

**The Hospitality Law Seminar Eastern Region  
June 1-2, 2009**

**The Family and Medical Leave Act Regulatory Revisions  
Effective January 16, 2009**

**Guide for Compliance**

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## **I. INTRODUCTION**

The Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, was enacted in 1993 for the purpose of providing job protection to employees who needed to take leave from their job for certain medical reasons and childbirth or adoption. Since that time, employers have struggled with its requirements, particularly those allowing employees the right to take leave intermittently. In 2007, Congress amended the FMLA to add protection for leaves related to military service. In 2008, the Department of Labor published revised regulations both to address these new forms of leave and to amend the original regulations in light of 15 years of experience in the application of the FMLA. 29 C.F.R. § 825.100 *et seq.* The regulations became effective January 16, 2009. While clarifying the answers to some issues and providing new forms for use in administering the leave, the amended regulations fell far short of most employers' hopes for clarity and guidance. As with all laws, compliance with the FMLA is a product of knowledge of its provisions. This guide is intended to assist in employers' compliance with FMLA's complex requirements.

## **II. GENERAL FMLA PROVISIONS**

### **A. Employers Covered**

The FMLA applies to private employers having 50 or more employees for a 20-week period during the current or preceding calendar year. It also, by its terms, applies to all governmental employers, local educational agencies, and schools, both public and private without regard to number of employees. 29 U.S.C. § 2611(4).

### **B. Affirmative Mandates**

Employers must provide eligible employees unpaid leave and other FMLA entitlements. 29 U.S.C. § 2612. These include restoration to the same or an equivalent position upon returning from leave and the continuation of health insurance during leave on the same terms and conditions while not on leave. 29 U.S.C. § 2614.

### **C. FMLA Prohibitions**

An employer may not discriminate against any employee or interfere with, restrain, or deny the exercise or the attempt to exercise any right provided under the Act. An employer may not discriminate against any individual for opposing practices made illegal by the Act. 29 U.S.C. § 2615(a).

## **III. EMPLOYEES ENTITLED TO FMLA LEAVE**

### **A. Employee**

The FMLA defines "employee" as "any individual employed by an employer." The term "employ" is defined as "to suffer or permit to work." This definition is borrowed *in toto* from the Fair Labor Standards Act. 29 U.S.C. 2611(3). As the regulations note,

this is one of the broadest definitions of the term “employee” under any federal law. 29 C.F.R. § 825.105(a).

## **B. Twelve Months Of Service**

To be entitled to FMLA leave an employee must have worked at least 12 months with their employer. 29 U.S.C. § 2611(2). The twelve months of service need not be consecutive, but must be within a seven year period prior to the employee’s request for leave. Employer’s need not, but may, count employment occurring prior to a seven year break in service toward the employee’s eligibility. 29 C.F.R. § 825.110. Because of the FMLA’s adoption of the Fair Labor Standards Act’s liberal definition of employer and employee, one court has held that time an employee worked as a temporary employee before being permanently hired counted toward calculation of this one year period. *Miller v. Defiance Metal Products*, 989 F. Supp. 945 (N. D. Ohio 1997). The regulations state that the 12 months of service include time spent on leave. As such, if an employee becomes eligible while on a leave, the remainder of the leave will, assuming all other prerequisites are met, be counted as FMLA leave. 29 C.F.R. § 825.110(d).

## **C. 1,250 Hours In 12 Months Immediately Preceding Leave**

To be “eligible,” an employee must have worked at least 1,250 hours in the 12 months preceding the time leave is to begin. 29 U.S.C. § 2611(2). An employee’s hours worked are calculated by utilizing the definition of hours worked in the Fair Labor Standards Act. Only hours actually worked qualify for credit toward this total. Hours paid for time off such as holidays and vacation do not count. If an employee is exempt from the Fair Labor Standards Act “FLSA” coverage, such as professional, executive, or administrative employees, the employer has the burden of proving the employee has not worked sufficient hours to be entitled to leave. It is presumed the employee worked the minimum number of hours for FMLA eligibility. 29 C.F.R. § 825.110(c).

