

***Final Rule on Family and Medical Leave and Military Leave
Effective January 16, 2009***

THE FINAL RULE- SIGNIFICANT CHANGES

• **Coverage and eligibility-**

- Service requirement: In determining whether an employee meets the 12 month service requirement to be eligible, employers need to review the 7 years prior to the date leave is to begin. This means that an employee who has worked less than 12 months during a current period of employment may still be eligible if, during the prior 7 years, that employee worked a total of 12 months. A break in service does not count towards service unless the break was due to National Guard or Reserve military service, or if there was a written agreement in place. If an employer does not maintain records beyond the 3 years required, the burden to prove prior employment beyond that period lies with the employee.
- If an employer grants a non-FMLA leave to an employee before he/she is eligible for FMLA, the employee may become eligible for FMLA leave while on the non-FMLA leave; the leave period after the employee is eligible for FMLA is FMLA leave and the period before is non-FMLA leave. Eligibility for leave is determined as of the date FMLA leave commences.
- In determining eligibility under the “50 employees within 75 miles rule,” an employee’s work site is the site to which the employee reports to work or, if none, where the employee’s work is assigned. For joint employment, the primary employer’s office is the employee’s work site unless the employee has worked for at least 1 year at the secondary employer.

• **Calculation of leave-**

- Holidays may count as FMLA leave if the employee is on FMLA leave the entire week in which the holiday falls. If the employee does not take the entire workweek in which the holiday falls as FMLA, then the holiday does not count as FMLA leave.
- FMLA leave must be tracked using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave as long as the increment is not greater than 1 hour and the employee’s FMLA leave balance is not charged for more than the amount of actual leave taken. FMLA leave does not need to be tracked according to the shortest period the payroll system tracks as with the previous rule.
- Different leave increments may be used to track leave under different leave policies. For example, the employer is permitted to have a policy that requires an employee to use leave only in 1 hour increments during the first hour of the shift to discourage tardiness. If an employee is a few minutes late due to an FMLA reason, the employer may prevent the employee from working for the full hour of FMLA. Alternatively, if the employee needs to leave 30 minutes early, only 30 minutes may be charged as FMLA.

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- **Overtime-** If an employee is not able to work scheduled overtime due to FMLA, the overtime he/she would have worked may be charged as FMLA. Voluntary overtime may not be counted as FMLA.
- **Certification**
 - Employers may directly contact an employee's health care provider to authenticate or obtain a clarification of information required by a certification form.
 - Direct supervisors are prohibited from making these inquiries. Only health care providers, a human resources professional, a leave administrator (including third-party administrators), or a management official may make these inquiries. To protect employee privacy, direct supervisors are prohibited from receiving any employee's medical information.
 - Employers must notify the employee in writing if the medical certification is incomplete or insufficient and to specifically identify the missing or insufficient information.
- **Employer Notice Obligations**
 - The notifications required have been specified as well as the timing of these notices. An employer is liable for failing to provide proper notice only to the extent an employee suffers actual harm, such as lost compensation and benefits, other monetary losses, or loss of employment or promotion.
 1. General Notice- must be posted in every workplace and incorporated into any employee handbook. If a company does not maintain a handbook, the general notice must be distributed to each employee upon hire. The general notice may be posted electronically if all employees have access to the posting and that is the normal method of communicating important information for the company.
 2. Eligibility Notice- a personalized Eligibility Notice must be issued to the employee within five days of either a request for leave or after learning that a leave may qualify for FMLA. This notice informs the employee if they are eligible for FMLA leave and if not, why they are not eligible. After the initial eligibility notice, a new notice is only required if the employee's eligibility status changes.
 3. Rights and Responsibilities Notice- this written notice must be issued to the employee at the same time as the Eligibility Notice and is similar to the previous Employer Response to the Employee Request for FMLA.
 4. Designation Notice- must be issued within five days after receiving sufficient information to determine if the leave qualifies for FMLA. This notice informs the employee if the leave will be counted as FMLA and must specify the amount of leave that will be counted as FMLA (if unknown, a new notice must be provided at the employee's request no more than every 30 days.) This notice must also state if a fitness-for-duty certification will be required or if further information is needed.
 - Recertifications may be requested every 30 days in conjunction with an absence for that FMLA-qualifying reason.
- **Employee Notice Obligations**

