

The New FMLA Rules: What Employers Need To Know

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- National labor and employment practice
- Counsel and represent employers exclusively in all aspects of labor and employment law
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Webinar details

- To join the audio portion of this Webinar, please dial (888) 617-3400
- Access code: 923462
- Questions may be submitted by entering question in box on right of the screen



Background

- New regulations published November 17, 2008; first FMLA changes since 1995
- Effective January 16, 2009
 - Provide greater clarity on several regulations
 - New military family leave obligations
 - New tools for managing FMLA abuse
 - Heightened (shared) responsibility for both sides



Agenda

- Highlight the revised regulations
 - Eligibility & Serious Health Condition
 - Notice requirements for Employees and Employers
 - Employer's response to a request for leave
 - Medical Certification requirements
 - *Slight* changes to Intermittent Leave
 - Odds & Ends
- Highlight the new Military Family Leave
- New forms galore!
- Practical steps to abide by new regulations
- Questions



Overview of FMLA

- Entitlement: Allows eligible employees up to 12 weeks of unpaid leave in a 12-month period for a qualified reason:
 - Employee's Serious Health Condition
 - Care for a child, spouse or parent with SHC
 - Birth of Child or Placement into Adoption/Foster Care
- Eligibility: Employee who has worked:
 - At least 12 months for Employer;
 - At a worksite where 50 or more employees are employed within 75 miles of that worksite; and
 - 1,250 Hours in previous 12 month period



Eligibility for FMLA Leave

- Employment prior to a gap in service of seven years or more need not be counted
- Keep records for 3 years; thereafter, employee's burden to establish employment within past seven years
- National Guard/Reserve service counts



Serious Health Condition

- A period of incapacity of more than three consecutive days that involves:
 - ❖ Treatment 2 or more times; or
 - ❖ Treatment by HCP on at least one occasion which results in continuing treatment
 - First visit must occur within 7 days
 - Second visit must occur within 30 days, unless extenuating circumstances exist



Serious Health Condition

- Second visit within 30 days—does this help?
- HCP must determine whether second visit is necessary
- If condition is “chronic,” employee must make at least two visits to HCP per year in connection with the medical condition



General Employer Notice Requirements

- New Required Poster
 - Revised poster as of January 16, 2009
- Handbook
 - FMLA Policy
 - If no handbook, provide to employees at time of hire
- * Electronic Notice Permitted—so long as all employees and applicants have access



Employee Notice

General framework remains the same:

- If foreseeable, must provide 30 days' notice
 - May require explanation if less than 30 days' notice
- If unforeseeable, employee must provide notice “as soon as practicable”
 - Generally means same or next business day
 - Must make exceptions for “unusual circumstances”



Call In Procedures

- Employers may require compliance with “usual and customary” procedures (e.g., call-in procedures, contact person)
- May delay or deny leave if employee does not comply
- Procedures must not require notice sooner than “practicable”
- Good opportunity for employers



Responding To Request For Leave

- New regulations requires multiple layers of “Notice” to employee seeking leave which may qualify as FMLA leave:
 - ❖ Eligibility and Rights and Responsibilities Notice
 - ❖ Designation Notice



Eligibility Notice

- Provide Eligibility notice within five business days
- Simply determining eligibility
- If employee not eligible, must provide at least one reason why the employee is not eligible
- Eligibility remains effective for leave year

DOL Model form: WH 381



Rights and Responsibilities Notice (provided with Eligibility Notice)

- Applicable 12-month period
- Leave may count as FMLA leave
- Certification requirements (and consequences for noncompliance)
- Substitution of paid leave, right to unpaid
- Requirements re: premiums for health coverage
- “Key employee”
- Right to maintain benefits & job restoration
- Liability for health premiums if fails to return



Designation Notice

- Within five business days after receiving sufficient information to determine whether leave qualifies, employer must notify employee whether the leave will be *designated* as FMLA leave
- One notice required per applicable 12-month period
- Retroactive notice permissible if no harm to the employee (Ragsdale case)

DOL Model form: WH 382



Content of Designation Notice

- Must inform employee:
 - Whether paid leave will be substituted for unpaid leave
 - Whether fitness-for-duty certification will be required
 - ❖ Employer may provide list of essential functions to determine employee's ability to perform job
 - How much leave will be counted against FMLA allotment, if amount of leave is known



Medical Certification

- Request within 5 days after employee requests leave
- Use the new DOL model form (WH-380(e)&(f))
- Must allow at least 15 calendar days for completion
- May seek certification in new leave year
- New rules require employee to provide certification that is both complete and sufficient



Complete & Sufficient Certification

Complete: All blanks filled in

Sufficient: Information not vague, ambiguous, or non-responsive

Incomplete or Insufficient: Must inform employee in writing of deficiency, allow 7 calendar days to fix (more if needed)



Essential Functions

When employee seeks leave for his/her own serious health condition, employer may:

- Include list of essential job functions
- Require certification to identify essential functions employee cannot perform



