

ARE YOU READY FOR THE NEW FMLA REGULATIONS?

by Dora Lane

The United States Department of Labor (DOL) promulgated new regulations applicable to the Family and Medical Leave Act (FMLA), effective January 16, 2009. The regulations change the current FMLA-compliance framework. Additionally, the DOL has published new FMLA forms that can be used for FMLA requests as of January 16, 2009. Given the short timeframe between the new regulations' publication and their effective date, links to these forms have been included within the article for your convenience. Be advised that the DOL forms do not reflect all rights employers have under the FMLA regulations and employers should seek advice of counsel to create forms tailored to their business. Employers should also carefully examine their FMLA policies and procedures to ensure consistency with these new regulations. Here are the highlights of the relevant changes.

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A. Eligibility. The former eligibility standard remains, with the exception of calculating whether the employee has worked for at least 12 months, in which case, consideration of past employment over 7 years ago does not count. Exceptions for service breaks as a result of military leave or the existence of rehire agreements (including Collective Bargaining Agreements (CBA)) that anticipate rehire after the break in service (e.g., for education or child rearing) apply. Employees who return from military service receive credit toward the 1,250-hour eligibility requirement for the hours they would have worked, but for the military service. Further, in determining whether the employee works in a location where at least 50 other employees work within 75 miles, the employee is counted as employed in the worksite where he or she reports/receives assignments (e.g., a construction management team from Las Vegas on-site in Reno is not included in the 50-employee count at the Reno "worksite"). A personal residence is not considered a "worksite" for salespersons. The 75 miles are measured by surface miles using surface transportation over public streets.

B. Duration and Types of FMLA Leave. Employees receive a maximum of 12 work weeks of leave in a 12-month period, unless they are eligible for leave to care for a covered servicemember, in which case they receive a maximum of 26 weeks. (The military-related FMLA leave is addressed separately below.) Employers must account for leave in increments of no greater than the shortest increment of time the employer uses to account for other forms of leave, provided that such increment is equal to one hour or less, and the employee's leave entitlement is only reduced by the amount of leave actually taken. If an employee would be required to work overtime, but for taking FMLA leave, the overtime may be counted toward the employee's leave entitlement. (Note: this does not apply to voluntary overtime.)

C. Calculation of the Applicable 12-Month Period. The employer may select one

of the following methods for determining the 12-month period during which the employee's available leave runs: (1) calendar year; (2) any fixed 12-month leave year (e.g., fiscal, anniversary date, etc.); (3) the 12-month period measured forward from the first time the employee takes leave; or (4) the rolling 12-month period measured backwards from the date when the employee first uses FMLA leave. Regardless of the method, the employer must use the 12-month period measured forward from the date when the employee first takes FMLA leave in cases where the leave is to care for a covered servicemember.

D. Intermittent/Reduced Schedule Leave. Such leave is available when (i) medically necessary for the serious health condition of the employee or a family member; (ii) qualifying exigency leave; (iii) caretaker leave; and (iv) pregnancy, but not for birth or placement of the child after the event, unless the employer and the employee agree. Only the periods taken count against the eligibility. The employer may temporarily transfer the employee to another position that accommodates the intermittent/reduced schedule leave at the same rate of pay and benefits, but the employee need not be performing the same duties. If the employee is not required to take more leave than medically necessary, an employer can also transfer the employee to a part-time job with the same hourly rate and benefits. Employees seeking intermittent leave/reduced schedule leave must "make a reasonable effort" to avoid disruption in the employer's operations when scheduling leave for planned medical treatment.

E. Serious Health Condition. As before, the finding of such a condition requires inpatient care or a continuing treatment. The new regulations clarify that "continuing treatment" means (i) 2 or more treatments by a health care provider, within 30 days of the first day of incapacity, unless extenuating circumstances exist, or (ii) a treatment on 1 occasion requiring a regimen of continuing treatment (e.g., prescription medications, physical therapy). Under either continuing treatment scenario, the first (or only) visit must be in person and occur within 7 days of the first day of incapacity.

F. Chronic Conditions. Employees with serious health conditions requiring "periodic" medical treatment have to visit their doctor at least twice per year.