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- o Employees must follow their employer's call-in policies when they miss work "absent unusual circumstances" that would prevent them from doing so.
 - o For foreseeable leave, 30 days notice is still required.
 - o If the need for leave is not foreseeable, notice must be given "as soon as practicable," meaning the same day or the next business day, or within the reasonable time frame as is established in an employer's usual and customary leave and absence notification policies.
 - o Failure to provide timely notice allows the employer to delay the start of the FMLA leave.
 - o Employees may give notice of their need for leave verbally. However, employees must follow their employer's usual and customary notice and procedural requirements when requesting leave (absent unusual circumstances.)
 - o An employee requesting leave for a particular FMLA qualifying reason need not state that they need FMLA. They only need to provide enough information for an employer to reasonably determine that the leave may qualify for FMLA. Calling in "sick" is not enough to trigger FMLA- the employee must specifically reference either the qualifying reason for the leave or the need for the leave.
 - o If the employee subsequently requests FMLA leave for a particular FMLA-qualifying reason for which the employer has previously provided leave, the employee must either specifically reference the reason for the leave or that the leave is FMLA. For example, if an employee has been certified for intermittent FMLA leave due to asthma attacks, that employee must state that they need FMLA leave when calling off work due to asthma attacks in order for the employer to properly classify the absence as FMLA.
- **Paid Leave-** Employees may only substitute paid leave benefits, such as vacation or sick days, while on FMLA leave if that employee follows the employer's policy regarding the use of such leave. The employer's policies must already be established and non-discriminatory. The employer must inform the employee of the terms and conditions of the policy. If the employee does not qualify to use paid leave, that employee may still be entitled to unpaid FMLA leave.
 - **Return to Work/Job Assignment and Reinstatement Rights**
 - o Employers may require fitness-for-duty tests for employees returning from intermittent FMLA leave if doing the job raises a significant risk of harm to themselves or others.
 - o A temporary transfer to an alternative job to accommodate intermittent leave is permitted only if the leave is foreseeable and planned. An employee on an unforeseeable intermittent leave cannot be transferred to an alternative job.

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- o Light duty work- When injured or ill workers are placed on light duty, the time on light duty may not count against the employee's FMLA leave entitlement. Employees on light duty work retain their job restoration rights during the same 12 month FMLA period.
- **Bonuses and Awards**
 - o If a bonus, award, or other payment is based on the achievement of a specific goal (for example, perfect attendance, safety, hours worked, products sold, etc.) and the employee has not met the goal due to FMLA leave, that bonus or payment can be denied and does not need to be pro-rated as long as other employees on an equivalent leave status (such as vacation, sick days, paid time off, etc.) for a reason that does not qualify as FMLA are treated the same.
 - o Employers should follow established policies regarding pay increases for employees on other types of non-FMLA leave.
 - o Bonuses, awards, pay increases, and other payments based on the achievement of a specific goal may, but are not required to, be pro-rated.
- **Waiver of Rights-** Employees may voluntarily settle FMLA claims or waive FMLA rights without approval by a court or the DOL so long as they are not doing so prospectively. An employee may not waive FMLA rights in advance, but may only do so as part of a settlement or severance agreement. This allows FMLA to be included in general release claims for severance agreements, settlements, or termination agreements.
- **Obligation to Communicate**
 - o Employers are required to: provide responsive answers to employee questions about rights and responsibilities under FMLA, discuss and resolve any disputes that arise about whether any leave qualifies as FMLA, and document all such discussions and resolutions and retain documentation for 3 years as required to the FMLA record retention rules.
 - o Employees are required to: respond to employer questions when determining whether an absence qualifies for FMLA, make a reasonable effort to schedule foreseeable leave so as not to unduly disrupt the employer's operations, and discuss and resolve any disputes that arise about whether any leave qualifies for FMLA.

IMPORTANT DEFINITIONS

- **Serious Health Condition:** the 6 key categories have not changed. Continuing treatment and chronic condition definitions have been clarified.
 - o Continuing treatment= A condition causes an incapacity for FMLA leave if it lasts more than 3 full consecutive days, requires in-person treatment by a health care provider at least once within 7 days of the incapacity, and requires either a regimen of continuing treatment indicated by the health care provider during the first treatment or a second in-person visit to the health care provider (as determined by the health care provider) for treatment within 30 days of the first day of incapacity.

