

FEDERAL LAW CHANGES

Family and Medical Leave Act

(As amended by the National Defense Authorization Act for FY 2008 (NDAA))

Summary of the Final Regulations

On November 17, 2008, the Department of Labor ("DOL") issued the final regulations under the Family and Medical Leave Act (FMLA). These new regulations include expansions to cover military leave in addition to the amendments to the existing FMLA regulations. The final regulations will take effect on January 16, 2009.

The following summary addresses the most significant changes and their practical impact upon the tracking and administration of family and medical leaves.

Serious Health Condition

The new regulations retain the six individual definitions of "serious health condition," but make three clarifications.

1. The Period of Incapacity remains at more than three consecutive calendar days, but the rule clarifies that the incapacity must be for full days.
2. Continuing Treatment is modified in the new regulations. If an employee takes leave which involves more than three consecutive calendar days of incapacity plus two visits to a healthcare provider, the two visits must occur within 30 days of the period of incapacity. The first visit must occur within 7 days of the onset of incapacity. A health care provider, not an employee, must determine when the second or follow-up visit should occur.

3. Periodic visits to a healthcare provider for chronic serious health conditions must involve treatment at least twice a year.

Eligibility

As before, an eligible employee is an employee of a covered employer who (1) has been employed by an employer for at least twelve months (2) has been employed for at least 1,250 hours of service during the twelve-month period immediately preceding the start of leave and (3) is employed at a work site that has fifty or more employees within a seventy-five mile radius.

Break in service. Any period of prior employment within seven years must be counted when determining if an employee has been employed for at least twelve-months. However, in applying the 7-year cut-off, special rules apply in the following two circumstances:

1. periods of employment older than seven years are counted if the breaks in service occurred as a result of fulfillment of military obligations;
2. "a written agreement, including a collective bargaining agreement, exists concerning an employer's intention to re-hire an employee after the break."

Please note that if an employer only retains records for the maximum time prescribed by the FMLA (three years), then the burden shifts to an employee to submit sufficient proof of his or her prior employment (e.g., W-2 forms, pay stubs, etc.).

Employer Notice Obligations

1. **General Notice.** An employer, as before, is required to include general

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notice information about the FMLA in any written guidance such as an employee handbook or other written materials concerning benefits and leave that an employer provides to its employees. If such materials do not exist, a copy of the general notice must be provided to new employees at the time of hiring. There is no annual distribution requirement. Electronic posting is sufficient if employees and applicants can access such materials.

2. **Eligibility Notice.** Once an employer becomes aware that an employee's absence may be for an FMLA-qualifying reason, the employer is required to notify the employee of the employee's eligibility for FMLA leave. Such notice addresses only whether an employee meets the statutory eligibility criteria - employment by an employer for 12 months; 1,250 hours of service in the 12-month period immediately preceding the request for leave; and employment at a worksite where 50 or more employees are employed within 75 miles. It informs an employee of the date when the leave was requested and an employer's understanding of the reason supporting the leave. It also advises whether an employee is eligible to take FMLA leave, and if not, why (at least one reason). The notice must go out within 5 business days absent extenuating circumstances.
3. **Rights and Responsibilities Notice.** In addition to the eligibility notice, an employer must provide written notice which appraises an employee about the specific expectations and obligations under the FMLA, and the consequences of failure to meet it. Such notice includes: a date certain for an employee to return any requests documentation for the leave (such as a medical certification), arrangements for payment of health insurance premiums while on leave, the use of concurrent paid leave, whether an employee is considered a "key employee", and any requirements for periodic status reports. It also provides an employer's method for calculating the FMLA leave year. This notice must go out with the eligibility notice within five days.
4. **Designation Notice.** If the requested FMLA leave is approved, an employer is required to provide notice to employees "designating leave as FMLA-qualifying." Such notice must provide the number of hours, days, or weeks that will be counted against an employee's FMLA entitlement and if the exact amount of leave is unknown or is expected to continue for an extended period of time, the employer is now required to provide this notice every 30 days. Such notice includes: an explanation of conditions applicable to

the use of paid leave that runs concurrently with unpaid FMLA, whether a fitness-for-duty certification will be required before an employee will be permitted to return to work. If such certification is required an employer must provide a list of essential job functions in the notice. Finally, if the information provided in the designation notice changes, an employer must provide an updated notice within 5 business days of the change.

