

## **FAMILY MEDICAL AND LEAVE ACT**

2009 (check for subsequent changes)

To be eligible for FMLA leave, employee must have 12 months of service with employer

- 12 months measured over 7 years.

Employer must post general FMLA notice even when they have no FMLA-eligible employees

- Each employee entitled to general FMLA notice unless employer publishes handbook or other summaries of leave rights.
- Posting requirements may be satisfied through electronic posting.

DOL WH-381 – Eligibility/Rights and Responsibilities Form

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf>

- Send within 5 business days, absent extenuating circumstances
- Details specific expectations and obligations of employees, explaining consequences of failing to meet the obligations.
- Eliminates need to provide a “preliminary” designation of FMLA leave.
- Possible ambiguity in instances where “eligible employees” have previously exhausted all FMLA leave.

DOL WH-382 -- Designation Form

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-382.pdf>

- Confirms employer’s leave determinations and designated leave amount.
- Due 5 business days after employer receives satisfactory medical certification of need for leave.
- Retroactive notice is permissible if it does not cause employee harm or injury.

Employee must explain reasons for leave to allow employer to determine whether leave qualifies under the Act:

- “Calling in sick” – insufficient
- Leave may be denied if employee fails to adequately explain
- For additional FMLA leave, employees must specifically reference the qualifying reason or need for FMLA leave
- Employees can be required to comply with customary notice and procedural requirements for requesting leave, absent unusual circumstances
- For incapacity plus treatment – must visit HCP two times within 30 days of first day of incapacity (absent extenuating circumstances)
  - Must see HCP within seven days of first day of incapacity
  - Employee with chronic SHC must see HCP at least twice/year

Employer “shall state in writing what additional information is necessary to make the certification complete and sufficient”:

- “Incomplete” and “insufficient” certifications defined
- Employee has 7 calendar days to cure deficiencies

- Employer need not retain health care provider to obtain clarification ... but employee's supervisor may not contact health care provider
- Will demand greater effort in administering FMLA leave
- Time to request medical certifications is 5 business days
  - Certifications may be required for paid leave
- If condition extends beyond a leave year, certifications can be requested annually
- In all instances, certifications can be requested once every six months
  - Even for ongoing or lifetime serious health conditions
- Absent showing of "changed circumstances" or reason to doubt continuing validity of leave, recertification may not be required until initial period of leave has expired

#### Fitness-for-Duty Certifications

- Employers may demand more than "simple statement" of ability to return to work
  - Fitness-for-duty certifications for intermittent leave may be sought if reasonable safety concerns exist
  - No second or third opinions permitted
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- Certification of health care provider for employee's serious health condition -- WH-380E Form, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-E.pdf>
  - Certification of health care provider for family member's serious health condition -- WH-380F Form, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-F.pdf>
  - State law may restrict access to medical information

#### Considering Information from Other Sources

- Recognize inter-relationship between FMLA, ADA, disability insurance and workers' compensation
- Employers may utilize information provided under such benefit programs
- Employer and employee can agree to supplement disability/workers' compensation benefits with paid leave

#### Intermittent Leave - Not Required to Utilize Payroll System Accounting

- Minimum Duration Must Be Consistent With Other Leaves
- Minimum Duration Cannot Exceed One Hour
- Calculation Where Starting Work is Physically Impossible During Middle of Shift
- Employer's Obligation to Track Intermittent Leave and inform employees of amount of leave available
  - But not more than once every 30 days

#### Light Duty - Employee cannot be forced to take light duty if FMLA eligible

- Time spent in light duty is not FMLA leave

#### Other Entitlements –

- Required overtime counts against FMLA leave entitlement
- Light duty does not count toward FMLA entitlement
- Disqualification for bonuses permitted so long as employer does so consistently

- Increased damages for interfering with FMLA leave rights: “any other relief tailored to the harm suffered”

Courts have split over employee ability to waive FMLA claims -

- Settlement of past FMLA claims permitted without DOL or court approval
- Employers should modify general releases to include FMLA claims, recognizing still some risk of litigation

Substitution of Paid Leave - employee must follow employer’s paid leave policies, but employer has obligation to give notice

Bonuses –

- No regulation on “perfect attendance award”
- Non-discrimination rule adopted

Military family leave

- For exigencies arising from active duty status
- Optional DOL Form WH384 for leave certification
  - Qualifying Exigency Defined (exclusive list)
    - 1) Short-notice deployment
    - 2) Military events and related activities
    - 3) Childcare and school activities
    - 4) Financial and legal arrangements
    - 5) Counseling
    - 6) Rest and recuperation
    - 7) Post-deployment activities
    - 8) Additional activities related to active duty or call to active duty

If foreseeable, notice must be “reasonable and practicable”

(29 U.S.C. 2612(e)(3))

- DOL interprets as “as soon as practicable” (29 C.F.R. 825.302(a))
- “[A]s soon as practicable” normally means same day or next business day but is circumstantial test (29 C.F.R. 825.302(b))
- If not foreseeable? Comments indicate when employee first seeks to take leave
- Notice not required upon notice of active duty or call to active duty

Military caregiver leave

26 weeks of leave in “a single 12 month period”

- 12 month period begins on first date of leave
- Operates independent of method for calculating 12 weeks of other FMLA leave (BAF, SHC, exigency)

Congress specified “a single 12 month period” (29 U.S.C. 2612(a)) (emphasis added)

- DOL says applies per service member, per injury
- No more than 26 weeks of leave in any 12-month period

- Son and daughter can be any age
  - Next of Kin does not include spouse, parent, son, or daughter (they already have a right to this leave)
  - Service member may designate blood relative in writing
  - In absence of designation, multiple family members at same level of relationship all are next of kin and may take leave consecutively or simultaneously
- If military caregiver leave would also qualify as SHC, no dual designation allowed
- Leave must be designated as service member leave first
  - Employer may retroactively designate leave as service member leave
- Optional DOL Form WH385 (serious illness or injury  $\neq$  serious health condition)
- Some unique certification requirements (*e.g.*, incurred in line of active duty, medically unfit to perform duties of SM office, grade, rank, or rating, *etc.*) (29 C.F.R. 825.310)
  - Specified health care providers may complete (DOD, VA, DOD Tricare, DOD non-network Tricare, DOD authorized representative)
  - Similar to SHC medical certification as to probable duration of the injury/illness and the frequency and duration of the leave