

Get Ready For The New FMLA Rules

The long-awaited, and much commented-on, changes to regulations governing the Family and Medical Leave Act (FMLA) were finalized and released in November by the Department of Labor (DOL). They are effective January 16, 2009. The regulations are, for the most part, not significantly different than the proposed rules that were issued earlier this year, except there are new rules concerning the expansion of the FMLA for military family members.

The procedures used for taking military family leave are the same as those used for other types of FMLA leave whenever possible. Therefore, the DOL has incorporated, wherever feasible, the new military family leave entitlements into the existing FMLA statutory framework. Creating completely separate provisions "would create unnecessary confusion and complexity for employees and employers," said the DOL.

Here's what you need to know about what's in the new final regs that has been clarified or changed from the current regs.

Highlights

- "Continuing treatment" and "periodic treatment" have been defined for purposes of establishing a serious health condition.
- "Qualifying exigency" has been defined.
- Employees may be required to follow the employer's normal call-in policies for requesting leave.
- Perfect attendance awards may be denied to employees who have taken FMLA leave.
- An employee's performance of a light-duty assignment does not affect his/her right to FMLA leave and to job restoration.
- Employers have five days to notify employees of their eligibility to take FMLA leave; employers also have five days to notify employees of the designation of FMLA leave.
- If FMLA leave is not timely designated and the employee suffers harm, the employer may be liable.
- Employers may contact an employee's health care provider without the employee's consent; while the employer does not have to utilize a health care provider to make contact, the employee's direct supervisor is prohibited from doing so.
- The DOL has created seven new optional forms.

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Joint Employer Coverage (§ 825.106)

The proposed rules added a new paragraph to address joint employment in the context of a Professional Employer Organization (PEO). PEOs are unlike traditional placement or staffing agencies that supply temporary employees to clients; PEOs generally provide payroll and administrative benefits services for the existing employees of an employer/client.

Is a PEO a joint employer? The proposed rules stated that the determination "also turns on the economic realities of the situation and must be based upon all the facts and circumstances. The final rules clarify that the right to hire, fire, assign, or direct and control may lead to a determination that a PEO is joint employer with a client employer depending upon all the facts and circumstances. The final rules also state (in the context of giving required notices to employees, providing FMLA leave, and maintaining health benefits) that, unlike with traditional placement agencies, the client employer "most commonly would be the primary employer" where a PEO is a joint employer.

Counting employees for the 50-employees-within-75-miles requirement. The final rules clarify that, if a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

Eligible Employees (§ 825.110)

12-month service requirement. Covered employees must have worked for an employer for at least 12 months, which need not be consecutive. The final regulations allow for a break in service of up to seven years. The FMLA only requires employers to keep records for three years. The burden of proving eligibility is always on the employee. They may prove employment in years four through seven using W-2 forms; pay stubs; a statement identifying the dates of prior employment, the

position the employee held, and the names of co-workers; any similar information that would allow the employer to verify the dates of the employee's prior service; or any application for employment the employee had completed.

Exceptions to the seven-year rule. The final regs adopt two exceptions to the seven-year cap: 1) breaks in service resulting from an employee's fulfillment of National Guard or Reserve military service, and 2) where a written agreement (including a collective bargaining agreement) exists concerning the employer's intention to rehire the employee after the break in service.

The final regs also adopt the provision stating that an employer may consider prior employment falling outside the cap, as long as it does so uniformly with respect to all employees with similar breaks.

1,250-hours-within-12-months requirement. The final regs include the provision that employers must count the time an employee would have worked but for the employee's fulfillment of National Guard or Reserve military obligations. The DOL commented that the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires this.

Eligibility determination while employee is out on leave. The final regs adopt the proposal that an employee out on a block of leave may attain FMLA eligibility when the employee satisfies the requirement of 12 months of employment. Any leave the employer provided prior to the employee reaching the 12-month threshold is not FMLA leave; FMLA protections do not apply to such leave, and the employer may apply their normal leave policies to such leave. Employers may not count any such non-FMLA leave to an employee's 12-week FMLA leave entitlement.