If more information is needed to determine whether the leave can be approved, an employer is required to advise an employee what information is needed and give the employee at least seven calendar days to provide it or notify the employee that a second or third medical opinion, at the employer's expense, is required. If the employee fails to satisfy these requests, the employer can deny the FMLA leave.

Retroactive Designation. An employer may retroactively classify an absence or period of absence as counting towards an employee's statutory FMLA-leave rights, even in circumstances in which the employer fails to provide accurate or timely notice as long as it does not cause harm or injury to the employee, or the employer and the employee mutually agree on the retroactive designation.

In cases in which an employee takes leave to care for a family member, the employee may plan with a sibling or a spouse on how to allocate their collective leave requirements. An employee can argue that a failure to designate causes harm, because the employee can make alternative coverage arrangements if the employer timely designated the leave. But if an employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, the employee would not suffer harm as a result of the employer's actions.

Employee Notice Obligations

Foreseeable Leave

If the leave is foreseeable, an employee is required to provide an employer with at least a thirty-day advance notice before FML begins. In cases in which a 30-day advance notice is not practicable, notice must be given "as soon as practicable." Under the new regulations, if an employee is required to provide at least 30-days' notice of foreseeable leave and fails to do so, upon an employer's request, the employee shall explain the reasons why such notice was not practicable.

- "As soon as practicable" means as soon as possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of the need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same

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day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take “into account the individual facts and circumstances of the individual case.”

- An employee’s failure to provide timely FMLA notice may entail delay or denial of the employee’s request for FMLA-qualifying leave unless an “unusual circumstances” justify that failure.

Unforeseeable Leave

If the leave is unforeseeable, an employee must provide notice to an employer “as soon as practicable.” The new regulations clarify that “it generally should be practicable for an employee to provide notice of leave that is unforeseeable within the time prescribed by an employer’s usual and customary notice requirements applicable to such leave,” (e.g., calling a specified number or contact individual) unless unusual circumstances justify the failure to do so.

Content of the notice

- First time taker: an employee must provide at least verbal notice sufficient to make an employer aware that an employee needs FMLA-qualifying leave and also must advise an employer of the anticipated timing and duration of the leave. Although an employee need not expressly assert rights under the FMLA, or even mention the FMLA, “calling in sick” is insufficient to trigger FMLA obligations.
- Subsequent takers: if an employee is making subsequent leave requests for the same FMLA-qualifying reason in which an employer had previously provided FMLA leave, the employee must specifically reference the qualifying reason for the leave or the need for FMLA leave.

In circumstances in which an employer needs more information to determine whether the reason for the leave qualifies for FMLA, the employer is required to inquire further and may also request medical certification. However, if the employee fails to respond and the employer is unable to determine if the reason for the leave is FMLA-qualifying, the employer may deny FMLA protection.

Medical Certification

The DOL has made several changes to the medical certification process. These changes allow an employer to obtain sufficient medical facts (such medical facts may include information on symptoms, diagnosis ...) to verify that the employee has a serious health condition and make a determination. Please note, in states like California, an employer may not request certifications that contain diagnoses.

Timing

The new regulations provide an employer with five (instead of two) days to request that an employee furnish medical

certification after an employee gives notice of the need for leave.

Incomplete or insufficient certification

If a certification is incomplete or insufficient - an employer is required to inform the employee in writing what information is necessary and give an employee 7 calendar-days to provide the additional information to cure the deficiency.

- Incomplete certification is one in which one or more entries have not been completed.
- Insufficient certification is one in which the information is vague, ambiguous, or non-responsive.

Contacting health care providers

Unlike the current regulations, employers may now directly contact the health care provider to obtain clarification after giving an employee the opportunity to cure any deficiencies, but an employee’s supervisor may not contact health care provider under any circumstance.

Annual Medical Certifications

An employer may require a new certification in each subsequent leave year in which an employee takes FMLA leave.

Authentication and Clarification

If an employer has questions about the information provided, the employer may contact the employee’s healthcare provider to clarify or authenticate an FMLA certification.

Frequency of Recertification

As a general rule, an employer may not request recertification more often than every 30 days. If a medical certification provides that the minimum duration of the medical condition is more than 30 days, however, an employer must wait until that period elapses to request recertification. The revised regulations provides that in all instances, an employer may request recertification of a medical condition every six months, even for ongoing or lifetime serious health conditions.

