEW PROCEDURAL REQUIREMENTS

The following revisions were made to require more stringent notice requirements on the part of employees seeking foreseeable and unforeseeable FMLA leave:

- A. Unforeseeable Leave:** Notice of leave must now be given to the employer "as soon as practicable under the facts and circumstances" (compared to one to two business days under the prior regulations).
- B. Compliance with the Employer's Notice and Call-In Procedures:** Absent unusual circumstances, employers can now require employees seeking leave to comply with the company's procedural requirements for requesting a leave and/or reporting an absence. Failure to do so may be grounds for delaying or denying a leave request and customary disciplinary action.
- C. Scheduling Intermittent Leave:** Employees are now obligated to make "a reasonable effort" (compared to "attempt" under the prior regulations) to schedule an intermittent leave so that it does not unduly disrupt the employer's operations.

Practice Tip: These employee notice requirements can be a valuable tool in curbing employee abuse of FMLA rights. However, the regulations caution that employers cannot delay or deny a leave request due to the employee's failure to comply *unless* the employee has had actual notice of the FMLA's notice requirements, which can be satisfied through the general notice requirements discussed above.

III. THE REVISED ELIGIBILITY REQUIREMENTS

To be eligible for FMLA rights, an employee must have worked for the employer for at least 12 months and for 1,250 hours in the previous year. The revised regulations clarify

when an employee meets these eligibility requirements:

- A. Breaks in Service:** The 12 months service requirement need not be consecutive. However, breaks of service for seven years or more need not be counted by the employer *unless* i.) the break was to fulfill military obligations; or ii.) the break was for approved absences, such as for child-rearing purposes – provided there is a written agreement reflecting the employer’s intent to rehire the employee. To comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act, time spent fulfilling military service in the National Guard or Reserve will count towards the employees 1,250 hours and 12 months requirements.
- B. Subsequent Eligibility for FMLA Leave:** Under the prior regulations, several courts reasoned that an employee on a non-FMLA leave of absence who subsequently satisfied the FMLA’s eligibility requirements was nevertheless ineligible for FMLA rights. To negate those decisions, the revised regulations specify that so long as the employee is still on the employer’s payroll and receiving other benefits, FMLA rights attach once the employee has met the FMLA’s eligibility requirements.

Practice Tip: This revision will typically come into play when an employer grants an unpaid leave of absence to an employee as a form of reasonable accommodation for a disability prior the employee’s 12 months of service, and during that leave the employee meets the service requirement. Under these circumstances, employers are cautioned that the leave may not be retroactively designated to the first day of absence because the employee was not eligible for FMLA at that time.

IV. CLARIFICATION OF THE SERIOUS HEALTH CONDITION REQUIREMENT

Despite urging from employer groups, the DOL declined to change or clarify the definition of a “serious health condition” – an illness, injury, impairment, or physical/mental condition that involves inpatient care or “continuing treatment” by a healthcare provider. However, two revisions are aimed at clarifying what medical treatments are needed to satisfy this definition.

i. The “continuing treatment” requirement: previous regulations required a showing that the employee or covered family member was incapacitated for more than three calendar days *and* i.) had one visit to a healthcare provider followed by a regimen of continuing treatment (such as a prescription drug treatment), *or* ii.) had two or more visits to a healthcare provider. The DOL included the following clarifications to this test:

- The employee or family member must be incapacitated for three consecutive *full* calendar days;

- To meet the “two or more visits to a healthcare provider” prong, the first two visits *must* occur within 30 days of the first day of incapacity, absent extenuating circumstances, with the first visit occurring within the first seven days of incapacity.

ii. Definition of “Chronic Serious Health Condition”: this definition was changed to require visits to a health care provider *at least twice a year*. However, employees suffering from chronic conditions qualify even if no treatment was provided during the absence period.

Practice Tip: Unfortunately, these changes may leave employers uncertain about whether an absence qualifies for FMLA protection because the employee now has up to 30 days to have the second treatment/visit, or in the case of chronic conditions, up to one year. Hopefully, future treatments/visits will be addressed in the physician certification, enabling the employer to make a timely designation.