50 Employees Within 75 Miles (§ 825.111)

The final rule adopts the proposed rule stating that the worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports "unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case, the employee's worksite is that location."

In the proposed and final rules, the term "telecommuting" was added to the use of the term "flexiplace," further clarifying that "virtual" employees who work out of their homes do not have their personal residence as their worksite; rather, they are considered to work in the "office to which they report and from which assignments are made."

Serious Health Condition (§ 825.113)

Mental illness. The DOL removed the phrase "resulting from stress" to clarify that a mental illness, regardless of cause, can be a serious health condition under the FMLA if all other regulatory requirements are met.

Continuing Treatment (§ 825.115)

For purposes of establishing a serious health condition, an individual must receive continuing treatment by a health care provider in connection with a period of incapacity of more than three consecutive calendar days. Continuing treatment involves either two visits to a health care provider or one visit and a regimen of continuing treatment. A serious health condition may also involve continuing treatment for a chronic condition.

More than three consecutive calendar days. The DOL refused to increase the required period of incapacity from three days. It did clarify that partial days cannot be used to meet the requirement by adding the word "full" to the final rule (i.e., a period of more than three consecutive, full calendar days).

Two visits to a health care provider. The final rule retains the proposal that the two visits occur within 30 days, clarifying that the 30-day period begins with the first day of incapacity. The first visit must occur within seven days of the first day of incapacity, absent extenuating circumstances.

The final rule clarifies that the health care provider must make the determination as to whether a second visit is needed. This eliminates the possibility that an employee may schedule a follow-up appointment simply to meet the test of a second visit.

The DOL intends the final rule to cover situations in which the health care provider initially determines that follow-up treatment is not necessary, but determines that additional treatment is necessary within the 30 days, e.g., the condition deteriorates.

Extenuating circumstances. This is defined in the final rule as circumstances that prevent the follow-up visit from occurring as planned by the health care provider (e.g., there are no available appointments during the 30-day period).

One visit to a health care provider, plus a regimen of continuing treatment. This one visit must also occur within seven days of the first day of incapacity.

Chronic conditions. A chronic serious health condition requires periodic treatment by a health care provider or a nurse under direct supervision of a health care provider. The proposed regs define "periodic treatment" as treatment occurring "at least twice a year." The determination as to whether two treatments are necessary must be made by the health care provider.

Leave For Pregnancy Or Birth (§ 825.120)

FMLA leave to care for a pregnant woman is available to a spouse and not, for example, to a boyfriend or fiancé who is the father of the unborn child. In the final rules, the word "father" is changed to "husband" in this provision.

Definition Of Adult Son Or Daughter With Qualifying Disability (§ 825.122)

The final rule clarifies that whether an adult child has a disability is based upon the facts as they exist when the leave commences. This is intended to eliminate the confusion about coverage that is caused when eligibility decisions are based on facts and circumstances that occur after the leave commences. The DOL did not intend to suggest that a final determination must be made when leave commences and that an employee could not subsequently provide further information (e.g., the child's condition changes).

Unable To Perform The Functions Of The Position (§ 825.123)

The final rule adopts the proposal that medical certification must specify what functions the employee is unable to perform, clarifying that it is sufficient if it enables the employer to determine whether the employee is unable to work at all or is unable to perform any one of the essential functions of the job. Employers have the option of providing a list of essential functions when it requires medical certification, but are not required to do so.

Definition Of Health Care Provider (§ 825.125)

The final rule expressly includes physician assistants (PAs). The DOL calls it an "appropriate clarification, not a significant change."

Qualifying Exigency (§ 825.126)

Covered military member. Includes members of the reserve components or retired members of the Regular Armed Forces or Reserve. Does not include those on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces.

