

The Show That Never Ends

Recent Changes to the Family and Medical Leave Act

Eileen C. Begle
Senior Assistant County Attorney
Office of Harris County Attorney

Vince Ryan
eileen.begle@cao.hctx.net
713-755-7159

Texas Association of County Auditors
Moody Gardens
Galveston, Texas
October 21, 2009

The Most Helpful Page

1. Website for the Family & Medical Leave Act of 1993, as amended by the National Defense Authorization Act (January 28, 2008).

<http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>

2. Website to the Department of Labor FMLA homepage, which contains links to:
 - The Final Rule *i.e., the current FMLA regulations*
 - The new FMLA poster (in English and Spanish)
 - FMLA forms
 - DOL Opinions

<http://www.dol.gov/esa/whd/fmla/>

3. List of Forms Attached

Attachment 1	Summary of FMLA Amendments 2009
Attachment 2	Intermittent Leave Letter
Attachment 3	HIPAA Release
Attachment 4	Letter for Clarification of an FMLA Certification
Attachment 5	Letter for Authenticating an FMLA Certification
Attachment 6	Letter for Suspicious Use of FMLA

The Show That Never Ends

Recent Changes to the Family and Medical Leave Act

I. Introduction

The Family and Medical Leave Act (“FMLA”) is truly “The Show That Never Ends.” Since originally enacted in 1993, Congress has considered dozens of bills attempting to expand the FMLA. Until last year, none of those bills had been successful. On January 28, 2008, President George W. Bush signed the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”) (Pub. L. 110-181) creating two additional qualifying events, both related to military service. The Department of Labor (“DOL”) issued final regulations on November 17, 2008, incorporating the new types of leave and revising the original FMLA regulations. 73 Fed. Reg. 67934. The new regulations took effect January 19, 2009.

This paper presumes that you have some working knowledge of the FMLA. Rather than an in-depth treatise on the details of FMLA, this paper focuses on what’s new and, theoretically, how the DOL improved the original regulations. I have included several links and forms you can use as-is or adapt to fit your needs. I hope they are helpful.

Sometimes in the day-to-day hustle of doing our jobs, we forget that employees are a county’s most valuable asset. We need to be familiar with these changes to make sure we treat the employees fairly ... *and limiting the county’s legal exposure is nice, too!*

II. Family & Medical Leave Act of 1993, as amended by the NDAA of 2008

In 1993 Congress passed the FMLA (29 U.S.C. § 2601 *et. seq.*) to balance employees’ needs to protect their families with the employers’ needs to develop high-performance organizations. That goal remains unchanged. 29 C.F.R. § 825.101.¹ The FMLA granted the Department of Labor (“DOL”) authority to develop implementing regulations. 29 U.S.C. § 2654. Basically, the law originally requires covered employers to provide eligible employees with up to 12 workweeks of leave in a 12-month period for the birth of a child (or placement of a child for adoption or foster care), the serious health condition of the employee’s spouse, parent, or child, or the employee’s own serious health condition. 29 U.S.C. § 2612. FMLA also requires employers to provide benefits protection while the employee is on leave and to restore the employee to the same job she had prior to taking leave. 29 U.S.C. § 2614.

Those basic requirements still apply. The NDAA created two new categories of leave, both related to military service. The first is “Leave Because of a Qualifying Exigency.”² The second is “Leave to Care for a Covered Servicemember”. Let’s look at these pretty closely.

¹ All references to the C.F.R. are to the current regulations unless specifically noted.

² Don’t you wish they could have found a better word than “exigency?”

A. Leave Because of a Qualifying Exigency

Basically, this provides leave for employees who need to take care of personal business because a *Covered Military Member* is on or has been called to *Active Duty*.

1. Who is a *Covered Military Member*?

A “covered military member” means the employee’s spouse, son, daughter, or parent on active duty or call to active duty status. 29 C.F.R. § 825.126(b). Here, “son or daughter” includes biological, adopted, foster, stepchild, legal ward, or a child for whom the employee stood in loco parentis, of any age. 29 C.F.R. § 825.126(b)(1).

2. What is *Active Duty or Call to Active Duty Status*?

Don’t hold your breath while reading this detailed definition. Feel free to read only the underscored words to get the point.

“Active duty or call to active duty status” means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12405 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

29 C.F.R. § 825.126(b)(2) (emphasis supplied).

3. Which Military Branches are Covered?

The spouse, parent, or child must either be a member of the reserve components (Army National Guard of the U.S., Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the U.S., Air Force Reserve and Coast Guard Reserve) or a retired member of the Regular Armed Forces and have been called to active duty in support of a contingency operation. 29 C.F.R. § 825.126(b)(2)(i). State calls are not covered unless under order of the President under one of the provisions identified above in support of a contingency operation. 29 C.F.R. § 825.126(b)(2)(ii).

Current members of the Regular Armed Forces either do not serve “under a call or order to active duty” or are not identified in the litany of provisions referred to from Title 10. Therefore, the first thing to determine if an employee asks for FMLA leave because his spouse, parent, or child is headed to war is whether the service member is currently in the Regular Armed Forces. If she is, then the employee is not eligible for leave for a qualifying exigency. The DOL explains (by quoting a comment to the proposed rule) that members of the Regular Armed Forces made a “conscious career choice and have accepted the terms and conditions of the employment” as opposed to Reservists, who usually work elsewhere but are willing to put their lives on the line when duty calls. 73 Fed. Reg. 67955.

Practice Tip # 1

Members of the Regular Armed Forces are not *Covered Military Members* for purposes of qualifying exigency leave.

Compare Practice Tip # 3 on p. 8.

