

Feb 2009



FMLA

Have you made the changes
and communicated the
updates to your managers?

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Are you compliant once again with FMLA?

It has been a month since the FMLA regulations became effective on January 16, 2009. So what exactly does this mean for employers?

For years we asked The U.S. Department of Labor to make clarifications to the gray lines we tried to navigate. Finally they made numerous changes to the regulations, and many employers are just beginning to look at how it is going to the impact how they do business. In the meantime, there are several things you should do.

One thing the final rule made clear is that the burden is on the employer to clearly communicate FMLA obligations to the employee. If the employer has communicated clearly and the employee fails to follow through, there might be no FMLA leave. The other thing that is clear to me, there are still questions.

1. Post the New FMLA Poster

Simply go the U.S. Department of Labor ("DOL") and print a copy of the new FMLA poster, "Notice to Employees of Rights under the FMLA." A copy of the notice is available <http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>. Employers are required to post this notice prominently, where it can be readily seen by employees and applicants for employment. In addition, the text must be large enough to be easily read and contain fully legible text.

The poster should be posted, even if there are no eligible employees at a site, and there should be general notice to employers either in a handbook or given to employees on hire. Do so in English as well as the language(s) your workforce is literate in.

Under the new regulations, employers may meet the posting requirement by posting the notice electronically, as long as the electronic posting meets the requirements that apply to paper posters—i.e., the electronic notice must be posted prominently in a conspicuous place where it can be readily seen by both applicants for employment and employees, with legible text that is large enough to be easily read.

2. Revise Your Organization's FMLA Policy

Revise your FMLA policy to ensure that the policy is consistent with the new FMLA regulations. In revising the policy, it's important to bear in mind that every FMLA-covered employer that publishes an employee handbook or other written guidance to employees concerning employee benefits or leave rights must include in such handbook or written guidance, at a minimum, all of the information that is contained in the FMLA poster. Some employers may choose to comply with this requirement by including a copy of the poster in their employee handbook. However, not everything is on the poster, so this may not comply fully. You may also decide to provide the policy at time of hire, either via paper or electronically, via email.

3. Start using the New FMLA Forms

The new FMLA regulations include several additional employer notice requirements. As before, the DOL published model notice forms that employers can use to comply. Make yourself familiar with these forms and the questions so that you can answer your employees questions. The new regulations include various new provisions regarding the certifications employers can request from employees regarding the need for leave.

a. Use the new Notice of Eligibility and Rights and Responsibilities Form

The first new notice form an employer must provide to employees is a Notice of Eligibility and Rights and Responsibilities, which is available <http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>. This notice must be given to employees within five (5) business days of an employee's request for leave for an FMLA-qualifying reason. Employers may customize this form so long as it includes, at a minimum, all of the information required by the regulations.

b. Use the New Certification Forms

If an employee will be required to submit a certification of his or her need for leave, the certification form should be provided to the employee, along with the Notice of Eligibility and Rights and Responsibilities, within five (5) business days of an employee's request for leave for an FMLA-qualifying reason. The DOL has prepared four prototype notice forms for these four types of leave:

The Certification of Health Care Provider for *Employee's* Serious Health Condition is available <http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>

The Certification of Health Care Provider for *Family Member's* Serious Health Condition is available <http://www.dol.gov/esa/whd/forms/WH-380-F.pdf>

The Certification of Qualifying Exigency for Military Family Leave is available <http://www.dol.gov/esa/whd/forms/WH-384.pdf>

The Certification for Serious Injury or Illness of Covered Service member for Military Family Leave is available <http://www.dol.gov/esa/whd/forms/WH-384.pdf>

Employees must be given at least fifteen (15) days to return a completed certification. This has not changed.

c. Start Using the New Designation Forms

The new regulations require employers to designate leave as FMLA-qualifying or non-FMLA-qualifying, to give employees written notice of such designation, and to provide certain other information to an employee if the leave has been designated as FMLA-qualifying. The DOL has created a new prototype Designation Notice form employers may use for this purpose. A copy of the Designation Notice is available <http://www.dol.gov/esa/whd/forms/WH-382.pdf>. The Designation Notice notifies the employee whether the leave is FMLA-qualifying or non-FMLA-qualifying, whether the employee will be required to substitute paid leave, and whether a fitness-for-duty certification will be required to return from leave. If an employer requires a fitness-for-duty certification that is specific to the essential functions of the employee's job, the employer must list the essential functions of the employee's position in the Designation Notice. In cases in which an employer designates leave as non-FMLA-qualifying, an employer may use the Designation Notice to inform the employee of such designation, or may simply provide a written statement to that effect.

