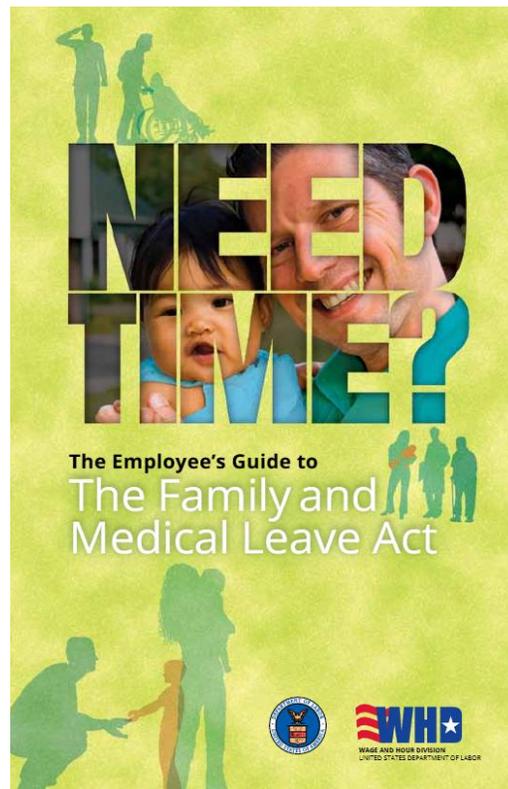


## Guiding an Employer through the FMLA Leave Process

You represent a growing private employer—one that has just hired its 50<sup>th</sup> employee. Now your growing client is seeking your guidance on complying with the Family and Medical Leave Act (FMLA). Although administering FMLA leave, particularly intermittent FMLA leave, can be challenging, employers and their counsel who regularly use helpful compliance tools increase their chances of effectively managing FMLA leave issues.

### Helpful Tools that Provide FMLA Guidance to Employers

- “Need Time? The Employee’s Guide to the Family and Medical Leave Act” – The Wage & Hour Division of the Department of Labor (DOL) has recently published this 16-page, plain language booklet designed to answer common FMLA questions and clarify who can take FMLA leave and what protections the FMLA provides.



<http://www.dol.gov/whd/fmla/employeeguide.pdf>

While the booklet was designed for employees, the publication can be helpful to employers in several ways. First, the guide provides a fairly easy to understand explanation of the how the FMLA works and can be used by employers to help answer the questions of employees seeking leave. Significantly, employees are more likely to accept an employer’s explanation of a document and the process and obligations it outlines when it contains the DOL seal on the front of it. Secondly, since many of the problems associated with administering the

FMLA arise out of poor communication between the employee on leave or seeking leave and the employer, dissemination of the guide to employees may help foster information sharing that will minimize unnecessary surprises.

- A number of DOL drafted forms and notices that are appendices to the FMLA regulations. A working familiarity with these documents and their contents will help employers administer FMLA leave from the time an employee provides notice of the need for FMLA leave through the employee’s return to work.

**FMLA FORMS AND NOTICES**

<b>Document</b>	<b>Purpose</b>
Employee Rights and Responsibilities Under the Family and Medical Leave Act	Explains the FMLA’s provisions and provides information concerning the procedures for filing complaints of violations of the FMLA with the DOL’s Wage and Hour Division. Also helps employers satisfy their general notice obligations.
Notice of Eligibility and Rights & Responsibilities	(1) To notify an employee whether he or she is eligible for FMLA leave; (2) when an employee is eligible for FMLA leave, to notify the employee of his or her rights and responsibilities for taking FMLA leave.
Certification Forms	Suitable to use in order to determine whether an eligible employee is actually qualified for FMLA leave. The 4 different FMLA certification forms and the basis for providing the applicable form to an employee is set out below (see <u>FMLA Certification Forms</u> ).
Designation Notice	Once an employee has completed the appropriate certification form, an employer should use the Designation Notice to: (1) approve the FMLA leave request; (2) obtain additional information; or (3) deny the FMLA leave request.

- This guide is designed to help employers:
  - Know their notice obligations;
  - Recognize when an employee gives notice of the need for FMLA leave;
  - Respond to an employee’s request for leave or notice of the need for FMLA leave;
  - Evaluate an employee’s certification and complete the Designation Notice;
  - Communicate with employees who are on leave; and
  - Anticipate and address an employee’s return to work following FMLA leave.

## **Employer Notice**

The employer has two general notice obligations under 29 C.F.R. § 825.300. The employer is required to:

A) Post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the Department of Labor's (DOL's) Wage and Hour Division;

B) Provide general notice to each employee. This can be accomplished through a policy in an employee handbook or by providing each employee with a copy the DOL's one-page document, "Employee Rights and Responsibilities Under the Family and Medical Leave Act." In either case, distribution may be accomplished electronically.

