

# Employer Bulletin: FMLA

## Final Regulations Effective January 16, 2009



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### Special points of interest

- **Employers now have 5 days to provide a Notice of Eligibility to employees after receiving notice of the need for leave.**
- **The required 12 months of employment for eligibility purposes need not be consecutive; however, the break may not be more than 7 years.**
- **The DOL's Certification of Health Care Provider form has been revised.**

On November 17, 2008, the U.S. Department of Labor ("DOL") issued revised regulations which interpret the Family Medical Leave Act ("FMLA"). If your company employs more than 50 employees at a single site or within a 75 mile radius of each worksite, you are required to provide FMLA leave to eligible employees. The revised regulations took effect **January 16, 2009**. The new regulations modify, clarify and reorganize the existing regulations. Further, they integrate the 2008 amendments which provide additional protections to service members and their covered family members (see KSWB's Winter 2008 Employee Bulletin). The changes were made in response to the DOL's past enforcement efforts, federal court opinions, and over 15,000 comments it received in response to a request for information in 2006. The DOL hopes these changes will help employers and employees better understand their respective rights and responsibilities. The following is a summary of the new regulations:

**Joint Employment:** The regulations define under what circumstances a Professional Employer Organization ("PEO") is a joint employer. The PEO must (a) exercise control over the employee; (b) have authority to hire, fire or supervise the employee; or (c) benefit from work performed by the employee. Further, the worksite of a jointly employed worker is where the employee is assigned or reports unless the employee has worked for at least one year at a facility of the second employer.

**Eligible Employee:** The 12 months of employment requirement was clarified in that it need not be consecutive. However, employers are not required to count a break of more than 7 years in the determination unless one of two exceptions apply: (a) military obligations; or (b) where there is a written agreement concerning the employer's intent to rehire the employee after the break in service. Further, the regulations clarify that an employee who is not eligible at the start of an absence may subsequently qualify for FMLA. Thus, the date the initial leave begins no longer determines eligibility.

**Serious Health Condition:** Notably, there were no changes to the definition of serious health condition. However, the term "continuing treatment" was clarified that the employee or family member must be incapacitated more than 3 full calendar days and the individual must: (a) receive treatment two times within 30 days of the first day of incapacity unless extenuating circumstances exist; (b) see a healthcare provider within 7 days of the first day of incapacity; and (c) visit the healthcare provider in person. Further, the term "chronic" serious health conditions now requires there be a visit to a healthcare provider at least twice a year in order to be "periodic."

**Pregnancy, Birth, Adoption or Foster Care:** The regulations clarify that a pregnant woman may take FMLA before the birth for prenatal care if her condition makes her unable to work. Further, a hus-

band may take FMLA to care for an expectant spouse if she is incapacitated. Both the mother and father may take up to 12 weeks of FMLA to care for a child with a serious health condition even if both have the same employer. “Adoption” has been redefined as legally and permanently assuming responsibility for raising a child.

**Care for a Family Member:** This has been clarified to explain that the employee need not be the only family member available to provide the care.

**Healthcare Provider:** Physicians Assistant has been included in the definition.

**FMLA During a Holiday Week:** Clarifications have been made in that if an employee who takes less than a full week of FMLA during a leave week will not have the holiday counted against FMLA unless the employee was expected to work the holiday.

**Intermittent/Reduced Leave:** Employees must now make a reasonable effort to schedule treatment as to not disrupt the employee’s business. A mere “attempt” is insufficient. An employee on intermittent leave may only be transferred to a different position when the need for leave is foreseeable based on planned treatment.

**Increments of Intermittent Leave:** Clarifications have been made to explain that an employer may limit the increment of leave to the shortest period of time the employer uses to account for other types of leave. Further, employees may not be disciplined in situations where the need for a short FMLA absence actually result in a longer absence because of the unique nature of the worksite. For example, some worksites exist that prevent an employee from joining or leaving the workforce midway through a shift. Thus, the entire period of absence should be protected as FMLA leave. Additionally, failure to work mandatory overtime due to FMLA leave counts toward FMLA leave, but not the failure to work voluntary overtime.

**Substitution of Paid Leave:** As previously written, the FMLA still allows the employer to require employees to

use paid leave concurrently with FMLA leave. However, the employer must make employees aware of this and any other procedural requirements, in the Notice of Eligibility. Further, employees must follow the employer’s established paid leave policies if they use any paid leave during FMLA.

**Bonuses:** An employer may disqualify an employee from a bonus program that is paid based on the achievement of a specific goal if the employee did not achieve the goal due to use of FMLA leave (ex. perfect attendance, sales quotas) only if all employees who are on other types of leave are treated the same.

**Light Duty:** Employees who take light duty work are not penalized by a deduction of leave from the employee’s FMLA bank. An employee’s right to be restored to his job is held in abeyance while on light duty up to the end of the applicable 12 month FMLA Leave. The acceptance of light duty does not result in an employee waiving restoration rights.

**Waiver of FMLA Claims:** An employee may only release FMLA claims for past actions.

**Employers’ Notice Obligations:** A new FMLA General Notice (poster), a Notice of Eligibility form and Designation Notice are now available from the DOL. The poster must be posted and distributed even if employees are not eligible for FMLA. This may be done electronically, in a handbook or other guide that is issued at the time of hire. The General Notice must be translated if a significant number of employees speak a language other than English.