The final rule defines "qualifying exigencies" as:

1. *Short-notice deployment.* When the notice of an impending call or order to active duty is seven calendar days or fewer prior to the date of deployment.
2. *Military events and related activities.* To attend any official ceremony, program, or event sponsored by the military, or to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member.
3. *Childcare and school activities.* To arrange childcare or to attend certain school activities for a son or daughter when the need arises due to active duty or the call to active duty.
4. *Financial and legal arrangements.* To make or update financial or legal arrangements to address the covered military member's absence.
5. *Counseling.* To attend counseling for the covered military member or their son or daughter when the need for counseling arises from the active duty or call to active duty of the covered military member. This provision is intended to cover counseling that is not already covered by the FMLA, such as counseling provided by a military chaplain, who does not meet the FMLA's definition of a health care provider.
6. *Rest and recuperation.* To spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.
7. *Post-deployment activities.* To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of active duty, and to address issues arising from the death of the covered military member while on active duty status.
8. *Additional activities.* The employer and employee can agree on other events that qualify for leave, and the timing and duration of such leave.

Definition of son or daughter. For the purpose of leave for a qualifying exigency, the final rule establishes a separate definition of "son or daughter": An employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in *loco parentis*, who is on active duty or call to active duty status, and who is of any age. This does not alter the definition of son or daughter for the purpose of leave for other FMLA-qualifying reasons.

Military Caregiver Leave (§ 825.127)

Definition of son or daughter. For the purpose of military caregiver leave, the final rule establishes a separate definition of "son or daughter": The covered service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in *loco parentis*, and who is of any age. This does not alter the definition of son or daughter for the purpose of leave for other FMLA-qualifying reasons.

Definition of parent. For the purpose of military caregiver leave, a parent is defined as the covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in *loco parentis* to the service member. Parents-in-law are not included.

Definition of next of kin. This is defined as the service member's nearest blood relative, other than the service member's spouse, parent, son, or daughter, in the following order of priority: blood

relatives who have been granted legal custody of the service member, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the service member has specifically designated in writing another blood relative as his/her nearest blood relative.

Employers may seek reasonable documentation of the familial relationship. For example, a simple statement from the service member indicating that the employee has been designated next of kin for purposes of military caregiver leave would suffice.

Circumstances under which leave may be taken. The 26 workweeks of military caregiver leave in a single 12-month period is a per-service member, per-injury entitlement. This is not a one-time opportunity. This means that an eligible employee may take 26 weeks in a 12-month period to care for a covered service member, and then may take another 26 weeks in another 12-month period to care for the same service member with a subsequent injury or illness or to care for another covered service member. Employees are limited to 26 weeks of FMLA leave when leave is requested to care for multiple service members in a single 12-month period.

Single 12-month period. It begins on the first day the employee takes leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12-week entitlement for other FMLA-qualifying reasons.

If an employee does not use the full 26 workweeks in a single 12-month period, the remaining workweeks are forfeited.

Within a single 12-month period, an employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for other FMLA-qualifying reasons.

Designation of leave. It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. If the leave qualifies as both military caregiver and leave to care for a family member with a serious health condition, the employer must designate such leave as military caregiver leave in the first instance.

Holidays (§ 825.200)

The final rule clarifies that, when a holiday falls within FMLA leave that is taken in a partial workweek increment, the hours the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to work on that day. The treatment of holidays that fall within a full week of FMLA stays the same; they are counted against the employee's FMLA leave entitlement.

Scheduling Of Intermittent Or Reduced Schedule Leave (§ 825.203)

The DOL adopts the proposal requiring employees to make a "reasonable effort" to schedule treatment so as not to unduly disrupt the employer's operations. It declined to further define "reasonable effort."

Increments Of FMLA Leave For Intermittent Or Reduced Schedule Leave (§ 825.205)

Minimum increment. The final regulations make clear that employers must account for intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than one hour. If different increments are used to account for different types of non-FMLA leave, the employer must account for FMLA leave using the smallest increment used for non-FMLA leave. Employers are not required to account for FMLA leave in increments of six minutes or 15 minutes simply because their payroll system is capable of doing so.

