

New DOL Regulations One Year Later

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Family And Medical Leave Act ("FMLA")

New FMLA regulations went into effect January 2009

- Intended to clarify issues that had arisen since the adoption of the FMLA and its regulations in 1993
- Attempted to, in some instances, provide employers with some flexibility in managing FMLA leave at his/her workplace

What Type Of Employer Does FMLA Cover?

- Private employers that have at least 50 employees for at least 20 weeks in the current or preceding calendar year
 - Number of employees = all workers over whom an employer's organization exercises control (may include temporary workers obtained through an outside agency)
- All government employers (regardless of the number of employees)
- Professional Employer Organization (PEO) – if it is considered a joint employer (addressed in the revised regulations)

Successor Employer

- Must grant leave to eligible employees who had provided notice to the previous employer and continue the leave begun by employees
- Must also follow the FMLA's rules on maintaining employees' benefits and reinstating them to their jobs

****The successor employer has this responsibility even if the new company has fewer than 50 employees.****

Employee Eligibility For FMLA Leave

- An employee must have:
 - been employed by the employer for at least 12 months (doesn't have to be consecutive)
 - worked at least 1,250 hours in the 12 months before he/she is to begin taking the FMLA leave and
 - been employed at a work site where the employer employs 50 or more employees within 75 miles of the work site.

Requirement 1: Employed By Employer For At Least 12 Months

- Does not have to be consecutive.
- Look back seven years to determine whether the employee has 12 months' service (New Regulations).
- Two exceptions:
 1. Look back longer than seven years if the employee's service break resulted from the employee's National Guard or Reserve military service obligations -- The employer must credit the time spent on Guard or Reserve duty toward the 12-month employment requirement.
 2. Look back more than seven years when the employer has a written agreement indicating its intention to rehire employees after a break in service.

Requirement 2: 1,250 Hours

- The employer must credit time spent on Guard or Reserve duty toward the 1,250 hours.

Requirement 3: Employment of 50 Employees Within 75 Miles of Worksite

- The employee's work site ordinarily is the place to which he reports or, if there's no such site, the place to which his work is assigned.
- The work site for those with no "fixed work site" can be either the place to which they're assigned, from which their work is assigned, or to which they report.
- The work site of a joint employee is the primary employer's office from which the employee is assigned or to which the employee reports, unless the employee has physically worked at a secondary employer's facility for at least one year (secondary employer's site is then the employee's work site).

Serious Health Condition

- The FMLA allows an eligible employee to take protected leave to:
 - care for his or her own serious health condition
 - care for certain close family members who suffer from a serious health condition

A serious health condition must fit within one of six categories.

Serious Health Condition:
Category 1

Inpatient care

- Conditions requiring an overnight stay in a health care facility (e.g., hospital or hospice) automatically are considered serious health conditions.
- FMLA leave covers the time in the facility and any subsequent period of incapacity or follow-up treatment in connection with the same condition.

Serious Health Condition:
Category 2

- **Period of incapacity for more than three consecutive, full calendar days, along with either two visits to a health care provider or one visit and a continuing treatment regimen**
- Incapacitation = the inability to perform essential functions of an employee's job, attend school or perform other regular daily activities because of the serious health condition, being treated for the condition, or recovering from treatment.
- Two treatments with healthcare provider must occur within 30 days of the start of incapacitation with the first treatment occurring within the first seven days.
- Extenuating circumstances (factors beyond employee's control) can excuse the failure to undergo two treatments in 30 days.

Serious Health Condition:
Category 3

Pregnancy and Prenatal Care

- The FMLA covers any period of incapacity due to pregnancy and/or prenatal care.
- No health care provider visit required.

Serious Health Condition:
Category 4

Chronic serious health conditions that incapacitate a person

- Chronic condition = requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than continuing periods of incapacity (ex: diabetes, asthma, epilepsy).
- An employee with a serious health condition must visit a health care practitioner for treatment at least twice a year under new DOL regulations.

Serious Health Condition:
Category 5

Permanent or Long Term Conditions

- Period of incapacity that is permanent or long-term because of a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal disease, etc.).

Serious Health Condition:
Category 6

Conditions Requiring Multiple Treatments

- Protects an absence to receive multiple treatments by health care providers and also to recover from the treatment (chemotherapy).
- Includes reconstructive surgery after an accident or injury or a condition that would be likely to result in incapacity of more than three consecutive full calendar days if left untreated (cancer, severe arthritis, or kidney disease).
- Does not include non-restorative cosmetic procedures, although they could be covered by FMLA if they required inpatient treatment.

