

• Summary of 2009 Revisions to Family and Medical Leave Act •

Notice of FMLA Rights

- Poster. The Department of Labor has created a new poster for employers to display. The poster can be found at www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf. The poster must still be displayed in a location where employees and applicants can see it.
- Notice to New Employees. Under the new regulations, employers must now distribute the FMLA Form Notice to new employees at the time of hire. The Notice may be part of an employee handbook provided to the new hire.
- Employee Handbook. Employee Handbooks must be updated to reflect the changes occasioned by the new regulations. If a significant part of the employer's workforce is comprised of employees who are not literate in English, the employer must provide the notice information in a language in which the employees are literate.

Employee Notice Requirements regarding FMLA Leave

- The new regulations clarify that employees taking FMLA leave must follow their employer's usual and customary procedures for reporting time off, absent unusual circumstances. Failure to comply with the employer's notice procedures is now grounds for denying a request for FMLA leave.

Providing Employees with Notices regarding FMLA Leave

- Eligibility Notice. When an employee requests FMLA leave, or the employer has reason to believe the requested leave may qualify as FMLA leave, the employer must notify the employee within five business days whether the employee is eligible for FMLA leave ("Eligibility Notice"). The Eligibility Notice must tell the employee whether he or she is eligible for FMLA leave and, if not, why not.
- Rights and Responsibilities Notice. The employer must provide a "Rights and Responsibilities Notice" at the same time it delivers the Eligibility Notice, to inform the employee of specific items of information listed in the regulations.
- Designation Notice. Within five business days of obtaining information regarding the facts and circumstances of the leave, the employer is required to inform the employee whether a request to designate the leave as FMLA leave has been approved, denied or more information is needed to make a determination. The notice must also tell the employee whether "fitness to return to work" certification will be required and, if so, it must list the employee's "essential job functions."

Medical Certification of Serious Health Condition

- Definition of “Serious Health Condition”. The definition of a “serious health condition” is essentially the same as before. However, the new regulations clarify that in order to qualify as a chronic serious health condition, the employee must visit his or her health care provider for treatment of the condition at least two times each year.
- Contacting Employee’s Health Care Provider. Certain company officials (a health care provider, HR professional, leave administrator, or management official) may now contact the employee’s health care provider without the employee’s permission to verify a medical certification or clarify information. However, the employee’s direct supervisor may not contact the employee’s health care provider. Employers may not ask the health care provider for any information beyond what is required on the DOL’s new certification forms. If an employee does not authorize direct contact, employers may deny a request for leave.
- Recertification of Condition. If the employee’s condition lasts less than 30 days the employer may request recertification of the condition every 30 days. If the condition lasts longer than 30 days, the employer may request certification every 6 months (the employer no longer has to wait until the minimum duration of the condition has passed).
- New Medical Certification Each Year. If the employee’s condition lasts longer than a year, the employer may now require a new certification for each year the employee is on leave.

Fitness To Return To Work Certification

- Employers may require an employee to provide a “Fitness to Return to Work” certification from his or her healthcare provider before the employee may return to work. The employer can now request that information in the Certification specifically address whether the employee can perform his or her essential job functions. If the employer requires a certification, the employer must notify the employee of this requirement in the Designation Notice. The employer must also provide a list of the employee’s “essential job functions.”

Military Family Leave Entitlements

- “Qualified Exigency” Leave. Employees are entitled to 12 weeks of leave due to a “qualifying exigency” that results when the employee’s spouse, child or parent is called to active military duty. Qualified exigencies include short notice (7 days) deployments; military events and activities; managing child care and school activities; managing financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and other activities agreed upon between the employee and employer.