The DOL emphasizes that employees may not be charged FMLA leave for periods during which they are working. For example, if an employee's serious health condition flares up 30 minutes before the end of their shift, the employee may not be charged with more than 30 minutes of FMLA leave, even if the employer otherwise uses one hour as the shortest increment of leave. That is because the employee has already worked the first 30 minutes of the last hour of the shift.

Where a physical impossibility exists that results in an employee taking a much longer absence than is needed, the entire period of absence is considered FMLA leave. For example, a "clean room" must remain sealed for the entire work shift. An employee requires two hours of FMLA leave at the beginning of the shift, but is unable to start working midway through the shift. The entire missed shift is counted as FMLA leave.

Calculation of leave. When an employee's work schedule varies so much from week-to-week that no "normal" schedule or pattern can be discerned, the employer must calculate a weekly average over the 12 months prior to the leave period.

Overtime. The final rule clarifies that where an employee would normally be required to work overtime, but cannot do so because of an FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked.

Substitution Of Paid Leave (§ 825.207)

The DOL now allows employers to apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave. Thus, if an employer's paid personal leave policy requires two days' notice for the use of personal leave, an employee seeking to substitute paid personal leave for unpaid FMLA leave would need to provide two days' notice.

The DOL clarifies that paid disability leave due to an FMLA-qualifying serious health condition is counted against an employee's FMLA leave entitlement, regardless of whether the employee is using accrued paid leave to supplement the disability benefits.

Where state law permits, the employer and the employee may voluntarily agree to supplement Workers' Compensation benefits with accrued paid leave. This is not considered a "substitution" of paid leave. Rather than stating that Workers' Comp leave may run concurrently with FMLA leave, the final rule states that Workers' Comp leave may be counted against an employee's FMLA entitlement.

The prohibition against the substitution of accrued compensatory time for unpaid leave in the public sector has been removed.

Bonuses (§ 825.215)

Employers may disqualify an employee from a bonus or other payment based on the achievement of a specified goal (e.g., hours worked, products sold, perfect attendance) where the employee has not met the goal due to FMLA leave, unless the bonus or payment is otherwise paid to employees on an equivalent leave status for a reason that does not qualify for FMLA leave. Bonuses that are not premised on the achievement of a goal, such as a holiday bonus awarded to all employees, may not be denied to employees because they took FMLA leave.

Similarly, pay increases based on seniority, length of service, or performance need not be granted to employees on FMLA leave unless otherwise granted to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

Discrimination/Retaliation (§ 825.220)

Remedies. The remedies for interfering with an employee's FMLA rights include: compensation and benefits lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; and appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

Waivers. The waiver prohibition applies only to prospective FMLA rights. Employees and employers are permitted to agree voluntarily to the settlement of past claims without first having to obtain the permission or approval of the DOL or a court.

Light duty. An employee's performance of a light-duty assignment does not affect his/her right to FMLA leave and to job restoration. The time the employee works in the light-duty assignment does not count as FMLA leave. At the end of the voluntary light-duty assignment, the employee has the right to be reinstated to the same or an equivalent position, provided that the employee can perform essential job functions. The right to restoration while in a light-duty assignment expires at the end of the 12-month leave year period that the employer uses to calculate FMLA leave.

General Notice Requirements (§ 825.300)

Employers that do not have employee handbooks or other written materials concerning benefits and leave that are distributed to all employees must provide the general notice to each new employee upon hire.

A covered employer with no eligible employees is not required to distribute the general notice, but it must post the notice.

The posting and distribution requirements may be satisfied through an electronic posting, as long as it otherwise meets statutory requirements and as long as all employees and applicants have access to the information. The fine for a willful violation of the posting requirement is \$110.

The DOL's *Employee Rights And Responsibilities Under The Family And Medical Leave Act* (WH-1420) may be used to satisfy the General Notice requirements.