## **Recognizing when an employee gives notice of the need for FMLA leave**

Employees have the responsibility of providing notice of the need for FMLA leave to the employer. 29 C.F.R. § 825.301(b). However, it is the employer's responsibility to designate leave as FMLA-qualifying once it has acquired knowledge that leave is being taken for an FMLA-qualifying reason. 29 C.F.R. § 825.301(a). Recognizing when an employee gives sufficient notice of the need for FMLA leave can be difficult. Unfortunately, even if an employer *unintentionally* fails to designate FMLA-qualifying absences as protected absences, it runs the risk of violating the FMLA's interference clause. This is because a termination or any other negative employment action based only in part on an absence covered by the FMLA may violate the FMLA. 29 C.F.R. § 825.220(c).

Employers and their counsel can use the "Need Time?" booklet to help supervisors and Human Resources representatives recognize potentially FMLA-qualifying absences. Pages 4 & 5 of that booklet answers the question: "When Can I Use FMLA Leave?" These pages summarize the various FMLA leave entitlements, including: the serious health condition of the employee or covered family member; leave for a birth, adoption, or foster care placement; and military family leave. Before disseminating the "Need Time?" booklet, employers should designate a person or certain group of people to provide guidance to supervisors in determining whether an absence for a health condition or other potentially covered reason qualifies for FMLA protection. Once the person or group is tasked with that responsibility, other employees should be notified about the role of these representatives and provided with their contact information.

Employees can make the employer's duty of designating leave as FMLA-qualifying easier by explicitly requesting FMLA leave when they want it by completing a leave of absence request form. Unfortunately, the FMLA regulations expressly provide that an employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice of the need for FMLA-qualifying leave. 29 C.F.R. § 825.301(b). Thus, a leave of absence form cannot be required as a condition precedent to taking FMLA leave. Additionally, a leave of

absence request form is not likely to be completed by employees who take unforeseeable leave. Consequently, supervisors should be cautioned against relying too heavily on completed leave of absence request forms when determining whether an employee has provided notice of his or her need for FMLA leave.

Because it is fairly common for supervisors to fail to properly recognize when an employee has given sufficient notice of the need for FMLA leave, several practices should be considered to help guard against unintentional interference with an employee's FMLA rights:

a. **When an employee calls in sick, his or her supervisor should document exactly what they are told.** In other words, if an employee calls in and says, "I have pneumonia and will be going to the doctor today, but I think I'll be out this entire week," the supervisor should not document this as "sick." Instead, the supervisor should write down precisely what he or she was told by the employee. Alternatively, if the supervisor is permitted to summarize what the employee said, the summary should be complete. For example, the following would be acceptable: "Pneumonia - seeing doctor today - possibly out for entire week."

b. **Before a FMLA eligible employee is either disciplined or reviewed unfavorably because of poor attendance, someone who has been trained on FMLA compliance should review the employee's attendance record.** A review of the attendance record should include a review of any notes created as discussed in paragraph a. above. In the event that a supervisor mistakenly treated an absence that was likely FMLA-qualifying as a non-FMLA absence, the Human Resources Department can take steps to retroactively designate the absence or absences as FMLA leave and/or ignore any such absences for disciplinary and/or performance review purposes.

### **Responding to an employee's request for leave or notice of the need for FMLA leave**

Once an employee either explicitly requests FMLA leave or provides the employer (through an immediate supervisor, Human Resources, or otherwise) with information sufficient to apprise it of the employee's need to take time off for a potentially FMLA-qualifying condition, a Notice of Eligibility of Rights & Responsibilities form should be completed within five business days of the employee notifying the employer of the need for FMLA leave. 29 C.F.R. § 825.300(b), (c). This form and the other applicable forms discussed below should be provided to the employee. The purpose of this form is two fold: (1) to notify the employee whether he or she is eligible for FMLA leave; and (2) in those cases where an employee is eligible for FMLA leave, to notify the employee of his or her rights and responsibilities for taking FMLA leave.

An employee who is eligible for FMLA leave is not necessarily entitled to such leave. For purposes of completing the Notice of Eligibility of Rights & Responsibilities form, "eligible" means that an employee has met the FMLA's 12-month length of service requirement, the 1,250-hours work requirement, and works at a site with 50 or more employees within 75-miles. If an employee specifically requests FMLA leave but is not

eligible for such leave, the Department of Human Resources should complete Part A of the form and check the appropriate line or lines indicating why the employee is not FMLA eligible. If the employee is eligible, Human Resources should indicate that fact in Part A of the form and then fully complete Part B.

