



# CAMBRIDGE

## PROPERTY & CASUALTY

### SPECIAL REPORT

## ARE YOU IN COMPLIANCE WITH THE NEW 2009 FMLA?

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This Special Report was written by Daniel P. Hale, J.D., CPCU, ARM, CRM, LIC, AIC, AIS, API. Mr. Hale is Vice President of Cambridge Property & Casualty and an attorney licensed to practice law in the State of Michigan. He can be contacted at 734-525-2429 or dhale@cambridge-pc.com. More Special Reports are available at [www.cambridge-pc.com](http://www.cambridge-pc.com).

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The new Family and Medical Leave Act (“FMLA”) regulations became effective on January 16, 2009. The regulations provide employers with new tools for administering FMLA leave more efficiently. The new regulations not only address the Military Caregiver and Qualifying Exigency Leaves established by the 2008 National Defense Authorization Act (“NDAA”), but they also make significant changes to a number of existing regulations, including a **new employer posting and notice requirement**.

The purpose of this Special Report is to highlight some of the changes to the FMLA that are of most significance to business owners.

### Military Caregiver Leave

The new FMLA permits a “spouse, son, daughter, parent or *next of kin*” to take up to 26 weeks of leave during a single 12-month period to care for a “covered service member” who suffers from a “serious injury or illness” incurred on active duty. Now, workers with family members who are seriously wounded or who fall seriously ill while on active duty in the military can take up to 26 weeks of unpaid leave in a single 12-month period to care for the servicemember.

### Qualifying Exigency Leave

An employee may take up to 12 weeks of FMLA leave for a “qualifying exigency” that arises when a spouse, parent or child is on or has been called to active duty. 29 U.S.C. § 2612(a)(1)(E); 29 CFR § 825.126(a).

Reasons for Qualifying Exigency leave include:

- Short-notice deployment,
- Military events,
- Childcare planning,
- Financial/legal arrangements,
- Counseling,
- Rest and recuperation, or
- Post-deployment activities.

### Joint Employer Coverage & The 75 Mile Rule

As with the previous regulations, employees are eligible for FMLA leave if they have been employed by the employer for at least 12 months, have worked 1,250 hours during the previous 12 months, and currently work at a site where the employer employs 50 or more employees within a 75-mile radius. 29 U.S.C. § 261 l(2)(B)(ii); 29 CFR §§ 825.110(a)-(e); 825.111 (a)-(c). The new rules provide instructions on how to count joint employees.

Under the new regulations, companies with shared employees or an employee interchange agreement are more likely to fall under the provisions of the FMLA.

The new regulations also clarify that an outside PEO (Professional Employer Organizations) that contracts with employers to provide administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies, will not ordinarily be considered a “joint employer” of the client’s employees unless they: 1) have the right to hire, fire, assign, or direct and control the client’s employees; or 2) benefit from the work the client’s employees perform. 29 CFR § 825.106(a).

### **Nonconsecutive Periods of Service**

One of the requirements that an employee must show in order to claim FMLA benefits is that they have accumulated 12 months of employment with that employer. The new rules provide that periods of employment preceding a break in employment of seven years or more need not be counted in determining whether an employee has been employed for 12 months, with certain exceptions. Further, the new rules clarify that employees who take leave as a result of military obligations must be credited for the hours of service they would have performed but for their military service for purposes of meeting both the 12-month and the 1,250-hour eligibility requirements.

### **Health Care Provider Contact Provisions**

The new provisions allow employers to contact employee healthcare providers to determine whether an employee’s absence patterns are consistent with the employee’s qualifying medical condition. An employee’s direct supervisor shall not make the contact with the provider. This ultimately allows greater communication between employers

and doctors to determine the full nature of an employee’s health condition and treatment.

### **Serious Health Conditions**

The FMLA defines a serious health condition as an illness, injury, impairment, or physical or mental condition requiring in-patient care in a hospital or residential treatment facility, or one that keeps an employee off the job for 3 days or more, and also requires continuing treatment from a healthcare provider. The new regulations modify the rules for determining the “more than three day” element of continuing treatment by a health care provider. The new regulations also clarify that a chronic serious health condition requires periodic visits to a health care provider for treatment, defined as at least twice a year. The DOL rejected suggestions that the periodic visits be timed to occur in six, four or three-month intervals, since as currently written, the visits could theoretically occur in the same week.

### **Employer Notice Requirements**

The revised notice provisions are divided into four distinct categories: 1) general notice; 2) eligibility notice; 3) rights and responsibilities notice; and 4) designation notice.

#### *1. General Notice*

As under the current rules, the new rules require employers to post a notice explaining employees’ FMLA leave rights. The DOL has created a revised poster reflecting the changes in the new rules. The new poster “must be posted prominently where it can be readily seen by employees and applicants for employment.” If a significant number of employees are not literate in English, the notice must be posted in a language in which the employees are literate. The new rules specifically allow for electronic

posting, so long as all employees and applicants have access to the information.

In addition to the new poster, employers must provide the general notice to each employee by including it in an employee handbook or other written guidance to employees regarding benefits or leave rights, if any. If the employer has no handbook or written benefits or leave policies, the general notice must be distributed to each new employee upon hire. The new rules expressly permit electronic distribution, so long as the electronic notice otherwise is accessible to everyone.