An employer may not request recertification more often than every 30 days absent:

- an employee’s request for an extension of FMLA leave;
- a change in the circumstances described in a previous certification; or
- receipt of information that casts doubt upon the reason for the absence or the validity of the certification.

Fitness-for-duty Certification

Under the new rule, an employer may demand more than a “simple statement” of an employee’s ability to return to work.

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As a result of the change, an employer may require that the certification must address specifically the employee's ability to perform the essential functions of his or her job. In this regard, an employer must advise employees of such a requirement at the time they provide the "designation notice" required under the regulations. An employer should also supply a list of an employee's essential job functions.

An employer may only provide oral notice of the requirement no later than with the designation notice if an employee handbook or other written leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation).

Fitness for duty certifications for intermittent leave may be sought if "reasonable safety concerns" exist. A reasonable safety concern is similar to ADA's direct threat that is a reasonable belief of a significant risk of harm to the individual employee or others.

No second or third opinions are permitted for fitness-for-duty certification.

Intermittent leave

1. **Scheduling.** The final rule clarifies that an employee who takes intermittent FMLA leave has a statutory obligation to make a "reasonable effort" to schedule such leave so it does not disrupt unduly an employer's operations.
2. **Increments.** Current regulations provide that employers must account for intermittent leave in the smallest increment of time used by their payroll system to account for absences or use of leave, so long as the increment is one hour or less. The new regulations permit employers to limit the increment of leave for FMLA purposes to the shortest period of time an employer uses to account for other types of use of leave, provided it is one hour or less. In other words, an employer's own recordkeeping system in accounting for other forms of leave or absences controls the amount of increment.
 - a. If an employer uses different increments to account for different types of leave (e.g., accounting for sick leave in 30-minute increments and vacation leave in 1-hour increments)
 - b. Different increments at different points in time, i.e. employers may maintain a policy that leave of any type may only be taken in a 1-hour increment during the first hour of a shift (i.e., a policy intended to discourage tardy arrivals).

- c. Employees may not be charged FMLA leave for periods during which they are working
 - i. flare-up of a condition 30 minutes before the end of an employee's shift,
 - ii. If such a flare up occurred at the beginning of a shift.

Note: under the new regulations, employers are not required to account for FMLA leave in increments of 1 minute, 6 minute, or even 15 minute increments simply because their payroll systems are capable of doing so.

3. **Calculation of Intermittent leave.** The way in which an employer calculates the average number of hours worked for employees with fluctuating work schedules (schedule that varies from week-to-week) has changed from the weekly average of the hours worked over the 12 weeks prior to the beginning of the leave to the new method of calculation based on the weekly average of hours worked over the previous 12 months prior to the commencement of an employee's FMLA leave.
4. **Mandatory Overtime and Intermittent Leave.** It is unclear under the current regulations whether an employee who presents a doctor's note that he or she cannot work more than 40 hours a week (and therefore cannot work overtime) is taking "leave" under the FMLA. Under the new rule, overtime hours not worked due to FMLA leave can be counted against an employee's FMLA entitlement. Overtime is factored into the FMLA entitlement because both the entitlement and the leave usage rate are based on an employee's required (i.e., scheduled) hours of work. An employee's inability to perform voluntary overtime hours may not be counted against an employee's FMLA leave entitlement.
5. **"Physical Impossibility."** This is an exception to the minimum increment rule. In circumstances, in which it is physically impossible for an employee to access the worksite after the start of a shift or depart from the worksite after the start of a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. For example, if a flight attendant will miss the flight if he or she takes leave at the start of a shift, the entire period of time the flight lasts will be counted as FMLA leave.

Light-Duty Assignment

If an employer offers and an employee accepts light duty work, the time spent performing such duties does not count against the employee's FMLA leave entitlement. Further more, according to the DOL, an employee's right to job restoration to his or her

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original position is “effectively held in abeyance” during the period of time that an employee works in the light duty role. The right to job restoration in such circumstances however, “ceases at the end of the applicable twelve-month FMLA leave year” used by an employer to calculate leave. Please note that, “if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.”

Substitution of Paid Leave

The terms and conditions of an employer’s paid leave policies apply and must be followed by an employee in order to substitute for FMLA leave any form of accrued paid leave, including paid vacation, personal leave, family leave, sick leave, and paid time off.