In order to determine whether an eligible employee is actually qualified for FMLA leave, an employer is entitled to require that the employee at issue complete an appropriate certification form. When the employer determines that an employee in need of FMLA leave is eligible for such leave, the appropriate certification form should be provided to that employee. The chart below explains which certification form should be provided to an FMLA-eligible employee:

**FMLA CERTIFICATION FORMS**

<b>Form Title</b>	<b>Basis for Providing to Employee</b>
<i>Certification of Health Care Provider for Employee's Serious Health Condition</i>	A FMLA eligible employee either explicitly requests FMLA leave or provides the employer with information sufficient to apprise it of the employee's need to take time off for his or her own medical condition that may qualify as a Serious Health Condition.
<i>Certification of Health Care Provider for Family Member's Serious Health Condition</i>	A FMLA eligible employee either explicitly requests FMLA leave or provides the employer with information sufficient to apprise it of the employee's need to take time off to care for a covered family member who has a medical condition that may qualify as a Serious Health Condition.
<i>Certification of Qualifying Exigency for Military Family Leave</i>	A FMLA eligible Employee either explicitly requests FMLA leave or provides the employer with information sufficient to apprise it of the employee's need to take time off to handle affairs related to that employee's spouse, parent, or child being called up in support of a contingency operation.
<i>Certification for Serious Injury or Illness of Covered Servicemember</i>	A FMLA eligible Employee either explicitly requests FMLA leave or provides the employer with information sufficient to apprise it of the employee's need to take time off to care for a covered servicemember (the employee's spouse, son, daughter, parent, or next of kin who is a current member of the Armed Forces) suffering from an illness or injury incurred in the line of duty.

Eligible employees should be given at least 15 calendar days to complete and return the appropriate certification form. 29 C.F.R. § 825.305(b). An extension of time should be

granted when it is not practicable under the circumstances for the employee to have the certification completed within 15 calendar days despite his or her good faith efforts. One of the most common forms given to eligible employees will be the Certification of Health Care Provider for Employee's Serious Health Condition. When that form is provided to an employee, the employer should also attach a job description listing the essential functions of the employee's position.

### **Evaluating an employee's certification and completing the Designation Notice**

Once an employee has completed his or her certification form, Human Resources should evaluate the certification and determine whether to: (1) approve the FMLA leave request; (2) obtain additional information; or (3) deny the FMLA leave request.

#### **A. Approving FMLA Leave**

The Designation Notice form should be completed when the employee's completed certification form demonstrates that the reason for leave is FMLA-qualifying. If an employee is taking leave for his or her own serious health condition, Human Resources can and generally should indicate on the Designation Notice that the employee will be required to present a fitness-for-duty certificate to be restored to employment. A fitness-for-duty certification may be required only when the employer has a uniformly-applied policy that requires all similarly situated employees (i.e., same occupation, same serious health condition) to provide a fitness-for-duty certification as a condition for reinstatement. 29 C.F.R. § 825.312(a). When an employer requires a fitness-for-duty certificate as a condition of reinstatement, the employer must not only inform the employee of this requirement on the Designation Notice but must also provide the employee with a list of essential job functions as an attachment to the Designation Notice.

Employees taking leave for reasons other than their own serious health condition or employees who will only miss work intermittently should not generally be required to present a fitness-for-duty certificate to be restored to employment. However, if reasonable safety concerns exist, an employer is entitled to a fitness-for-duty certification for employees on intermittent leave up to once every 30 days. 29 C.F.R. § 825.312(f).

#### **B. Obtaining Additional Information**

If the employee provides an incomplete or insufficient certification form, Human Resources should indicate on the form that "additional information is needed to determine if your FMLA leave request can be approved." Additionally, the person completing the form should also indicate what information is needed to make the certification complete and sufficient. It may be necessary to attach a separate letter or memorandum describing what additional information is needed. Employees should be provided with at least seven (7) calendar days to provide the missing information. 29 C.F.R. § 825.305(c).

If an employee submits a complete and sufficient certification, either initially or after he or she is given seven (7) calendar days to provide the missing information, the employer

may not request additional information from the health care provider. However, after an employee has been given an opportunity to cure any deficiencies with his or her initial certification, certain representatives of the employer may contact the health care provider for purposes of clarification and authentication<sup>1</sup> of the medical certification. 29 C.F.R. § 825.307(a). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. However, under no circumstances, may the employee's direct supervisor contact the employee's health care provider. 29 C.F.R. § 825.307(a).