An employer must provide written Designation Notice to an employee requesting leave within five business days after the employer's determination of whether the leave qualifies as FMLA leave.

4. Ensure that Supervisors are Aware of New Types of FMLA Military Family Leaves

Congress amended the FMLA to create two new types of military family leave entitlements and to covered servicemembers. A covered servicemember is a person who is a member of the armed forces, National Guard or Reserves and is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the servicemembers office, grade, rank or rating.

- Eligible employees may now take up to 12 work weeks of leave per year due to a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or who has been notified of an impending call or order to active duty. The new regulations define qualified exigencies to include circumstances such as leave to address issues related to short notice deployment and non-medical activities (i.e.); leave for military events, and related activities, such as family support and assistance programs and official events; leave to arrange for alternative childcare or to provide emergency childcare when the call to active duty necessitates a change in existing child care or school activities; leave to make or update financial or legal arrangements; leave to attend non-medical counseling; leave to spend time with a covered military member who is on short-term temporary rest and recuperation leave during a period of deployment; and leave for post-deployment activities, such as an arrival ceremony; and rest and recuperation.
- Eligible employees may now take up to 26 weeks of leave in a single twelve month period to care for a covered military service member with a serious injury or illness incurred in the line of duty if the employee is the spouse, son, daughter, parent, or next of kin of the service member.

5. Employers ensure that Individuals Responsible for Administering FMLA leaves are Familiar with New Regulations and Entitlements

The changes made to the FMLA regulations are numerous, and this article is not intended to be a comprehensive summary of the changes. In the coming months, many human resources professionals or other individuals charged with responsibility for administering FMLA leaves will want to attend seminars and engage in professional reading in order to assess the impact of the new regulations on their business. At a minimum, however, these individuals should be generally aware of the changes to the regulations and should seek counsel.

If you would like assistance in revising your organization's FMLA policy or communicating to your employees and managers the new FMLA regulations, please contact HRC-Partners, LLC. You may reach us at mmcdermott@hrc-partners.com or (407)949-7251. We specialize in creating customized training to meet your needs and budget. Our training is not just about handing out the forms and check sheets, it is about ensuring your employees and managers understand how to apply the information long after we leave.



Here are helpful clarifications and examples to navigate FMLA from the Dept of Labor:

- **Breaks in Service:** to be eligible for FMLA leave, employees must have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12 month period preceding the leave. The new regulations clarify that, although the 12 months of employment do not have to be consecutive, employers are not required to count employment prior to a continuous break in service of seven years or more, unless the break in service was occasioned by the employee's fulfillment of military service obligations in the National Guard or Reserves, or unless a collective bargaining agreement affirmed the employer's intention to rehire the employee after the break in service. 29 C.F.R. § 825.110(b).
- **Fitness for Duty Certifications:** Employer may require that the certification specifically address the employees ability to perform the essential functions of the job and if safety concerns exist, may require a fitness for duty certification before employee returns to work after intermittent leave.
- **Light Duty:** Employees who accept "light duty" assignments while recovering from a serious health condition are not considered to be on FMLA leave. 29 C.F.R. § 825.220(d).
- **Medical Certification:** Employer may request re-certification of an ongoing condition every six months.
- **Perfect Attendance Awards:** Employers will now be allowed to deny a "perfect attendance" bonus or other award to an employee who does not have perfect attendance because he or she took FMLA leave. However, the employer must treat employees who take non-FMLA leave in the same manner. 29 C.F.R. § 825.215(c)(2).
- **Professional Employer Organizations (PEOs):** The application of the FMLA to joint employers was modified to include PEOs, which are companies that contract with employers to perform administrative functions such as payroll, benefits and maintaining employment policies. However, when PEOs have the right to hire, fire, assign, direct and control their client's employees, depending on the circumstances, this can lead to a determination that the PEO and the client employer are joint employers. 29 C.F.R. § 825.106(b)(2).
- **Substitution of Paid Leave:** The new regulations allow employers to apply their normal policies for taking paid leave when an employee substitutes paid leave for unpaid FMLA, regardless of the type of paid leave being substituted. Employees who seek to substitute accrued paid leave of any kind for unpaid FMLA leave must comply with the terms and conditions of the employer's normal leave policies. While employers must allow substitution of paid vacation, personal leave, or "paid time off" for any situation covered by the FMLA, employees can be required to follow normal procedures. 29 C.F.R. § 825.207.

Definition Clarifications:

- **Periodic Visits:** definition of period visit for chronic health conditions defined as at least 2 visits to a health care provider per year.
- **Serious Health Condition:** More than three consecutive days of incapacity and two health care provider visits must occur within 30 days of the beginning of the period of incapacity and the first health care visit must occur within 7 days of the first day of incapacity.

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