V. CHANGES IN PREGNANCY AND BIRTH LEAVE

The DOL made the following clarifications for leave associated with pregnancy and the birth of a child with a serious health condition:

- FMLA leave is available to expectant mothers prior to birth for prenatal care or if she is unable to work due to her medical condition even if the absence does not last three days and no medical treatment is sought during the leave period (e.g., a pregnant employee suffering from morning sickness).
- FMLA leave is available to a *husband*, (not a boyfriend, the child’s father, etc.) to care for an incapacitated expectant spouse, including for the purposes of providing psychological comfort or support.
- Two weeks of leave are available to *both* parents working for the same employer to care for a newborn child with a serious health condition.

VI. CHANGES IN EMPLOYEE LEAVE ENTITLEMENTS

A. Treatment of Holidays During the Leave Period: Under the revised regulations, holidays falling during the leave period may be counted towards the FMLA allotment *if* the employee is taking a full week of leave that week. If less than a full week is being taken, the holiday *may not* be counted unless the employee was otherwise scheduled to work on the holiday.

B. Modifications to Intermittent/Reduced Leave:

i. Counting Increments of Intermittent/Reduced Leave: Generally, an employer can only count time actually away from the workplace against the FMLA allotment. The revised regulations clarify the application and

exceptions to this principle:

- Where the employee is physically unable to get to the worksite after a shift begins (e.g., a flight attendant), the employer may charge the employee with more FMLA leave than needed.
- Employees unable to work *mandatory* overtime can be charged FMLA time for that period.
- Employers may account for leave using increments no greater than the shortest period of time utilized to account for other types of leave, *provided* the time period charged is no greater than one hour.

C. Substitution of Paid Leave: The prior regulations placed limitations on what types of paid time off (sick time, vacation time) could be substituted during an FMLA leave, depending on the reason for the leave. The revised regulations now specify that the employee must follow the employer's paid leave policies when substituting paid benefits during an FMLA leave. Thus, an employee may be required to utilize a full PTO day even if only two hours are needed so long as the employer's policy prohibits the use of PTO benefits in increments of less than a full day.

However, when an employee is receiving disability or workers compensation benefits, the substitution rules *do not apply* and substitution is not permitted. If disability/workers compensation benefits do not fully replace the employee's income, the employer and employee may agree to supplement these benefits with paid leave benefits.

Practice Tip: New Jersey employers must also be mindful of the additional substitution limitations imposed by the recently enacted Paid Family Leave Act ("PFLA") that goes into effect on July 1, 2009. The PFLA provides qualifying employees with up to six weeks of paid leave to care for a family member, but permits employers to require substitution of up to only two weeks of PTO benefits during that leave. Thereafter, the employee may collect PFLA benefits for the remaining four weeks but the employer may not require substitution of any remaining PTO benefits until the six weeks of PFLA is exhausted.

D. Bonus/Perfect Attendance Awards: Employers are now permitted to deny both perfect attendance awards and achievement bonuses (e.g., sales quota bonuses) not met because of the use of FMLA leave, provided employees taking leave for non-FMLA purposes are similarly treated.

E. Light Duty: If an employee voluntarily accepts a light duty position rather than an unpaid FMLA leave, time spent in the light duty position does not count against the employee's FMLA entitlement. *However*, the employee's right to reinstatement to the former position expires at the end of the 12-month leave year used to calculate FMLA leave.

VII. MEDICAL CERTIFICATIONS

The DOL made the following changes to the medical certification process aimed at facilitating the employer's efforts to secure medical information:

- A. New Medical Certification Forms:** The DOL's single certification prototype form has been replaced by two new prototype forms: i.) **Form WH-380E** to be utilized when the employee is seeking leave for his/her own serious health condition, and ii.) **Form WH-380F** to be utilized when the employee is seeking leave to care for a family member.
- B. Authentication and Clarification of a Medical Certification:** Employers are now permitted to communicate directly with a healthcare provider to authenticate a medical certification without the employee's permission. If the employer seeks clarification of a certification, the healthcare provider may be contacted directly, subject to HIPAA requirements. Contact may be made by an HR professional or leave administrator or manager. In no event should the employee's immediate supervisor make the contact.

