

Final FMLA Regulations

effective January 16, 2009



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November 17, 2008 marked the release of the final expanded Family Medical Leave Act (FMLA) regulations. The Department of Labor (DOL) was responsible for releasing the Final Rule (the Rule) which outlines the changes required due to the National Defense Authorization Act. Additionally, the DOL used the opportunity to address several areas of the current Act. All changes will take effect January 16, 2009.

The Rule expands FMLA job and benefits protection to military personnel and families for a period of up to 26 weeks in a 12 month period. An employee may take leave to care for a seriously injured or seriously ill covered service member (if that injury or illness occurred in the line of duty). Additionally, the families of National Guard and Reserve personnel from any military branch may take FMLA job protected leave to manage their affairs, defined as 'qualifying exigencies'. Qualifying exigencies are:

- Short notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post deployment activities
- Additional activities the employer and employee agree upon

In addition to the military provisions the Rule outlined guidance for several aspects of the Act. The processes regarding medical certification were further clarified to allow employers to request a health care provider's recertification every 30 days unless the duration of the qualified leave condition was outlined in the original certification. Additionally, return to work procedures were reviewed. New guidance allows an employer to request a fitness for duty certification before the employee may return to work. If the leave is intermittent, the employer may request the health care provider's certification for return to work each time the employee comes back to work. Please note, the Department of Labor did respond to the concerns regarding HIPAA privacy violations. The Final Rule includes a limit as to who may contact the health care provider and specifically bans the employee's supervisor from direct contact with the health care provider.

The "categorical" penalty previously outlined in the Act has been removed. This decision was made to uphold the US Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* An employer is liable only if an employee can demonstrate 'individual harm' resulting from the employer's failure to notify him of potential FMLA rights.

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An employer's timing requirements were expanded under the Final Rule. An employer now has five days to provide notice to employees versus the two days previously allowed. Timing of an employee's notification to the employer was also altered. Previously, the Act allowed for an employee to request leave up to two business days after the actual leave date, even if earlier notification was possible. Under the Final Rule, the employee must follow the employer's normal call in procedures (barring any unusual circumstances).

Employer notification requirements have been clarified and outlined in one section of the Rule to assist employers. Employers eligible for the Act must provide all of the following to employees so they may understand the rights and responsibilities under the Act.

- General Notice about FMLA Leave (either on a poster, in a handbook, or through other written guidance)
- Eligibility Notice
- Rights and Responsibilities Notice
- Designation Notice

The "serious health condition" definition is imperative to the proper administration of an FMLA policy. The Final Rule further defines the term to include the following language:

*"if an employee is taking leave for more than three consecutive calendar days of incapacity plus two visits to a health care provider, those two visits must occur within 30 days of the incapacity"*¹

Past court cases have ruled that 'light duty' assignments count towards FMLA leave calculations. The Final Rule reversed those decisions to state that voluntary light duty assignments may not be counted as FMLA leave. If an employee is working, he is not on Leave.

The Department of Labor has long abided by the theory that an employee may retroactively waive or settle his FMLA claim without informing a court or the Department of Labor. Some confusion was caused by a decision by the US Court of Appeals (4th Circuit) stating even retroactive release of claim was not allowed without Department of Labor notification. The Final Rule included its original opinion and reconfirmed that FMLA rights may never be prospectively waived.

Finally, employers may now deny a "perfect attendance award" if the employee was on Family Medical Leave. This is a reversal of the original regulations. The award may be denied as long as all employees taking leave (non FMLA leave) are treated identically.

More information, including sample policies, will be available soon. Contact your Account Executive with any questions, or the WGA Compliance Practice directly at compliance@wgains.com.



¹ New Release, US DOL, 11/14/08