## **D. Worksite With 50 Employees Within 75 Mile Radius**

To be eligible, an employee must work at a worksite with 50 or more employees within 75 miles of the worksite. 29 U.S.C. § 2611(2)(B)(ii). A worksite is a single location or a group of contiguous locations. Separate buildings within a single location are considered the same worksite if the buildings are reasonably close to each other, serve the same purpose, and use some of the same staff and equipment. For employees who have no fixed worksite, their assigned home base is considered the employee's worksite. 29 C.F.R. § 825.111(a).

The 75-mile radius is based upon road miles. When determining whether the radius test is satisfied, an employer must consider the shortest route, using public streets, roads, highways, and waterways from the worksite where the employee requesting the leave is employed. The number of employees on the payroll determines the number of employees within the 75 miles. 29 C.F.R. § 825.111(b).

Employers with salesmen who work out of their homes should be aware of how the regulations define worksite in these situations. They state: “An employee's personal

residence is not a worksite in the case of employees who travel a sales territory and who generally leave to work and return from work to their personal residences.... Rather, their worksite is the office to which they report and from which assignments are made.” 29 C.F.R. § 825.111(a)(2).

**E. Eligibility For Protection From Retaliation For Exercise Of FMLA Rights**

An employee does not have to be eligible to take FMLA to continue to be protected against discrimination/retaliation for utilizing FMLA leave. 29 U.S.C. § 2615. Thus, the fact that an employee would not be eligible for FMLA leave at the time of termination does not render him unprotected if the employer takes protected leaves into account when making the termination decision. Likewise, applicants for employment are protected from discrimination for exercising FMLA rights. 29 U.S.C. § 825.220.

**IV. CIRCUMSTANCES TRIGGERING THE LEAVE REQUIREMENT**

Eligible employees may be entitled to FMLA leave for any of six reasons:

- Child birth and subsequent care of the newborn.
- Placement of a child for adoption or foster care.
- Care of the employee's spouse, the employee's child, or parent of the employee who has a serious health condition.
- The employee's own serious health condition that makes it impossible for the employee to perform the functions of the job.
- Due to a qualifying exigency caused by a spouse, son, daughter, or parent’s call to active military duty.
- To care for a covered servicemember with a serious injury who is the employee’s spouse, child, parent, or next of kin.

The maximum amount of leave that may be taken in a 12-month period for all reasons combined is 12 weeks, with one exception. For leave to care for a Covered Servicemember, the maximum combined leave entitlement is 26 weeks, with leaves for all other reasons constituting no more than 12 of those 26 weeks.

**V. CHECKLIST FOR IMPLEMENTING NEW FMLA REQUIREMENTS**

**A. Audit Compliance With Posting and Paperwork Requirement**

\_\_\_\_\_ FMLA poster is posted in a prominent location at each worksite.

The Department of Labor (“DOL”) has updated its form WH-1420, *Employee Rights and Responsibilities Under the Family and Medical Leave Act*, which

replaces *Your Rights under the Family and Medical Leave Act of 1993*, rev'd. 8/01. Posting must be accessible to employees and applicants. Electronic posting is permitted, and posting in language other than English may be required. This and other DOL forms are available on the DOL's website, [www.dol.gov/esa/whd/fmla](http://www.dol.gov/esa/whd/fmla).

\_\_\_\_\_ Notice has been disseminated to all employees and a procedure is in place to distribute it to new hires.

Updated WH-1420 may be used for this purpose. In lieu of this notice, a covered employer may satisfy this obligation by revising its current FMLA policy (as incorporated within an employee handbook) to incorporate all elements contained within updated form WH-1420. Among other things, any such policy should identify the basis for measuring the 12-month period in which leave may be taken (i.e., rolling backwards, calendar year, etc.).

\_\_\_\_\_ Updated notice and designation forms are being utilized.