Eligibility Notice Requirements (§ 825.300)

Employers must notify employees of their eligibility to take FMLA leave (or a change in eligibility status) within five business days, absent extenuating circumstances. If the employee is not eligible, the employer need only state one reason why.

Rights And Responsibilities Notice (§ 825.300)

Notice of the employee's rights and responsibilities must be provided to the employee at the same time the eligibility notice is provided.

Employers may use the DOL's *Notice Of Eligibility And Rights & Responsibilities* (WH-381).

Designation Notice Requirements (§ 825.300)

Employers must notify employees within five (was two) business days of making the determination whether leave has or has not been designated as FMLA leave, absent extenuating circumstances. Only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block or on an intermittent or reduced leave schedule basis.

Employees must also be notified if the substitution of paid leave is required, or that paid leave taken under an existing leave plan will be counted as FMLA leave.

The employer must also notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must specify the number of hours, days, or weeks that will be counted. If this is not possible, the employer must provide notice of the amount of leave counted against an employee's FMLA leave entitlement upon request by the employee, but no more than once in a 30-day period and only if leave was taken in that period. This notice may be oral or in writing. Oral notice must be confirmed in writing no later than the following payday. If the following payday is less than one week after oral notice, then by the subsequent payday.

Any requirement for a fitness-for-duty certification must be provided with the designation notice. Oral notice is sufficient; written notice is not required.

The DOL created WH-382, *Designation Notice*, which employers may choose to use.

Retroactive designation. Consistent with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, the final rule removes the "categorical" penalty requiring an employer to provide more than 12 weeks of FMLA leave, and clarifies that an employee who suffers individual harm as a result of the employer's failure to follow the designation notification rules may be entitled to compensation and benefits lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; and appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

Employer Designation Of FMLA Leave (§ 825.301)

Employees (or their spokesperson) are required to provide sufficient information to allow the employer to determine whether the leave qualifies under the FMLA. If the employer does not have sufficient information, it may inquire further of the employee or his/her spokesperson. An employee's failure to provide sufficient information may result in the delay or denial of FMLA leave.

If there is a dispute between an employee and employer as to whether leave qualifies as FMLA leave, the final regs state that it should be resolved through discussions between the employee and employer, and the discussions should be documented.

Employers may retroactively designate leave as FMLA leave, with appropriate notice to the employee, provided the delay does not cause harm or injury to the employee. The employee and employer can mutually agree that leave be retroactively designated as FMLA leave.

Employee Notice For Foreseeable Leave (§ 825.302)

Timing. If the need for leave is foreseeable, employees must provide at least 30 days' notice. If leave is foreseeable, but 30 days' notice is not practicable, employees must provide notice "as soon as practicable." Rather than define "as soon as practicable" as "within one or two business days," it is now defined as "as soon as possible and practical, depending on the facts and circumstances of the situation." The DOL calls for employees to provide notice "either the same day or the next business day."

If an employee fails to provide at least 30 days' notice when practicable, the employee must explain the reasons why if the employer asks.

Content. Depending on the situation, information that may be sufficient for an employer to become aware of an employee's need for FMLA leave includes:

- a condition that renders the employee unable to perform the functions of the job;

- that the employee is pregnant;
- that the employee has been hospitalized overnight;
- whether the employee or the employee's family member is under the continuing care of a health care provider;
- that a covered military member is on active duty or call to active duty status and the need for leave is due to a qualifying exigency;
- that a family member's condition renders him/her unable to perform daily activities;
- that a family member is a covered service member with a serious injury or illness; and
- the anticipated duration of the absence, if known.

If the employee is seeking leave for a qualifying condition for which the employer has previously provided FMLA leave, the employee must specifically reference the particular reason for leave or the need for leave.

Employer policy. Employers may require employees to follow their usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances, so long as the employer's usual reporting procedure is not more stringent than the FMLA allows.

Employee Notice For Unforeseeable Leave (§ 825.303)

This section is fairly consistent with the provisions related to foreseeable leave.