If the certification is incomplete or insufficient, the employer must give written notice specifying the additional information needed and permit the employee seven days to cure those deficiencies. If the employee fails to cooperate, a leave request may be denied.

- C. Recertification:** The DOL provided the following clarification with respect to an employer's ability to request recertification from the healthcare provider:
- An employer may request recertification every 30 days *unless* the initial certification states that the minimum duration of the condition is more than 30 days. More frequent recertification is permitted only if i.) the employee is seeking an extension of leave; ii.) there has been a significant change in the circumstances stated in the previous certification; or iii.) the employer receives information that casts doubt on the validity of the initial certification.
 - For employees on an intermittent or reduced leave in excess of six months, the employer is permitted to request certification every six months.
 - For chronic conditions lasting more than a year, the employer may request an annual certification.
- D. Fitness for Duty Certification:** The revised regulations permit an employer to require a fitness-for-duty (FFD) certification addressing the employee's ability to perform essential job functions. However, this requirement cannot be imposed *unless* the employer i.) advises the employee of this requirement in the Designation of Leave Notice, and ii.) provides the employee with a list of essential job functions to be provided to the healthcare provider.

Additional revisions to the FFD regulations include:

- Employers cannot obtain a second opinion on a FFD certification.
- For employees on a reduced/intermittent leave, an FFD certification may be required once every 30 days *if* “reasonable safety concerns” exist regarding the employee’s ability to safely perform job duties.
- Reinstatement may be denied to employees who fail to timely provide the FFD certification.

VIII. MILITARY SERVICE MEMBER LEAVE

The DOL issued its first interpretive regulations addressing the new leave entitlements under the recent FMLA amendments – Injured Service Member Leave and Qualifying Exigency Leave.

A. Injured Service Member Leave: Qualifying employees are entitled to 26 weeks of leave in a 12-month period to care for a covered service member with a serious injury or illness.

i. Coverage/Eligibility:

- A covered service member is defined as a current member of the Armed Forces, National Guard or Reserve, including those on a temporary disability list. Those on a permanent disability list are not covered.
- Employees may take leave to care for a spouse, parent, child, or “next of kin,” defined as the service member’s nearest blood relative.
- Unlike all other forms of FMLA leave, the injured service member’s leave year is a single 12-month period commencing on the first day the employee takes leave.
- Leave is applied on a per-covered service member, per injury basis, but a maximum of 26 weeks of leave is available.

ii. Certification Requirements:

- The employer may obtain additional details about the service member’s medical condition, including whether the injury occurred in the line of duty, to ensure the required nexus with active service.
- The regulations related to recertifications and second or third opinions do not apply.
- The employee may be required to provide proof of the relationship to the service member.

The DOL has issued a **Certification for Serious Injury or Illness of Covered Service Member for Military Family Leave Form, WH-385F**, which employers may opt to utilize for service member leave.

B. Qualifying Exigency Leave: Qualifying employees are entitled to 12 weeks of leave due to a “qualifying exigency” arising out of the fact that a covered family member has been called up for active duty.

i. Coverage/Eligibility:

- The family member is limited to the employee’s spouse, child or parent – “next-of-kin” is not included.
- Leave is not available to employees with family members in the regular armed forces.
- A “qualifying exigency” includes: short notice deployment; activities related to the call to active duty; childcare/school activities; making financial or legal arrangements; counseling; rest and recuperation for up to five days per leave to spend with a service member on short-term leave; and post-deployment activities.

ii. Certification Requirements: During the certification process the employer may request the following information:

- Copies of the service member’s military documentation and additional information regarding the nature of the exigency;
- In the event the exigency is to meet with a third party (e.g., a financial planner), the employee may be required to provide information about the third party and the nature of the meeting so that the employer can verify the need for the leave.

The DOL has issued a **Certification for Qualifying Exigency for Military Family Leave Form, WH-384**, that employers may utilize for exigency leave requests.

IX. WAIVER OF FMLA RIGHTS

In response to conflicting decisions from the courts, the DOL revised the regulations to clarify that employees may voluntarily settle or release past FMLA claims without obtaining approval from the DOL or the courts.



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