An employer must now provide an employee with the Notice of Eligibility within 5 business days (as opposed to the former 2 day requirement) of receiving notice of the need for FMLA. The Notice of Eligibility must now state whether the employee is eligible for FMLA leave and if not, why not. If the reason is due to length of employment, the employee must be notified how many months he has worked towards the requirement.

Once an employer has sufficient notice to make a determination as to whether an employee qualifies for FMLA, the employer has 5 days to provide the employee with a written Designation Notice indicating whether the leave is designated as FMLA, whether the employee is/is not required to use any paid time off towards the FMLA leave, whether the employee will be required to submit a Fitness for Duty Certification form, how much time will be counted against the FMLA leave and when the FMLA will end.

**Certification of Health Care Provider Form:** This form has been significantly revised and is available from the DOL. The request to complete the form should be issued from the employer within 5 days after the request for leave is made. Where a certification form is incomplete or insufficient, an employer must now notify the employee in writing of what information is necessary to complete the certification and provide the employee at least 7 calendar days to furnish the additional information. The employee may now provide any necessary authorization for the health care provider to release a complete, certification directly to the employer. But, signing a release may not be a condition for taking FMLA leave.

Employers may now contact the employee’s health care provider directly in order to authenticate or clarify (not request additional information) information in the medical certification. However, only a human resources professional, a leave administrator or a management official may make the contact. Under no condition may an employee’s direct supervisor make the contact. However, the employer must first allow the employee opportunity to cure the deficiency prior to making contact with the health care provider.

**Recertification:** Generally, an employer may request recertification no more often than every 30 days and only in connection with the absence, unless the minimum duration of the condition is more than 30 days. Recertifications may be requested for absences less than 30 days if the employee requested an extension of leave, circumstances as provided in the previous certification have

changed significantly, or if the employer receives information that casts a doubt on the continuing validity of the employee’s medical certification. Recertification for employees requesting intermittent leave may be requested every 6 months. An employer may also provide an employee’s health care provider with a record of the employee’s absence pattern and ask the health care provider if the employee’s serious health condition and need for leave is consistent with the pattern of absences.

**Fitness for Duty Certification:** An employer must now supply the employee with a list of the employee’s job’s essential functions at the same time the Notice of Eligibility is sent to the employee if a Fitness for Duty Certification will be required. If an employee does not provide the Fitness for Duty Certification upon return to work, he may be denied reinstatement. The certification may be requested up to once every 30 days if the employee has used intermittent leave and if reasonable safety concerns exist regarding the employee’s ability to perform his duties. An employer may not obtain a 2nd or 3rd opinion regarding Fitness for Duty Certification.

**Recordkeeping:** The recordkeeping provision clarifies that employers must maintain copies of all written notices given to employees.

**Employee Notice Requirements:** The new regulations impose a stricter requirement on employees who know of the need for leave in that employees are now required to provide notice of the need either the same day or the next business day. Employees are required to comply with the employer’s usual notice and procedures requirements for other types of leave. However, where leave is unforeseeable, the regulation states it should be practicable for employees to provide notice within the time prescribed by the employer’s usual and customary notice requirements.

Calling in sick without providing all information is insufficient to put the employer on notice of the need for FMLA leave. If an employee has been previously on FMLA leave and misses work due to the same reason,

the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave in order to put an employer on notice. However, the employer should inquire further if it doubts whether the new request is covered by a previously approved FMLA leave.

**What Do You as an Employer Need to Do Now?** As an employer, you should review your existing FMLA policies, procedures and forms to ensure they meet the requirements of the new regulations. Further, you need to ensure your human resources department and managers are aware of and complying with the new expanded definitions of eligible employees, serious health conditions, properly notifying employees in accordance with the new notice requirements and following subtle, yet important changes to bonus payments, light duty, fitness for duty and medical certification procedures. It may be necessary to obtain and provide training to help managers understand the changes implemented in the new rules. Addi-

tionally, you must inform employees of their new updated notification requirements.

Kotz Sangster can review your existing policies, and processes for managing FMLA leave and evaluate what changes, if any, are necessary. We can also provide any additional training you may feel is necessary for your management personnel to understand and comply with the FMLA. We are available to provide you with any help you may need in order to ensure that your company is compliant.

We are experienced, proactive and aggressive legal counsel providing superior service in all areas of employment law. If you would like further information regarding the issues raised in this newsletter or any other employment related issues, please contact Heather G. Ptasznik at (313) 259-8586 or John T. Below at (313) 259-8597. For more information about Kotz Sangster, please visit us at [www.kotzsangster.com](http://www.kotzsangster.com).

#### SUMMARY OF THE NEW REVISED FORMS

The Department of Labor ("DOL") published new and revised forms for employers to use in order to comply with the new rules covering the FMLA. These forms are optional and may not address every situation within which you might encounter. The forms are available on the DOL's website at [www.dol.gov](http://www.dol.gov) and are effective January 16, 2009. The changes are as follows:

##### NEW FORMS:

- Designation Notice to Employee of FMLA Leave (WH-382);
- Certification for Qualifying Exigency for Military Family Leave (WH-384);
- Certification for Serious Injury or Illness of Covered Servicemen for Military Family Leave (WH-385).

##### REVISED FORMS:

- Notice of Eligibility and Rights Responsibilities form (WH-381);
- Certification of Health Care Provider form for Employee's Serious Health Condition (WH-380E);
- Certification of Health Care Provider form for Family Members Serious Health Condition (WH-380F);
- FMLA Designation Notice (WH-382).

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