DOL has issued two new forms for this purpose, WH-381, *Notice of Eligibility and Rights and Responsibilities*, and WH-382, *Designation Notice*. Together, these forms replace WH-380, *Employer Response to Request for Leave*, rev'd. 6/97.

\_\_\_\_\_ Updated certification forms are provided to employees.

DOL has issued two updated certification forms, to be utilized depending on the nature of the underlying leave request. WH-380E is the *Certification of Health Care Provider for Employee's Serious Health Condition*. WH-380F is the *Certification of Health Care Provider for Family Member's Serious Health Condition*. Together, these two forms replace WH-380, *Certification of Health Care Provider*, rev'd. 12/99.

DOL has also issued two new certification forms for purposes of dealing with military FMLA leave. WH-384 is the *Certification of Qualifying Exigency for Military Family Leave*. WH-385 is the *Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave*.

\_\_\_\_\_ Coordinate revisions with other existing leave policies.

Non-FMLA leave policies should be reviewed to ensure that they require employees on leave to furnish a report on status and intent to return to duty along with a certification of fitness-for-duty.

\_\_\_\_\_ Review and update current job descriptions.

Employers must attach an updated list of essential job duties to WH-382, *Designation Notice* should they choose to compel return-to-work certification addressing employee's ability to perform essential job functions.



\_\_\_\_\_ Audit compliance with new paperwork requirements.

\_\_\_\_\_ Conduct supervisory training.

Train supervisors to review new forms and procedures called for by the revised regulations, along with refresher points highlighting those requests that may implicate FMLA rights, and the need to proceed with caution when discipline or discharge is implicated.

## **B. Responding To A Leave Request Or Absence**

### **1. Evaluating Qualification for FMLA Leave**

\_\_\_\_\_ Review the request or absence to determine whether it is potentially FMLA-qualifying, by confirming whether it falls into one of six categories:

\_\_\_\_\_ Birth of employee's child, and/or to care for newborn child;

\_\_\_\_\_ Placement of a child for adoption or foster care with employee;

\_\_\_\_\_ Provide care for "close family member" with a "serious health condition";

\_\_\_\_\_ Employee's own "serious health condition" that makes employee unable to perform job functions;

\_\_\_\_\_ Care for "covered servicemember" due to serious injury or illness sustained in the line of duty while on active duty; or,

\_\_\_\_\_ To tend to a "qualifying exigency" arising out of a "covered military member's" commitment to duty under a call or order to active duty.

\_\_\_\_\_ If employee fails to provide sufficient information to make this determination, then inquire further to ascertain whether the leave is potentially FMLA-qualifying.

### **2. Evaluating Notice Preceding FMLA Leave**

\_\_\_\_\_ Did employee comply with customary notice and procedural requirements for requesting leave?

\_\_\_\_\_ If the need for leave appears foreseeable, determine whether the employee provided 30 days' advance notice. If not, ask for an explanation.

\_\_\_\_\_ If 30 days is not practicable under the circumstances, determine whether the employee provided notice within a business day of it becoming practicable.

\_\_\_\_\_ If need for leave is not foreseeable (or if need derives from a “qualifying exigency”), determine whether the employee provided notice as soon as practicable.

\_\_\_\_\_ Utilize a standardized Leave Request form for purposes of tracking this information.

### **C. Issuing Mandated Notice And Designation**

#### **1. Complying with the New Notice Requirement**

\_\_\_\_\_ Within five business days of receiving leave request or acquiring knowledge of FMLA-qualifying basis for leave, notify employee of eligibility utilizing WH-381, Part A, *Notice of Eligibility and Rights and Responsibilities*.

\_\_\_\_\_ State at least one reason for any determination of ineligibility, verbally or in writing.

\_\_\_\_\_ If employee is deemed eligible, provide written notice detailing specific expectations and obligations of employee and consequences for failing to meet those obligations utilizing WH-381, Part B, *Notice of Eligibility and Rights and Responsibilities*.

\_\_\_\_\_ If applicable, provide employee with appropriate Certification Form to complete and return within 15 days.