For example, if an employer’s policy requires vacation leave to be taken in full-day increments, an employee substituting vacation for FMLA leave would have no right to use less than a full day of vacation leave. Similarly, if an employer requires a two-day notice before taking personal leave, an employee seeking to substitute personal leave for FMLA leave would need to meet the two-day notice requirement.

Please Note: As explained under the rights and responsibilities notice requirements, employers are required to notify employees in writing of any such restrictions regarding the use of paid leave and also have to inform an employee that he or she remains entitled to unpaid FMLA leave even if he or she chooses not to meet the terms and conditions of the paid leave policy.

Short-term Disability

If an employer has a disability benefit plan that requires an employee to provide more or different medical information than that permitted under the FMLA’s medical certification requirements, the employer may consider the information to determine whether the need for leave also qualifies for FMLA, as long as an employer makes clear that the failure to provide this additional information only jeopardizes receipt of disability benefits, not the entitlement to unpaid FMLA leave. The same rule applies in the case of workers’ compensation benefits.

Waiver of Rights

An employee may voluntarily settle or release FMLA claims based on past employer conduct without first obtaining DOL or court approval for such settlement or release. The rule, however, does not allow waiver of retrospective FMLA rights.

Holiday Week

Whether an employee may be charged FMLA leave for a holiday depends upon whether an employee takes the FMLA leave for a full or partial work week. An employee taking a full week of FMLA leave during a week containing a holiday will have the

holiday counted against his or her FMLA allotment. On the other hand, if an employee takes less than a full week of FMLA leave during a week containing a holiday will not have the holiday counted against his or her FMLA allotment unless the employee was otherwise scheduled and expected to work the holiday.

Perfect Attendance Awards

The new regulation eliminates the distinction between bonuses based on the absence of occurrences (such as perfect attendance or safety) and bonuses based on achievement of goals (such as production bonuses). Thus an employer is allowed to disqualify an employee who has not achieved the goal due to employee’s use of FMLA leave. Nevertheless, an employer may not treat employees taking non-FMLA leave differently from employees taking FMLA leave.

Family Military Leave

Qualifying Exigency Leave

The NDAA amendment to the FMLA allows an eligible employee to take up to 12 work weeks of leave because of any “qualifying exigency” arising out of the fact that an employee’s spouse, child, or parent is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a “contingency operation.” However, the term “qualifying exigency” was not defined in the statute. The DOL has now provided the definition.

Definition of qualifying exigencies

1. Short-notice deployment: to address any issue that arises from a call or order to active duty 7 or less calendar days prior to the date of deployment.
2. Military events and related activities: to attend any official ceremony, program, or event sponsored by the military including attending family support and assistance programs and informational briefings.
3. Childcare and school activities: for alternative childcare arrangement, to provide childcare on an urgent, immediate need basis (but not on a regular basis,) to attend meetings with staff at a school or a day care facility, such as meetings with school officials regarding disciplinary measures.
4. Financial and legal arrangements: to make or update legal and financial arrangements, to act as the servicemembers representative.
5. Counseling: provided that the need for counseling arises from the active duty or call to active duty status of a covered military member.

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6. Rest and recuperation: to spend time with a servicemember who is on short-term, temporary rest and recuperation during the period of deployment. An employee may take up to 5 days of leave for each instance.
7. Post-deployment activities: to attend arrival ceremonies, reintegration briefings and events, and official ceremony or program sponsored by the military for a period of 90 days following:
 - i. the termination of the covered military member's active duty and
 - ii. to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.
8. Additional activities: to address other events provided that an employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

Definition of active duty

Qualifying exigency leave is limited to circumstances involving a family member of the National Guard or Reserves or a retired member of the regular armed forces or the reserve. However, this entitlement to qualifying exigency is not available to family members of the Regular Armed Forces because members of the Regular Armed Forces do not serve "under a call or order to active duty" as required by the NDAA amendments. Moreover, a call to active duty does not include state calls unless pursuant to the order of the President in certain circumstances.

Certification requirements

An employer may require that an employee provide a copy of a covered family member's active duty orders or other documentation issued by the military that shows that a covered military member is on active duty or call to active duty status, and the dates of the active duty service. The employer, however, may only request this information once per family member, although it may request a copy of new orders or other military documentation if the need to take such leave arises out of a different period of active duty or call. An employer may verify the information, but no second opinion or recertification is permitted for this type of leave.