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- o Chronic Condition= Requires visits for treatment by a health care provider at least twice per year, continues over an extended period of time including recurring episodes, and may cause intermittent incapacity rather than a continuous period of incapacity as determined by a healthcare provider.
- **Prenatal Care:** The employee husband of a pregnant spouse is entitled to FMLA leave to care for a pregnant spouse who has severe morning sickness or other prenatal complications and may need physical care, or to accompany her to prenatal doctors' appointments. This leave is not available to non-spouse fathers.
- **Needed to Care For:** Leave may be taken to provide physical and/or psychological care. The employee does not need to be the only individual or family member available to provide the care.
- **Health Care Provider:** Physicians assistants authorized to practice under state law qualify as health care providers and all medical para-professionals who fall within the definition of "health care providers" (nurse practitioners, nurse-midwives, clinical social workers, and physician assistants) must be performing within the scope of their practice as defined under state law.
- **Active Duty or Call to Active Duty Status:** Duty under a federal call or order to active duty in support of a contingency operation for members of the National Guard or Reserve or retired members of the Regular Armed Forces or Reserves. An employee may not take exigency leave for a servicemember in the Regular Armed Forces.
- **Covered Servicemember:** A current member of the Regular Armed Forces, National Guard, or Reserve, including those on the temporary disability retired list (TDRL). This does not include former members or members on the permanent disability retired list. The servicemember must be receiving medical treatment or oversight by a Department of Defense or Veterans Affairs health care provider or by a Department of Defense TRICARE network or non-network authorized private health care provider.

MILITARY CAREGIVER LEAVE

An eligible employee is entitled to 26 weeks of leave to care for a covered injured or seriously ill servicemember. Leave may be taken continuously, intermittently, or on a reduced schedule basis.

- "Next of kin," which includes spouses, parents, children, grandparents, aunts, uncles, first cousins, and any relative so designated by the service member are eligible to take this leave. Next of kin does not apply to any other types of FMLA leave and means the nearest blood relative of the servicemember.
- The 26 weeks can be taken over a 12-month period, with the clock starting on the first day of the leave.
- This military caregiver leave may be taken only one time per injury. However, more than one family member may qualify for the leave for a single servicemember, and each relative may take leave again if there are other injuries. The leave is available only while the service member remains in the military.
- Certification may be required. However, unlike other types of FMLA leave, employers may not request second or third opinions or require recertifications.

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- The employee, during that time period, is entitled to no more than 12 weeks of leave for any other type of FMLA leave. The total leave entitlement during any single 12 month period, including all qualifying reasons under FMLA, is 26 weeks.

QUALIFYING EXIGENCY LEAVE

The other new military family leave benefit allows relatives of those called to active duty in the National Guard and Reserves (excluding regular active-duty military members) to take up to 12 weeks of leave for qualifying “exigencies” related to deployment that arise out of the fact that the employee’s spouse, son, daughter, or parent is on active duty or on call to active duty status. This type of leave is subject to the maximum of 12-weeks of FMLA leave in a year.

- **Certification:** The employer may require certification that the covered military member is a member of the National Guard or Reserves who is on active duty or called to active duty in support of a contingency operation. Employers may require a copy of the covered military member’s active duty orders or other military documentation to accomplish this one time. Employers may not require the same certification again for subsequent absences related to the same active duty of that particular military member.
- **Notice Requirements:** The employee must give the employer notice as soon as practicable of the need for leave. There is no 30 day notice requirement for this type of FMLA leave only.
- **Qualifying exigencies may include:**
 - **Short-notice deployment-** to address any issue that arises from an impending call or order to active duty in support of a contingency operation seven days or less prior to the date of deployment.
 - **Military events and related activities-** military ceremonies, programs, or events related to the active duty or call to active duty status or to attend certain family support or assistance programs and informational briefings.
 - **Child-care and school activities-** to arrange or provide for childcare or school-related activities (not including ongoing childcare)
 - **Financial and legal arrangements-** to make or update various financial or legal documents and arrangements
 - **Counseling-** to attend counseling by someone other than a health care provider, such as a member of the clergy, when necessary as a result of the active duty or call to active duty
 - **Rest and recuperation-** an employee may take up to five days of leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment.
 - **Post deployment activities-** to attend arrival ceremonies, including funeral or memorial services, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following active duty status.
 - **Additional activities-** to address other events arising from military duty agreed upon between employer and employee

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What You Should Do Now

- Update all policies and procedures to incorporate the new changes.
- Ensure that all policies and procedures comply with any applicable state laws as well as the new FMLA rules.
- Train all supervisors, managers, and staff on the new requirements.
- Update all notifications, postings, and forms to meet the new notice requirements.