Timing. The final rule replaces the statement that employees will be expected to give notice "promptly" with the statement that it generally should be practicable for employees to provide notice "within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."

Content. The final rule explicitly states that calling in "sick" without providing further information will not be considered sufficient information to trigger an employer's obligations under the Act.

Certification, General (§ 825.305)

Timing. Employers should request medical certification at the time the employee gives notice of the need for FMLA leave, or within five business days (was two) thereafter. In the case of unforeseen leave, within five business days after the leave commences.

The DOL has declined to require employers to notify employees when a certification is not received because of the administrative burden this would impose. It does remind employers to be mindful of the fact that employees must rely on the cooperation of their health care provider or other third party in submitting certification, and that employees should not be penalized for delays over which they have no control, as long as there is evidence of the employee's diligent, good-faith efforts to provide timely certification. The DOL expects employees to check with their employer to ensure the certification has been received and to follow-up with their health care provider if it has not.

Complete and sufficient certification. A certification is considered incomplete if one or more applicable entries has not been completed or if the information provided is vague, ambiguous, or non-responsive.

If certification is found to be incomplete, the employer must inform the employee in writing and give the employee seven calendar days to cure any such deficiencies. If the employee fails to cure such deficiencies in the resubmitted certification, the employer may deny the taking of FMLA leave.

Annual medical certification. If the need for leave is due to a serious health condition (either the employee's or the employee's family member's) and lasts beyond a single leave year, the employer may require the employee to provide new medical certification in each subsequent leave year. The new certifications are subject to the provisions for authentication and clarification, including second and third opinions.

Medical Certification, Serious Health Condition (§ 825.306)

If the Americans with Disabilities Act (ADA) or a state Workers' Compensation statute also applies, the FMLA does not prevent employers from following ADA or Workers' Comp procedures for requesting medical information. Also, any information received under these laws may be considered in determining the employee's entitlement to FMLA leave.

Employers may not require employees to sign a release of their medical information as a condition of taking FMLA leave.

In place of WH-380, the DOL created separate optional certification forms for an employee's serious health condition (WH-380-E, *Certification Of Health Care Provider For Employee's Serious Health Condition*) and for a family member's serious health condition (WH-380-F, *Certification Of Health Care Provider For Family Member's Serious Health Condition*).

Authentication And Clarification Of Medical Certification, Serious Health Condition (§ 825.307)

Contacting the employee's health care provider. Previously, employers could contact an employee's health care provider only through another health care provider and only with the employee's consent. The final regulations allow the employer (e.g., HR professional, leave administrator, management official) to contact the employee's health care provider directly; however, the employee's direct supervisor may not make contact.

HIPAA. The final rule also makes clear that the requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule must be satisfied when an employee's individually identifiable health information is shared with an employer by a HIPAA-covered health care provider. In order for the health care provider to share such information, written authorization is required.

Copies of opinions. Employers have five business days (was two), absent extenuating circumstances, to provide a copy of a second or third opinion to an employee who requests one.

Foreign medical certification. If a medical certification is completed in a language other than English, employers have the right to ask the employee to provide a written translation.

Recertification, Serious Health Condition (§ 825.308)

Recertification of the employee's or family member's serious health condition may not be requested more than once every 30 days, longer if the minimum duration of the condition is longer than 30 days. However, under the final rule, employers may ask for recertification every six months in all cases, including conditions for which the minimum duration is more than six months or the duration is indicated as lifetime, indefinite, or unknown.

Certification, Qualifying Exigency (§ 825.309)

Employers may require employees to provide a copy of the covered military member's active duty orders or other military-issued documentation that indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the active duty service. This information need only be provided once; new active duty orders or other documentation must be provided only if the need for leave arises out of a different active duty or call to active duty order of the same or a different covered military member.

