

Employment Edge 92nd Edition - The New FMLA Regulations: Steps Employers Need to Take by January 16, 2009

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The new FMLA regulations become effective on January 16, 2009. So what exactly does this mean for employers? The U.S. Department of Labor has made numerous changes to the regulations, and many employers are just beginning to analyze the impact of the new regulations on their organizations. In the meantime, however, there are several tangible steps that employers covered by the FMLA (i.e. employers with 50 or more employees) should take before January 16, 2009 in order to comply with the new regulations:

1. Post the New FMLA Poster

The U.S. Department of Labor ("DOL") has published a new FMLA poster, the "Notice to Employees of Rights under the FMLA." A copy of the notice is available [here](#). Employers are required to post this notice prominently, where it can be readily seen by employees and applicants for employment. In addition, the text must be large enough to be easily read and contain fully legible text. Employers covered by the FMLA are required to post the poster at a worksite even if no employees at that worksite would be eligible for FMLA leave.

Under the new regulations, employers may meet the posting requirement by posting the notice electronically, as long as the electronic posting meets the requirements that apply to paper posters—i.e., the electronic notice must be posted prominently in a conspicuous place where it can be readily seen by both applicants for employment and employees, with legible text that is large enough to be easily read. Employers that wish to satisfy the posting requirement with an electronic poster should consult with legal counsel to ensure that these requirements are met.

2. Revise Your Organization's FMLA Policy

Employers should work with legal counsel to review and revise their FMLA policy to ensure that the policy is consistent with the new FMLA regulations. In revising the policy, it's important to bear in mind that every FMLA-covered employer that publishes an employee handbook or other written guidance to employees concerning employee benefits or leave rights must include in such handbook or written guidance, at a minimum, all of the information that is contained in the FMLA poster. Some employers may choose to comply with this requirement by including a copy of the poster in their employee handbook. Others may want to incorporate the information from the poster into their FMLA policies in order to meet this requirement. If an employer's workforce is comprised of a significant portion of workers who are not literate in English, this information must also be provided in a language in which the employees are literate.

FMLA-covered employers that do not publish an employee handbook or other written guidance to employees concerning benefits or leave rights must distribute a copy of the FMLA poster to each new employee upon hiring. The notice can be distributed in paper form or electronically, such as via e-mail. Again, if an employer's workforce is comprised of a significant portion of workers who are not literate in English, the FMLA poster should be provided in a language in which the employees are literate.

3. Start using the New FMLA Forms

The new FMLA regulations include several additional employer notice requirements, and the DOL has published model notice forms that employers can use to comply with these requirements. In addition, the new regulations include various new provisions regarding the certifications employers can request from employees regarding the need for leave. The DOL has also published prototype certification forms that comply with these new requirements.

a. Start using the new Notice of Eligibility and Rights and Responsibilities Form

The first new notice form an employer must provide to employees is a Notice of Eligibility and Rights and Responsibilities, which is available here. This notice must be given to employees within five (5) business days of an employee’s request for leave for an FMLA-qualifying reason. Employers may customize this form so long as it includes, at a minimum, all of the information required by the regulations.

b. Start Using the New Certification Forms

If an employee will be required to submit a certification of his or her need for leave, the certification form should be provided to the employee, along with the Notice of Eligibility and Rights and Responsibilities, within five (5) business days of an employee’s request for leave for an FMLA-qualifying reason. Employers may ask employees to provide a certification if the employee is taking FMLA leave for: (1) his or her own serious health condition, (2) a family member’s serious health condition, (3) military family leave due to a qualifying exigency, or (4) military family leave to care for a covered servicemember. The DOL has prepared four prototype notice forms for these four types of leave:

- The Certification of Health Care Provider for Employee’s Serious Health Condition is available here.
- The Certification of Health Care Provider for Family Member’s Serious Health Condition is available here.
- The Certification of Qualifying Exigency for Military Family Leave is available here.
- Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave is available here.

Employees must be given at least fifteen (15) days to return a completed certification.

c. Start Using the New Designation Forms

The new regulations require employers to designate leave as FMLA–qualifying or non-FMLA-qualifying, to give employees written notice of such designation, and to provide certain other information to an employee if the leave has been designated as FMLA-qualifying. The DOL has created a new prototype Designation Notice form employers may use for this purpose. A copy of the Designation Notice is available here. The Designation Notice notifies the employee whether the leave is FMLA-qualifying or non-FMLA qualifying, whether the employee will be required to substitute paid leave, and whether a fitness-for-duty certification will be required to return from leave. If an employer requires a fitness-for-duty certification that is specific to the essential functions of the employee’s job, the employer must list the essential functions of the employee’s position in the Designation Notice. In cases in which an employer designates leave as non-FMLA-qualifying, an employer may use the Designation Notice to inform the employee of such designation, or may simply provide a written statement to that effect.

An employer must provide written Designation Notice to an employee requesting leave within five business days after the employer’s determination of whether the leave qualifies as FMLA leave.

4. Ensure that Supervisors are Aware of New Types of FMLA Military Family Leaves

In 2008, Congress amended the FMLA to create two new types of military family leave entitlements. Eligible employees may now take up to 12 weeks of leave per year due to a qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a military member on active duty or who has been notified of an impending call or order to active duty. The new regulations define qualified exigencies to include circumstances such as leave to address issues related to short notice deployment; leave for military events, and related activities, such as family support and assistance programs and official events; leave to arrange for alternative childcare or to provide emergency childcare when the call to active duty necessitates a change in existing child care; leave to make or update financial arrangements; leave to attend counseling; leave to spend time with a covered military member who is on short-term temporary rest and recuperation leave during a period of deployment; and leave for post-deployment activities, such as an arrival ceremony.

In addition, under the FMLA amendments, eligible employees may now take up to 26 weeks of leave in a single twelve month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

Employers should ensure that managers are aware of these new leave entitlements.

5. Ensure that Individuals Responsible for Administering FMLA leaves are Familiar with New Regulations

The changes made to the FMLA regulations are numerous, and this article is not intended to be a comprehensive summary of the changes. In the coming months, many human resources professionals or other individuals charged with responsibility for administering FMLA leaves will want to attend seminars and engage in professional reading in order to assess the impact of the new regulations on their organization. At a minimum, however, these individuals should be generally aware of the changes to the regulations and should work with legal counsel with regard to any questions that come up.

If you would like assistance in revising your organization's FMLA policy or complying with the new FMLA regulations, please contact a member of the Gray Plant Mooty Employment and Labor Law practice group.

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