Covered Family Members

- Spouse (husband or wife; same-sex spouses aren't covered under FMLA);
- son or daughter (biological child, adopted child, foster child, stepchild, legal ward, or child for whom the employee stands in place of a parent); or
- parent (employee's biological parent or person who stood in the place of a parent when the employee was a child).

Employers may request documentation that confirms the family relationship.

Employer Notice Requirements

1. Post a general notice about FMLA at facility even if no eligible employees are working there.
2. Provide employee with Eligibility Notice within five business days of FMLA request or learning leave may be for a FMLA qualifying reason.
 - If employee is ineligible employer must give at least one reason for ineligibility.
 - Notify employee how much FMLA s/he has available.
3. Provide Rights and Responsibilities Notice (at same time you provide Eligibility Notice).
4. Provide Designation Notice within five days of employer obtaining enough information to determine if leave is being taken for FMLA qualifying reason.
 - Tells employee whether the leave will count as FMLA leave
 - States whether paid leave will be substituted for unpaid FMLA leave
 - States amount of time counted against FMLA leave

Employer Liability

- If an employee suffers individual harm because his employer did not follow the notification rules, the employer may be liable for any actual harm the employee suffered as a result.

Employee Notice Requirements

- **Foreseeable leave:** Employees must give at least 30 days notice when the need for FMLA leave is foreseeable. If 30 days isn't practicable, the employee must give notice "as soon as practicable."
- **Unforeseeable leave:** According to the new regulations, **absent unusual circumstances, employees must follow their employers' usual notice and procedural requirements** for taking leave unless they are more stringent than FMLA permits.
- Employee's notice must provide "sufficient information" to make his employer aware of the need for FMLA and must state the employee's anticipated timing and duration of leave.

Recent Developments

DOL Opinion Letter:

- Reaffirms the new regulations' conclusion that an employee may be required to use the employer's regular call-in procedure to give an employer notice that he/she needs FMLA leave.
- This is true absent unusual circumstances.
- If an employee fails to use the employer's established call-in procedures to qualify for FMLA leave, then an employer is able to deny or delay FMLA leave to that employee.

Recent Developments Continued...

Smith v. CallTech Communications, LLC, No. 2:07-cv-144, 2009 U.S. Dist. LEXIS 48518 (S.D. Ohio June 10, 2009).

- **Holding:** The employer was entitled to some documentation for employee's absences but the three day period she was given to get a doctor's note was unreasonable as a matter of law.

This case shows that employers need to adopt policies that set a reasonable period of time for the employee to provide the doctor's note, with some flexibility that takes into account the facts of each case.

Medical Certification

- Employer has five business days to request certification.
- Employee has at least 15 calendar days to submit it (including when the employee has given 30 days advance notice of foreseeable leave).
- Employees have at least seven days to cure incomplete or insufficient certifications (employer should put in writing the additional information that would make the employee's certification sufficient).
- An employer may request certification for an employee's serious health condition, a family member's serious health condition or a fitness for duty certification. An employer should not request certification for leave to care for a healthy newborn/adopted/foster child.
- An employer may obtain annual certifications of conditions lasting more than one leave year.

More About Medical Certification

- A representative of the employer who is not the employee's direct supervisor may contact the employee's health care provider directly for authentication or clarification of certification, provided the employee has been given an opportunity to cure a faulty certification.
- An employer may obtain return-to-work certifications, also known as fitness-for-duty certifications, from employees returning from leave. Employees on intermittent leave may be asked for fitness-for-duty certification when there are reasonable safety concerns.
 - These certifications can't be required more often than once every 30 days.

Substituting Paid Leave

- Employer may require an employee to use his/her accrued paid leave when he/she chooses to take FMLA leave.
- Employee may voluntarily substitute his accrued paid leave for unpaid FMLA leave.
- FMLA leave and paid leave run concurrently.
- If an employer requires that an employee use his/her accrued paid leave, the employee must follow the terms of the employer's paid leave policy.

Other Provisions

- **Perfect Attendance Awards:** An employer may deny a "perfect attendance" award to employees who don't have perfect attendance because they took FMLA leave
 - but only if the employer treats employees taking non-FMLA leave the same way.
- **Mandatory Overtime:** Employees assigned to mandatory overtime who cannot work that overtime because of an FMLA situation, may take FMLA leave that amounts just to the overtime not worked during the week.
 - Following the exhaustion of FMLA leave, employees still unable to work mandatory overtime may be considered "not qualified" for their jobs.
 - This is true only for **required/mandatory** overtime, not voluntary.

Thank you!



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