Employers may require employees to support a request for qualifying exigency leave by providing certification containing the following information:

- a statement or description signed by the employee of appropriate facts regarding the qualifying exigency;
- the approximate date on which the qualifying exigency commenced or will commence;
- if the employee requests leave for a single, continuous period of time, the beginning and end dates for the absence;
- if the employee requests leave on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and
- if the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employees is meeting, and a brief description of the purpose of the meeting.

Verification. Employers may contact the individual or entity with whom the employee is meeting in order to verify a meeting or appointment schedule and the nature of the meeting. Employers may also contact an appropriate unit of the Department of Defense to request verification of active duty or call to active duty status. In both cases, the employee's permission is not required, and no additional information may be requested.

Certification, Military Caregiver Leave (§ 825.310)

Required information from health care provider. Employers may require employees to obtain a certification completed by an authorized health care provider of the covered service member, including:

- a U.S. Department of Defense (DOD) health care provider;
- a U.S. Department of Veterans Affairs (VA) health care provider;
- a DOD TRICARE network authorized private health care provider; or
- a DOD non-network TRICARE authorized private health care provider.

Employers may request the following information from the health care provider:

- the name, address, and appropriate contact information (telephone number, fax number, and/or e-mail address) of the health care provider; the type of medical practice; the medical specialty; and whether the health care provider is: a U.S. Department of Defense (DOD) health care provider, a U.S. Department of Veterans Affairs (VA) health care provider; a DOD TRICARE network authorized private health care provider; or a DOD non-network TRICARE authorized private health care provider;

- whether the covered service member's injury or illness was incurred in the line of duty on active duty;
- the approximate date on which the injury or illness commenced, and its probable duration;
- a statement or description of appropriate medical facts regarding the service member's health condition for which FMLA leave is requested;
- information sufficient to establish that the covered service member is in need of care, and whether the service member will need care for a single, continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;
- if leave is requested on an intermittent or reduced schedule basis for planned medical treatment appointments, whether there is a medical necessity for the covered service member to have such periodic care and an estimate of the treatment schedule of such appointments; and
- if leave is requested on an intermittent or reduced schedule basis to care for a covered service member other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the service member to have such care, which can include assisting in the service member's recovery, and an estimate of the frequency and duration of the periodic care.

Required information from employee/covered service member. In addition to the information requested from an authorized health care provider, employers may request that such certification set forth the following information from the employee and/or covered service member:

- the name and address of the employer of the employee requesting leave, the name of the employee requesting leave, and the name of the covered service member for whom the employee is requesting leave;
- the relationship of the employee to the covered service member;
- whether the covered service member is a current member of the Armed Forces, the National Guard, or the Reserves, and the service member's military branch, rank, and current unit assignment;
- whether the service member is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients, and the name of the medical treatment unit or facility;
- whether the covered service member is on the temporary disability retired list; and
- a description of the care to be provided to the service member and an estimate of the leave needed to provide the care.

The DOL has created optional form WH-385, *Certification For Serious Injury Or Illness Of Covered Servicemember For Military Family Leave*, for this purpose.

In lieu of WH-385 or the employer's own certification form, an employer must accept invitational travel order (ITOs) and invitational travel authorizations (ITAs) issued to any family member to join an injured or ill service member at his/her bedside. The employee does not need to be named in the ITO or ITA, and it is sufficient even if it is not signed by a health care provider.

Fitness-For-Duty Certification (§ 825.312)

Instead of a "simple statement," employers may now require that fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the job, as long as the employer provides the employee with a list of those essential job functions no later than with the designation notice.

If the employer will require a fitness-for-duty certification, the employer must advise employees of this requirement in the designation notice, and indicate whether the certification must address the employee's ability to perform the essential functions of the job.

Fitness-for-duty certification may not be required for each absence taken on an intermittent and reduced schedule leave. Such certification is allowed up to once every 30 days if reasonable safety concerns exist. Employees must be informed of this requirement at the same time the designation notice is issued.

Info from www.legalworkplace.com free report Get Ready for The New FMLA Rules