#### **2. Complying with the New Designation Requirement**

\_\_\_\_\_ Within five business days of acquiring sufficient information to determine if leave is FMLA-qualifying, issue notice as to whether leave will be designated as FMLA-qualifying. Any verbal notice must be confirmed in writing by the following payday. WH-382, *Designation Notice*, may be used for this purpose.

\_\_\_\_\_ Any such notice must state the amount of leave that will be counted against the employee’s annual entitlement, any requirement for substitution of paid leave, and any applicable fitness for duty certification requirements.

\_\_\_\_\_ If health care provider is to certify that returning employee can perform essential job functions, a list of essential duties must accompany the *Designation Notice*.

\_\_\_\_\_ If leave is subsequently requested for a different qualifying reason and the employee’s eligibility status has changed during the applicable 12-month measuring period, then an additional *Designation Notice* must be issued.

\_\_\_\_\_ *Designation Notice* may be issued retroactively, so long as it does not cause harm or injury to the employee.

## **D. Utilizing The New Certification Forms**

- \_\_\_\_\_ If employees request leave for their own serious health conditions, they should be asked to furnish a complete and sufficient *Certification of Health Care Provider for Employee's Serious Health Condition* form, WH-380E.
- \_\_\_\_\_ Those who request leave for the serious health condition of a close family member should furnish a *Certification of Health Care Provider for Family Member's Serious Health Condition* form, WH-380F. Documentation of the family relationship may also be required.
- \_\_\_\_\_ Those who seek leave to tend to a “qualifying exigency” arising out of a “covered military member’s” commitment to active duty should furnish a completed *Certification of Qualifying Exigency for Military Family Leave* form, WH-384. Active duty orders or military documentation of active duty or call to active duty may be required on a per-incident basis. Confirmation of family relationship may also be required.
- \_\_\_\_\_ Those who seek leave to care for “covered servicemember” due to serious injury or illness sustained in the line of duty should be asked to furnish a completed *Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave*, WH-385. “Invitational Travel Orders” or “Invitational Travel Authorizations” issued to family members may be provided in lieu of certification. Documentation of “next of kin” status may also be required.
- \_\_\_\_\_ All certification forms should be returned within 15 days, unless it is impracticable to do so despite the employee’s diligent, good faith efforts.
- \_\_\_\_\_ If employee fails to furnish a complete and sufficient certification despite receiving an opportunity to timely cure the problem, leave may be denied.
- \_\_\_\_\_ A new certification may be required for every 12-month period for non-military related leaves.

## **E. Resolving Problems With Certification/Documentation**

### **1. Incomplete or Insufficient Certification**

- \_\_\_\_\_ Advise employee in writing of additional information necessary to render the form complete and sufficient.
- \_\_\_\_\_ Provide employee with seven calendar days to cure any deficiencies, unless impracticable despite employee’s diligent, good faith efforts.
- \_\_\_\_\_ The *Designation Notice*, WH-382 should be used to advise employee of any requirements in this regard.

## **2. Questioning Authenticity of Certification**

- \_\_\_\_\_ Contact health care provider after seven-day curing period above has lapsed. Contact should be confined to a health care professional, human resources professional, leave administrator or other appropriate management official. Direct supervisor may not take part.
- \_\_\_\_\_ Provide health care provider with a copy of the completed certification form and inquire into whether he or she completed and/or authorized the information.
- \_\_\_\_\_ Do not require any additional medical information.

## **3. Clarifying the Certification**

- \_\_\_\_\_ Health care provider may be contacted pursuant to limitations set forth above.
- \_\_\_\_\_ “Clarification” is limited to understanding the handwriting and the meaning of the response. Employer may not request additional information beyond that required on the certification form.
- \_\_\_\_\_ Employer may be called upon to furnish HIPAA authorization.