See WHD Publication 1420 *Employee Rights and Responsibilities under the FMLA - Poster*

## 2. Eligibility Notice

Upon notice of an employee's need for leave that may qualify as FMLA leave, an employer must provide an "eligibility notice," informing the employee whether he or she is eligible for leave. (An employee is "eligible" if he or she has been employed for at least 12 months, worked at least 1,250 hours in the 12 months preceding the start of leave, and is employed at a worksite where 50 or more employees are employed by the employer within 75 miles.) If the employee is not eligible, the notice must state at least one reason why the employee is not eligible. Absent extenuating circumstances, the employer must provide this notice within five business days after it receives notice of the employee's need for leave (as opposed to two business days under the old rules).

The new rules also clarifies that if an employee later needs to take additional leave for the same FMLA-qualifying reason, the employee remains eligible for

leave for that reason, even if he or she would no longer be eligible to take leave for a different reason (i.e., because he or she drops below the 1,250-hour requirement, or because the employer no longer has 50 employees working within 75 miles of the employee's worksite).

## 3. Rights and Responsibilities Notice

The new rules require employers to provide a "rights and responsibilities notice" each time they provide an eligibility notice, as described above. This further clarifies the employee's rights and duties under the FMLA.

The Department of Labor has combined these form into one "*Notice of Eligibility and Rights & Responsibilities*" WH-381.

## 4. Designation Notice

Within five business days of receiving sufficient information to determine whether a leave qualifies as FMLA leave (e.g., after receiving a completed medical certification), the employer must notify the employee whether the leave will be designated as FMLA leave. See *Designation Notice to Employee of FMLA Leave*, Form WH-382. Only one notice is required for each FMLA-qualifying reason per applicable 12-month leave period, regardless of whether leave is taken in a single block or intermittently.

The notice must advise the employee if paid leave will be substituted for unpaid FMLA leave. The notice must also advise the employee if he or she will be required to submit a fitness for duty certification before returning from leave. If the amount of leave is known, the designation notice must inform the employee how much leave will be counted against his or her 12 weeks of FMLA leave. If this is not possible (e.g., because the expected

duration of the leave is not known), the employer must advise the employee how much leave he or she has used upon request, no more often than once during each 30-day period in which leave is taken. Under the new rules, an employer may provide both the eligibility and designation notice at the same time when the employer has the information necessary to designate the absence as FMLA leave.

### **Employee Notice Requirements**

If leave is foreseeable, employees are required to give 30 days notice, or as much notice as practicable. If leave is unforeseeable or will take place in less than 30 days, the employee must provide notice as soon as practicable.

### **Substitution of Paid Leave**

Under the new rules, employers are required to allow employees to substitute paid leave such as vacation and personal days for FMLA leave only when the employee is otherwise eligible for paid leave under the employer's policies. For example, if an employer requires all paid vacation to be scheduled in advance, it need not permit an employee to substitute paid vacation for an unscheduled FMLA leave.

The new regulations clarify that an employee's ability to substitute paid leave is determined by the terms and conditions of the employer's applicable paid leave policies. Even if the employee substitutes paid leave, the entire period of leave is counted against the employee's FMLA entitlement.

### **Medical Certification**

A request for medical certification should be made within five business days after the request for leave is made in the case of foreseeable leaves and within five business days after the leave commences in the case of

unforeseeable leaves. 29 CFR § 825.305(b). This allows the employer to confirm the legitimacy of the employees' reason for FMLA leave.

Under the new regulations, an employer may, as a general rule, request recertification "no more often than every 30 days" but only in connection with an absence. 29 CFR § 825.308(a).

### **Waiver of FMLA Rights**

Under the new regulations, employees cannot waive or be induced by employers to waive their prospective rights under the FMLA. 29 CFR § 825.220(d). The prohibition against prospective waiver, however, does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.

### **New Poster**

Companies must post the new "*Notice to Employees of Rights Under FMLA*," WH Publication 1420, in each of their facilities even if the employees in a facility would not qualify for FMLA leave. The Notice must be posted prominently where it can be read by employees and applicants for employment. The Wage and Hour Division of the Department of Labor can fine an employer \$110 for each separate offense.

### **Revise Employee Handbooks.**

The employer must provide the information contained in the Notice to Employees of Rights Under FMLA to each of its employees by including it in the company's employee handbook or other written guidance to employees concerning employee benefits or leave rights. Companies should consider amending the FMLA policies contained in these handbooks or policies to incorporate

the information contained in the Notice. If an employer does not have a written handbook or guidance, the employer can comply with this requirement by providing a copy of the Notice to each newly employed employee. The regulations do not require employers who do not have a handbook or policy regarding benefits and leaves to provide the Notice to current employees.

### **FORMS**

- WHD Publication 1420 Employee Rights and Responsibilities under the FMLA – Poster
- WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition
- WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition
- WH-381 Notice of Eligibility and Rights & Responsibilities
- WH-384 Certification of Qualifying Exigency for Military Family Leave
- WH-385 Certification for Serious Injury or Illness of Covered Servicemember  
WH-382 Designation Notice.

Each of the above forms can be found at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>