In certain circumstances, employers have the right to require an employee to obtain a second or third medical certification at the employer's expense. Before seeking a second or third medical certification, which will likely be a rare occasion, employers should discuss this with counsel.

### **C. Denying the FMLA Leave**

Denying requested FMLA leave at this stage is appropriate under any of the following circumstances:

1. The employee fails to return a completed certification form;
2. The certification form indicates that the employee has not been absent and/or will not be absent for a FMLA qualifying reason. For example, an employee's Certification of Health Care Provider for Employee's Serious Health Condition may indicate that an employee's medical condition does not constitute a serious health condition.
3. The employee has exhausted his or her FMLA leave entitlement in the applicable 12-month period.

If any of these reasons apply, the bottom section of the Designation Notice should be completed.

### **While the employee is on FMLA Leave**

Depending on an employer's policy, employees taking a leave of absences, whether for FMLA leave or not, may be required to contact Human Resources at certain time intervals (i.e., every 15 days). Since it is somewhat unlikely that employees will remember to initiate contact with the employer while on leave, the employer may wish to consider adopting a practice of contacting the employee on leave every 30 days to inquire about the employee's status and intent to return to work. Employees should have been notified of their need to provide the employer with periodic reports of their status when they were provided

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<sup>1</sup> Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification was completed and/or authorized the health care provider who signed the document. 29 C.F.R. § 825.307(a).

with a Notice of Eligibility and Rights and Responsibilities form. While communicating with an employee regarding his or her intent to return to work, Human Resources personnel should also discuss any return to work logistics with the employee including, if applicable, completing the fitness-for-duty certification requirement.

When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. For example, if an employee has been previously certified for intermittent leave due to migraine headaches, when the employee calls in to notify his or her supervisor that he or she will be either late or absent, the employee must either specifically state that he or she will be late because of a migraine headache or because he or she needs FMLA leave. If such an employee were to simply call in "sick" without further explanation, the employer does not need to treat the absence as FMLA leave and should not be viewed as interfering with FMLA rights by not designating the absence as FMLA leave. In addition, the representative receiving the call may specifically ask if the leave is FMLA leave or, when an employee has been certified for more than one FMLA-qualifying reason, the representative may inquire further to determine for which qualifying reason leave is needed. 29 C.F.R. § 825.302(c).

If an employee's completed certification indicates that he or she may be on intermittent on reduced schedule leave for a period in excess of six months, the employer is permitted to request a recertification every six months. 29 C.F.R. § 825.308(b). Generally, employers should consider taking advantage of this right and require a recertification every six months when an employee is taking leave in connection with a "lifetime" or "indefinite" condition. For recertification purposes, the employer should require the Certification of Health Care Provider for Employee's Serious Health Condition form to be completed.

Tracking intermittent leave is important not only so that Human Resources can determine how much FMLA leave an employee has used but also to segregate FMLA absences (which cannot be used as the basis for disciplinary actions/ performance reviews) from non-FMLA absences (which can be the basis for such actions/decisions).

Employers and counsel be aware that it is quite possible that an employee who is taking intermittent FMLA leave will experience both foreseeable and unforeseeable leave. For example, an employee's medical certification form may indicate that he or she will be late and/or absent from work from time to time because of migraine headaches (unforeseeable leave) and will need to miss work two (2) or three (3) times a year for doctor visits (foreseeable leave). When medical treatments/appointments are foreseeable, employees should be providing the employer with thirty (30) days prior notice or a reasonable explanation of why such prior notice was not practicable. Additionally, the employee should work with the employer to "schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider." 29 C.F.R. § 825.302(e). If an employee fails to give thirty (30) days notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at

least thirty (30) days after the date the employee provides notice to the employer of the need for the FMLA leave. 29 C.F.R. § 825.304(b).

### **Return to work following FMLA leave**

In accordance with the employer's FMLA Policy, employees returning to work from leave for their own serious health condition must provide certification from their health care provider that they are able to resume work and perform the essential duties of their regular job. Failure to do so may delay, or result in the denial of, reinstatement. 29 C.F.R. § 825.313(d). Before the employer makes the decision to deny reinstatement to an employee returning from FMLA leave (including because the employee has exhausted all available FMLA leave and is still unable to return to work), the potential implications of such a decision under the Americans with Disabilities Act, as amended, and the state workers' compensation law (as applicable), must be considered.

### **Managing the Unexpected**

Successful FMLA administration requires employers and their counsel to plan for and skillfully respond to the unexpected. By establishing, using, and continually updating their FMLA toolkit, employers can help reduce the headaches often associated with FMLA leave compliance.

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