G. Health Care Provider. This is defined as a doctor of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, nurse practitioners, physician assistants, nurse-midwives, chiropractors (with limitations), clinical social workers, Christian Science practitioners, as well as a "healthcare provider" as defined under a group health care plan. Non-U.S. health care providers fall within the definition, as long as they are authorized to practice in accordance with the foreign state's law and are performing within the scope authorized under such law.

H. Employer Notification Obligations. This area of the new FMLA regulations has significantly changed.

Employers have to provide four different types of notice to employees: (1) general

notice; (2) eligibility notice; (3) rights and responsibilities notice; and (4) designation notice. If a significant portion of the employer's workforce is not literate in English, the employer has to provide the notices mentioned below in a language in which the workforce is literate. The same is advisable even if the workforce is generally literate in English, but the specific employee requesting FMLA leave is not.

1. General Notice. The general notice requirement is two-fold. A proper FMLA posting must be placed in a prominent location where employees and applicants can easily see the posting. Next, the FMLA policy should be included in the employer's handbook – this requirement can be satisfied by delivery of a paper notification upon hiring, as well as subsequent electronic notification. Employers must post the general notice, even if they do not have FMLA-eligible employees. (For the applicable DOL form, see Form WH Publication 1420 (Notice to Employees of Rights and Responsibilities under FMLA), available at <http://www.bipc.com/images/pdfs/5Notice.pdf>.)
2. Eligibility Notice. The employer must notify the employee of his or her FMLA eligibility within 5 business days of the request for FMLA leave or 5 business days from when the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason, unless extenuating circumstances exist. The notice must state whether the employee is eligible for FMLA leave. If they are not eligible, at least one reason why the employee is not eligible should be provided. The eligibility notification can be verbal or in writing. (For the applicable DOL form, see Form WH-381 (Notice of Eligibility and Rights and Responsibilities), at <http://www.bipc.com/images/pdfs/3Eligibility.pdf>). If the employee notifies the employer of a subsequent need for leave within the applicable 12-month period and the employee's eligibility has not changed, no further eligibility notice is required. However, if the employee's eligibility changes, the employer must notify the employee of the change within 5 business days, unless extenuating circumstances exist.
3. Rights and Responsibilities Notice. Each time the employer provides the employee with an Eligibility Notice, the employer must provide the employee with a written notice detailing the specific expectations and obligations of the employee, as well as any consequences of the employee's failure to meet these obligations. Employers may still use Form WH-381 for purposes of providing the Rights and Responsibilities Notice. This notice must tell the employee that the employer may designate and count the leave toward the employee's FMLA entitlement, if qualifying. The notice must also inform the employee of his or her right to substitute paid leave, whether the employer will require the paid leave substitution, the conditions related to substitution, and the employee's entitlement to take unpaid leave if the employee does not meet the paid leave requirements. The notice can be accompanied by a certification form. If the specific information provided in the notice changes, the employer must notify the employee of the change within 5 business days of receipt of the employee's notice of need for leave after any change, unless extenuating circumstances exist.

4. **Designation Notice.** This notice must be written and inform the employee whether the leave is FMLA-qualifying and that such leave will be designated as FMLA-qualifying. The employer must give the notice within 5 business days after the employer has enough information to determine whether the employee is taking the leave for an FMLA-qualifying reason (e.g., after receiving certification). The employer must inform the employee whether the employer will substitute paid leave for FMLA leave or whether paid leave under an existing plan will be counted as FMLA leave. If the employer will require a fitness for duty certification before the employee can return to work, the employer must notify the employee in the designation notice. If the certification will address the employee's ability to perform his or her essential job functions, a description of the employee's essential job functions must generally be included with the notice. The employer must further notify the employee of the amount of leave counted toward the employee's FMLA entitlement. The notice of amount of leave counted against the employee's leave entitlement may be verbal, as long as the employer confirms it in writing generally by the following payday. (For the applicable DOL form, see Form WH-382 (Designation Notice), at <http://www.bipc.com/images/pdfs/4Designation.pdf>). Employers only need to give one designation notice for each FMLA-qualifying reason per 12-month period (both continuous and intermittent).
- I. **Retroactive FMLA Designation.** The employer may retroactively designate leave as FMLA with a proper notice to the employee, but the employer's failure to designate must not cause harm or injury to the employee. Where the leave would qualify for FMLA protections, the employer and the employee can agree to retroactive designation.
- J. **Employee Notice Requirements.** If the leave is foreseeable, the employee must give the employer at least 30 days notice before the leave begins. If the 30-day notice is not practicable due to changed circumstances or a medical emergency, the employee must provide notice as soon as practicable (usually defined as the same day or next business day after learning of the need for FMLA leave). The notice can be verbal, as long as it apprises the employer of the need for FMLA-qualifying leave and the leave's anticipated timing and duration. Simply calling in "sick" does not qualify. An employer may generally require that the employee comply with the employer's customary policies for requesting leave (e.g., provide written notice stating reasons for leave, contact a specific person, etc.) and delay or deny leave where the employee fails to follow these policies. The employer cannot delay or deny leave if the employer's policies require the employee to provide notice sooner than the FMLA regulations permit and the employee's notice is timely under the regulations. If the leave is not foreseeable, the employee must provide notice as soon as practicable. The regulations provide that it should be practicable for the employee to give notice within the time allowed by employer's usual and customary notice requirements for such leave.
- K. **Insurance Benefits.** Absent a policy to the contrary, the employer's obligation to maintain health insurance coverage stops if the employee's premium payment is