Please Note: qualifying exigency leave is an additional qualifying reason available for an employee to take the standard 12-week leave entitlement (i.e., leave for an employee's own or a family member's serious health condition, and leave for the birth, adoption, or foster care placement of a child) provided

by the FMLA. It is not a 12-week entitlement in addition to the standard 12-week entitlement.

Servicemember Caregiver Leave

Pursuant to the NDAA amendments, the new regulations provide eligible employees who are the family members of covered service members to take up to 26-weeks of leave in a "single twelve-month period" to care for a covered service member.

Covered Servicemember

A covered service member is a person who is:

1. on the temporary disability retired list; for a serious injury or illness "incurred in the line of duty on active duty"; or
2. a current member of the Armed Forces, including a member of the National Guard or Reserves, who has 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; or
3. otherwise on outpatient status.

Please note: Unlike the Qualified Exigency Leave, a military caregiver leave is not limited to members of the National Guard or Reserves who are on active duty or have been called to active duty status, but also to members of the Regular Armed Forces. Former members of the Regular Armed Forces, the National Guard and Reserves, and members on the permanent disability retired list, however, are not considered covered servicemembers.

"Next of kin"

The DOL has defined the "next of kin of a covered servicemember" as the servicemember's nearest blood relative, other than the servicemember's spouse, parent, son, or daughter, in the following order of priority:

1. blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions,
2. brothers and sisters,
3. grandparents,
4. aunts and uncles, and
5. first cousins.

A covered servicemember, however, may specifically designate in writing another blood relative to be his or her next of kin for purposes of military caregiver leave under the FMLA. In such circumstances, only that designated next of kin may take FMLA leave to care for the servicemember. When no such designation

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is made and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember.

"Single 12 month period"

There is a separate "FMLA year" for military caregiver purposes. The 'single 12-month period' commences on the first day an employee takes leave to care for a covered servicemember with a serious injury or illness and ends 12 months after that date, regardless of the method used by an employer to determine an employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

Certification

Certification can be requested from an "authorized healthcare provider." The standard FMLA authentication and clarification provisions apply, but an employer may not utilize the second opinion or recertification process for this leave entitlement.

STATE LAW CHANGES & DEVELOPMENTS

New Jersey

The New Jersey Department of Labor (NJDOL) has posted additional information regarding the new Paid Family Leave Law. The detailed Question and Answer sheet provides important payroll information (including how to report employee contributions on Form NJ927 and W-2s) at: http://lwd.state.nj.us/labor/fli/content/fli_faqs.html

New Jersey is the third state, along with California and Washington, which have similar paid family leave plans.

The New Jersey Paid Family Leave Law (NJ-PFL) expands the state's temporary disability insurance program to give workers up to 6-weeks of paid family leave during any 12-month period to care for a sick family member or a newborn or newly adopted child. It provides temporary disability insurance benefits at two-thirds of wage replacement up to a maximum of \$524 per week in 2008. The program will be financed through a payroll deduction.

On a related note, New Jersey lawmakers have introduced two bills in the Assembly that seek to delay the implementation of the NJ-PFL (by periods of one and two years). If either bill passes, the payment of benefits for family temporary disability leave under the Paid Family Leave Law would commence on July 1, 2010 or 2011, instead of July 1, 2009 as currently scheduled, and the collection of

taxes to fund those benefits would commence on January 1, 2010 or 2011, instead of January 1, 2009.

Wisconsin

Milwaukee is now the third city following San Francisco and the District of Columbia to require employers to provide paid time leave to their employees.

Under the measure, a full-time employee earns a minimum of an hour of paid sick time for every 30 hours worked, or nine days a year. Businesses with 10 or fewer employees are required to provide 5 days a year of paid sick time to full-time employees.

The paid leave can be taken for illness or medical care for the employee or the employee's child, parent or other relative. The time can also be used to attend to medical and legal issues resulting from domestic violence, sexual assault, or stalking.

The ordinance will take effect on February 10, 2009.

Reminder

Reed Group recommends that employers review their employee handbook, leave and FMLA policies in order to ensure they are in compliance with the revised and new regulations.

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