## **4. Questioning Validity/Obtaining Second Opinion**

- \_\_\_\_\_ Employer may require second opinion at its own expense, unless purpose of leave is to care for a servicemember.
- \_\_\_\_\_ Absent limited exceptions, employer may not designate a health care provider that it employs, regularly engages or contracts with.
- \_\_\_\_\_ If the second opinion differs from the first, a third opinion may be required at the employer’s expense. The third health care provider is jointly designated by the employer and the employee. The third opinion is final and binding.
- \_\_\_\_\_ At the employee’s request, the employer must provide copies of the second and third opinions within five business days, absent extenuating circumstances.
- \_\_\_\_\_ Employee is provisionally entitled to FMLA benefits, pending receipt of any second or third opinions.

## **5. Questioning the Need for Qualifying Exigency Leave**

- \_\_\_\_\_ Consider contacting the Department of Defense to verify active duty or call to active duty status.
- \_\_\_\_\_ Consider contacting any meeting participant to verify the schedule and nature of the meeting.

## **F. Obtaining Recertification Of Serious Health Condition**

- \_\_\_\_\_ Consider requesting recertification due to serious health condition of employee or family member. It may not be requested in connection with leave sought to care for or tend to a servicemember.
- \_\_\_\_\_ Provide the health care provider with a record of the employee's absence pattern and ask him or her if it is consistent with the employee's or close family member's serious health condition and the underlying need for leave.
- \_\_\_\_\_ A recertification may typically be required no more than every 30 days. If leave is certified for more than 30 days, however, the employer must wait until the duration of leave or six months, whichever is less.
- \_\_\_\_\_ Recertification may be requested less than every 30 days if:
  - \_\_\_\_\_ The employee requests extension of leave;
  - \_\_\_\_\_ There is a significant change in circumstances; or,
  - \_\_\_\_\_ Employer receives information casting doubt on reason for absence or continuing validity of certification.
- \_\_\_\_\_ Employee must furnish complete and sufficient recertification within 15 days from Employer's written request, unless it is impracticable to do so under the circumstances despite employee's diligent, good faith efforts.
- \_\_\_\_\_ Employee must cure any deficiencies in recertification within seven calendar days of Employer's written notice seeking additional information necessary to render the recertification complete and sufficient.

## **G. Obtaining Status Reports**

- \_\_\_\_\_ Periodic report of status and intent to return to duty may be required if Employer also requires such reports for employees on non-FMLA leave. Employees should be advised of their obligations in the *Notice of Eligibility and Rights and Responsibilities* form, WH-381.
- \_\_\_\_\_ Employer may require employee to provide two days' notice of any changed circumstances requiring additional leave or reduction in anticipated leave.

## **H. Fitness For Duty Certification**

- \_\_\_\_\_ Returning employees may be required to provide a fitness for duty certification, at employee's expense, consistent with a uniformly-applied policy or practice for similarly-situated employees.
- \_\_\_\_\_ Certification may address employee's ability to perform essential job functions.

- \_\_\_\_\_ Any such certification must address only the serious health condition that gave rise to the need for FMLA leave.
- \_\_\_\_\_ All certification requirements must be set forth in the *Designation Notice*, WH-382, or within the employee handbook.
- \_\_\_\_\_ If Employer wants the health care provider to address employee's ability to perform essential job functions, it must attach a list of essential duties to the *Designation Notice*.
- \_\_\_\_\_ Employer may not require fitness for duty certification for each return from intermittent leave or leave on a reduced work schedule, but may require certification up to once every 30 days in the presence of reasonable safety concerns.
- \_\_\_\_\_ Employer may contact health care provider for clarification and authentication of fitness for duty certification, consistent with the limitations set forth above. Return to work, however, may not be delayed during this process.
- \_\_\_\_\_ Employer may not request second or third opinions for fitness for duty certifications.
- \_\_\_\_\_ Employer may delay job restoration due to employee failure to furnish completed fitness for duty certification, so long as proper employer notice was provided.

**This checklist is only intended to highlight those procedural aspects of FMLA that have been altered or clarified by the new regulations. It is not intended to serve as a substitute for other steps that were left unchanged, but remain crucial to general compliance, including for example, the evaluation of employee eligibility.**