more than 30 days late. To drop coverage, the employer must provide a written notice to the employee at least 15 days before coverage stops, advising that the coverage will stop on a specified date 15 days from the notice unless the employer receives payment.

L. FMLA Prohibitions. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, and FMLA leave cannot be counted under “no fault” attendance policies. However, an employer can disqualify an employee from a bonus or award predicated on the achievement of a goal where the employee did not meet the goal because of an FMLA absence, unless the employer gives the bonus or award to employees on an equivalent leave status that is not FMLA leave.

M. Medical Certification. An employer must give written notice of the need for certification each time the employer provides a written Rights and Responsibilities Notice to the employee. Employers can verbally request subsequent certification. The employer must request certification at the time the employee gives FMLA notice or within 5 business days of the notice. If the leave is unforeseen, the employer must request certification within 5 business days after the leave commences. When medical certification is requested, the employer must notify the employee of the consequences of the employee’s failure to furnish certification (i.e., that leave may be denied). The employee should provide the requested certification within 15 calendar days of the request. If the certification the employee provides is insufficient or incomplete, the employer must inform the employee of that fact, in writing, and explain what additional information is needed to make the certification complete or sufficient. The employee then has 7 calendar days to cure the deficiencies, unless doing so is not practicable under the circumstances, despite the employee’s diligent good faith efforts. If the employee fails to cure the deficiencies or fails to provide certification altogether, the employer may deny FMLA leave.

When the employee takes leave because of the serious health condition of the employee or a family member, the employer can require that the certification contain the following: (i) a statement that the affected person has a “serious health condition”; (ii) the date when the condition commenced; (iii) the condition’s probable duration; (iv) a statement that the employee is needed to care for the family member and an estimate of the amount of time needed for care; (v) a statement that the employee is unable to perform the essential functions of the job; (vi) the particulars of any necessary intermittent/reduced schedule leave.

The employer can seek a second or third opinion, at the employer’s expense, if there is a reason to question the validity of the employee’s certification. Meanwhile, the employee is provisionally entitled to FMLA benefits.

(For applicable DOL forms, see WH-380E (Certification of Health Care Provider for Employee’s Serious Health Condition), at <http://www.biprc.com/images/pdfs/1HCEmployees.pdf> and WH-380F (Certification of Health Care Provider for Family Member’s Health Condition), at <http://www.biprc.com/images/pdfs/2HCFamily.pdf>).

N. Medical Recertification. The employer may require annual certification in cases where the employee takes leave due to his or her own serious health condition or the serious condition of the employee's covered family member, when the condition lasts over a single leave year. Recertification requests are not permitted where the employee took leave to care for an injured servicemember.

O. Authentication and Clarification of Medical Certification. The employer can communicate directly with health care providers to authenticate and clarify certifications, but the contact can never occur through the employee's direct supervisor. The employer also cannot request more medical information than what the certification form covers. Additionally, where the employer is seeking authentication or clarification of fitness for duty certification, the employer cannot delay an employee's return to work while the employer communicates with the health care provider. The employer is not entitled to a second or third opinion on a fitness for duty certification.

P. Waiver. Employees can settle or waive past FMLA claims without DOL or Court approval.

Q. Light Duty. Employees can accept a light duty job offer while recovering from a serious health condition. The acceptance of such an offer does not waive the employee's right to be restored to his or her prior position, but the right to restore ends at the conclusion of the applicable 12-month FMLA period. An employer cannot reduce an employee's FMLA leave entitlement by the period spent performing light duty work.