Employer contact with HCP

- Employer may contact HCP to authenticate or clarify the certification after giving employee opportunity to cure
 - Authenticate: Confirming that information was prepared or authorized by HCP
 - Clarify: Understand handwriting or the meaning of a response (cannot delve into identifiable health info)
- Employee's direct supervisor cannot contact HCP



Recertification

- Must allow employees 15 days
- No more often than every 30 days, with two exceptions:
 - Minimum duration of certification is more than 30 days; or
 - Employee: 1) requests extension; 2) change in circumstances of leave; 3) information which casts doubt on reason for absence
- Recertification every 6 months in *all* cases



Intermittent Leave

- No longer required to use shortest increment used in payroll system
- Now, may use the shortest time period used for other forms of leave to account for intermittent leave—can never be greater than one hour
- “Physical impossibility” exception



Bonus Programs

- Where a bonus is based on achievement of a specific goal, it now may be denied to employees taking FMLA leave (e.g., hours worked, perfect attendance, products sold)
- Must maintain same bonus program for those employees on non-FMLA leave



Light Duty

- Old regulations: Arguably could count time on “light duty” assignments against FMLA leave
- New regulations: No way!
 - Employee’s right to job restoration is “stayed” during light duty period



How Do Employers Calculate Amount of FMLA Leave Used?

- Variable workweek
 - ❖ Old: Avg. number of hrs. worked over previous 12 *weeks*
 - ❖ New: Avg. number of hrs. over previous 12 *months*
- Overtime
 - ❖ If voluntary, don't count
 - ❖ If mandatory, *count*
- Holidays
 - ❖ Full week: *Count* the holiday
 - ❖ Less: Don't count



Compensatory Time and Waiver

- Comp time: Public sector employees now may substitute compensatory time for unpaid FMLA leave.
- Waiver: Employees now can agree to release prior acts/claims without approval by the DOL or a court
 - May not prospectively waive claims



Military Family Leave



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Military Family Leave

12 weeks for “qualifying exigency”

26 weeks to care for covered servicemember



Qualifying Exigency Leave

“Qualifying Exigency” related to:

- Employee’s spouse, son, daughter or parent
- On “active duty or call to active duty status”
- National Guard or Reserves only
- In support of a “contingency operation”



What is a “Qualifying Exigency?”

- Short-notice deployment (7 days)
- Military events and related activities
- Childcare and school
- Financial and legal arrangements
- Counseling
- Rest & Recuperation (5 days)
- Post-deployment activities
- Other activities as agreed



Qualifying Exigency Certification

- Copy of active duty orders or other documentation (1 time only)
- Employee certification
 - Facts necessitating leave, w/documentation
 - Approximate date exigency began
 - Duration / schedule of leave
 - Info regarding meetings with third party
- May verify meetings, active duty status

DOL Model Form: WH-384



Caring for Covered Servicemember

- Covered Servicemember
- Employee's spouse, son, daughter, parent, or "next of kin"
- Serious injury or illness incurred in the line of duty on active duty
- Undergoing medical treatment, recuperation, or therapy, or otherwise on temporary disability retired list.



Covered Servicemember

- Current member of the Armed Forces
- Includes Regular Armed Forces, National Guard, Reserves
- Does not include FORMER members (retired, permanent disability retired list)



Next of Kin

Nearest blood relative:

- Relative designated by servicemember
- Relative with legal custody
- Brother or sister
- Grandparents
- Aunts & Uncles
- First cousins



26 Workweeks of Leave

- Taken in single 12-month period, beginning with first day of leave
- Per-servicemember, per-injury
- Combined total of 26 workweeks FMLA leave
- Husband and wife may be limited to combined total of 26 weeks



Information From Employee

- Name of the covered servicemember
- Relationship to servicemember
- Servicemember's branch, rank, and unit
- Outpatient unit / facility
- Temporary disability retired list
- Description of care needed
- Estimated duration of leave



Medical Certification

- From an authorized Healthcare Provider
- Injury or illness incurred in line of duty
- Date injury or illness began
- Medical facts regarding condition, including unfitness for duty
- Information establishing need for care
- Information regarding intermittent leave

Form WH-385

OR

Invitational Travel Order /
Invitational Travel Authorization



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Verification

- No 2nd or 3rd Opinions
- No Re-Certifications
- May seek authentication / clarification
- May require confirmation of family relationship



Illinois Military Family Leave

- Spouse or parent of person called to military service longer than 30 days
- 12 months / 1250 hours
- Unpaid leave
 - 15-50 Employees: 15 days
 - 51+: 30 days



So What Do We Do Now?

- Post new poster
- Revise your FMLA policy and any relevant personnel policies & inform employees
- Update Employee Handbook and FMLA forms
- Analyze bonus programs/criteria
- Update job descriptions
- Audit compliance with new regulations
- Train! Train! Train!
- Look for new opportunities to assert your rights
- Attorneys: Revise severance agreements



Need help?

Call or email us (or the Franczek Radelet attorney with whom you typically work):

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Questions?



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