

CHANGES TO FMLA REGULATIONS

New regulations implementing the Family and Medical Leave Act (FMLA) go into effect on January 16, 2009. Because these new regulations implement FMLA military leave entitlements and materially change the way the FMLA is applied, all employers need to review and update their FMLA policies, forms, and practices to comply with the new regulations.

Key Changes to Existing FMLA Regulations

Definition of serious health condition

Although the regulations retain the six definitions of "serious health condition," they modify the tests of incapacity and treatment in three ways. First, the new regulations clarify that the employee or family member must be incapacitated for more than three consecutive calendar days. Second, for continuing treatment involving two or more treatment visits, those visits must now occur within 30 days after the start of the incapacity. Third, the first visit with a health care provider must occur within seven days after the start of the incapacity in order to be a serious health condition.

Medical certification

Employers, but not supervisors, may contact the employee's health care provider directly, but only for two purposes: clarification and authentication of the medical certification form. The employer may not request additional information beyond that included in the certification form, however, the DOL modified the standard form and added additional sample forms to cover the various type of leaves now covered by the FMLA. Employers can also now return incomplete certifications to employees, which the employee must complete and return to the employer within seven days. Leave may be denied if the forms are not returned or the information is incomplete.

Fitness-for-duty certification

Employers may require fitness-for-duty certifications as long as the employee was provided with a list of the essential functions of his/her job at the time the leave was designated by the employer as FMLA leave.

Notice requirements

The new regulations clarify and expand employers' obligations to notify employees about FMLA rights. There are four em-

ployer notice requirements under the new regulations:

1. **Poster/General Notice** (WH-381) Employers must post and distribute the General Notice to every employee even if the employer has no FMLA eligible employees;
2. A **Notice of Eligibility** (WH-381) must be provided to employees within five business days after the employee's need for leave is made known to the employer. This notifies employees of eligibility and specifies conditions to grant leave (i.e. medical certification, etc.);
3. **Designation Notice** (WH-382) This notice must be provided to employees to communicate the decision to grant FMLA leave. This notice is necessary in order for an employer to require a fitness for duty certification upon an employee's return from leave and specifies other conditions for continued approval. In such instances, the certification must be communicated as part of the designation notice. The physician's fitness for duty certification must then be based only upon the essential job functions the employer provides or attaches to the notice. If an employer fails to describe job duties or attach a job description to the notice, the employee's physician may certify fitness to return to work based solely upon the employee's description of the job duties; and
4. **Employers** with employee handbooks or policy manuals must communicate FMLA rights, responsibilities, and policies in the handbook or manual.

When an employee becomes aware of a need for FMLA leave less than 30 days in advance, the employee must provide notice of the need for leave either that same day or the next day. When the need for leave is not foreseeable, an employee must follow the employer's usual and customary notice requirements for requesting leave, however, the employer can require the notice of need for leave to be provided within two days after the start of the leave, and may require that the employee comply with the employee's standard call-in procedures.

Intermittent leave

Employees who take intermittent FMLA leave have a statutory obligation to make a "reasonable effort" to schedule such leave so as not to unduly disrupt the employer's operations. The employer may also require recertification for an intermittent leave every six months, or more often in certain situations.

Gaps in service

To be eligible for FMLA leave, an employee must be employed by the employer for at least 12 months, but the period of employment need not be consecutive. An employer should include all periods of service toward the 12-month requirement, unless the break in employment is at least seven years.

Light duty

Time spent performing “light duty” work is not FMLA leave and does not count against an employee’s FMLA leave entitlement.

Perfect attendance awards

Employers may deny a perfect attendance award to an employee who does not have perfect attendance because he or she took FMLA leave, but only if the employer treats employees taking non-FMLA leave in the same manner.

Settlement agreements

Employees can release and settle FMLA claims without Department of Labor or court approval.

FMLA Military Leave Entitlements

Military caregiver leave

Eligible employees who are family members of covered service-members may take up to 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious illness or injury incurred in the line of active duty. The leave may be taken as a continuous leave or on an intermittent basis, however, the period cannot be extended beyond the 12-month period, regardless of whether the full 26 weeks are used. The 12-month period begins on the first day of the leave. Military caregiver leave can be taken by a spouse, parent, son, daughter, or “next of kin” of a servicemember.” “Next of Kin” is defined as a “blood relative.” The 26 weeks can run concurrently with available FMLA leave.

Qualifying exigency leave

This provision makes the normal 12 weeks of FMLA leave available to eligible employees with a spouse, parent, son, or daughter who is a covered military member serving in the National Guard or Reserves. FMLA leave is now available for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty in support of a contingency operation. Qualifying exigencies are broadly defined as: 1) short-notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; 7) post-deployment activities; and 8) any additional activities where the employer and employee agree to the

leave. Some limits may apply on time available for this type of leave.

For More Information

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