Military-Related FMLA Leave

The National Defense Authorization Act, which went into effect in January 2008, extended FMLA leave protections to employees who needed leave to care for an injured servicemember or due to a qualifying exigency in support of a contingency operation. The new regulations outline the circumstances and conditions warranting such leave, as well as employer's rights and responsibilities in providing the leave.

A. Leave Because of a Qualifying Exigency. Under this FMLA provision, eligible employees may take up to 12 weeks of FMLA leave in a 12-month period when the employee's spouse, daughter, son, or parent is on active duty or call to active duty due to: (i) short-notice deployment – a call or order given no more than 7 days before deployment (the employee can take up to 7 days beginning on the notification date); (ii) military events and related activities – e.g., official military sponsored ceremonies and family support and assistance programs sponsored by the military and related to the family member's call to duty; (iii) urgent (but not recurring or routine) child care and school activities, such as arranging for child care; (iv) financial and legal tasks – e.g., making or updating legal arrangements to deal with the family member's active duty; (v) for counseling for the employee or his minor child; (vi) to spend time with the covered service member on rest or recuperation breaks during deployment, for up to 5 days per break; (vii) for post-deployment

activities – e.g., arrival ceremonies and reintegration briefings or to address issues from the service member's death while on active duty; or (viii) for other purposes arising out of the call of duty, as the employer and employee agree. Employers may request proper certification demonstrating the need for exigency leave. (For applicable DOL forms, see WH-384 (Certification of Qualifying Exigency for Military Family Leave), at <http://www.bipc.com/images/pdfs/6Qualifying.pdf>). No second or third opinions are allowed.

Although qualifying exigency leave involves a call to active duty, the qualified exigency leave is not available to family members of active servicemembers of the regular armed forces. Rather, it is only available to the family members of reservists and retired members of the regular armed forces who are on active duty or are called to active duty in support of a contingency operation. The active duty or call to active duty must relate to a federal matter. State calls to active duty are not covered unless they are made under order of the President of the United States. A "contingency operation" is one designated by the Secretary of State as an event in which military members are or may become involved in military actions, hostilities, or operations against an enemy of the U.S. or against an opposing military force. Alternatively, a contingency operation is an event that results in the call or order to, or retention on active duty of members of the uniformed services (other than active regular armed forces) during a war or national emergency. Employees may take qualifying exigency leave on an intermittent or reduced schedule basis. (Note: Unlike the leave to care for an injured servicemember, the employer may apply its standard 12-month leave entitlement period to exigency leave.)

B. Leave to Care for a Covered Servicemember with a Serious Injury or Illness.

This type of leave allows eligible employees to take up to 26 workweeks of FMLA leave to care for a covered servicemember with a serious injury or illness in a "single 12-month period." Eligible employees are the spouse, son, daughter, parent, or next of kin of a covered servicemember. Covered servicemembers are current members of the regular armed forces, members of the armed forces who are on a temporary disability retired list, or who are in outpatient status (but do not include reservists, former military members, or military members who are on the permanent disability retired list). To be covered, the servicemember must have a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation or therapy. Employers may, of course, request proper certification showing the need for the requested leave. (For applicable DOL forms, see WH-385 (Certification for Serious Injury or Illness of Covered Servicemember), at <http://www.bipc.com/images/pdfs/7Injury.pdf>). No second or third opinions or recertification are allowed.

Unlike any other FMLA leave, the single 12-month period for this type of leave begins on the first date when the employee uses FMLA leave and continues for 12 months thereafter, regardless of the method used by the employer to calculate the applicable 12-month period for other leaves under its FMLA policy. The leave can be taken intermittently or on a reduced schedule basis. The leave entitlement

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is per-covered servicemember, per-injury basis, which means that the employee may be entitled to more than 1 period of 26-week leave if the leave is needed to care for another servicemember or for another injury, but the employee cannot take more than 26 weeks of leave in a single 12-month period. Where single 12-month periods attributable to different covered servicemembers or different injuries overlap, the employee can not take more than 26 weeks in each single 12-month period. Employees cannot take more than a combined total of 26 weeks to care for a servicemember or because of another FMLA-qualifying reason.