4. What is a *Qualifying Exigency*?

Congress granted the DOL authority to identify what a “qualifying exigency” is. The DOL describes eight specific categories of exigencies.

Short-Notice Deployment

29 C.F.R. § 825.126(a)(1)

This leave is available to address any issue that arises from a covered military member being notified of an impending call or order to active duty with notice of seven calendar days or less. This leave is limited to seven calendar days beginning the date a covered military member is notified of the call to active duty. The employee does not have to show that the need for leave satisfies one of the other seven categories. For instance, if an employee’s spouse is in the reserves and is ordered to active duty in support of a contingency operation on November 5 and will be deployed on November 9, the employee is eligible for leave under this section for November 5 – 11. After November 11, she will have to demonstrate one of the other qualifying exigencies to be eligible for leave.

Military Events and Related Activities

29 C.F.R. § 825.126(a)(2)

This leave is available to attend any official ceremony, program, or event sponsored by the military related to the call to duty and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross.

Childcare and School Activities

29 C.F.R. § 825.126(a)(3)

Eligible employees can use this leave for the following circumstances, but only when the need is caused by the active duty or the call to active duty. For this provision, the word “child” is the same as under the original FMLA.³

- To arrange for alternative childcare;
- To provide childcare on an urgent, immediate need basis (not routine, regular, or everyday basis);
- To enroll in or transfer to a new school or day care facility;
- To attend meetings with staff at a school or daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with counselors.

The preamble to the regulations suggests that an eligible employee could leave work to care for a child of a covered military member on active duty if the child gets sick and needs to be picked up from school or day care immediately. But the family is expected to make alternate arrangements if the child’s illness continues. 73 Fed. Reg. 67960.

Financial and Legal Arrangements

29 C.F.R. § 825.126(a)(4)

Eligible employees can take leave:

- To make or update financial or legal arrangements to address the covered military member’s absence, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

³ A biological, adopted, or foster child, a stepchild or a legal ward, a child for whom the covered military member stands *in loco parentis* who is under 18 or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave begins.

- To act as the covered military member's representative before a federal, state, or local agency for the purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status and for a period of 90 days following the termination of the active duty status.

Counseling by Someone Other than a Health Care Provider

29 C.F.R. § 825.126(a)(5)

Eligible employees can use leave to attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or the son or daughter of the covered military member provided that the need arises from the active duty or call to active duty. The provision is intended to cover counseling that is not already covered by FMLA. That might include counseling by a chaplain, pastor, or minister, or counseling offered by the military or a military service organization. 73 Fed. Reg. 67961.

Rest and Recuperation

29 C.F.R. § 825.126(a)(6)

Eligible employees may take leave to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. This leave is limited to five days for each instance of rest and recuperation for the covered military member.

Post-Deployment Activities

29 C.F.R. § 825.126(a)(7)

Eligible employees may take leave 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 the covered military member's active duty status and to address issues that arise from the death of a covered military member while on active duty, such as meeting and recovering the body and making funeral arrangements.

Additional Activities

29 C.F.R. § 825.126(a)(8)

The new regulations also allow an employee to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of such leave.

5. How Much Leave Does an Eligible Employee Get?

Leave for a qualifying exigency is included within the original 12 weeks of leave an eligible employee is entitled to each FMLA year. 29 U.S.C. § 2612(a)(1). Since your payroll system is already capturing this time, it should not be difficult to administer ... **if** your first-line

supervisors and payroll administrators recognize these circumstances as potential FMLA situations. Attachment 1 is a form memo you can distribute to the people in your county who need to be aware of these new FMLA qualifying events.

Practice Tip # 2

Your county uses the calendar year as the FMLA year. Sally Sue takes 6 weeks of FMLA for the birth of her child in March. In November, her husband, a reservist, gets called to active duty. Sally still has 6 weeks of FMLA available for any qualifying exigency.

B. Leave to Care for a Covered Servicemember

The second new leave available protects an employee who needs to miss work to provide care to a current member of the Armed Forces, including the National Guard or Reserves, who has a serious injury or illness sustained in the line of active duty.

1. Who is a Covered Servicemember?

The FMLA defines “covered servicemember” as:

a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

29 U.S.C. § 2611(16).

Practice Tip # 3

Current members of the Regular Armed Forces are *Covered Servicemembers* for purposes of military caregiver leave.

Compare Practice Tip # 1 on p. 5.

The term “outpatient status” means:

The status of a member of the Armed Forces assigned to--

- (A) a military medical treatment facility as an outpatient; or
- (B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

29 U.S.C. § 2611(17).

The DOL form for certifying military caregiver leave requires the treating physician to acknowledge that the servicemember's injury or illness was sustained in the line of duty and that the treating physician actually works at a covered medical treatment facility.

2. Who is Eligible to be a Caregiver?

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember may take leave to care for the covered servicemember. 29 U.S.C. § 2612(a)(3). The act defines "next of kin" as "the nearest blood relative of that individual." 29 U.S.C. § 2611(19). The DOL tells us what that means.

"Next of kin" is the nearest blood relative other than the service member's spouse, parent, or child, in the following order:

- blood relatives who have been granted legal custody of the service member by court decree or statutory provisions,
- brothers and sisters,
- grandparents,
- aunts and uncles, and
- first cousins

unless the service member has specifically designated in writing another blood relative as his nearest blood relative for purposes of military caregiver leave under the FMLA.

29 C.F.R. § 825.122(d).

Note that the spouse, parent, and child are covered automatically. That makes sense. The next of kin issue may lead to some confusion. First, where the servicemember has not designated a "next of kin" in writing, family members sharing the closest level of familial relationship are all considered next of kin. For example, in the absence of a written designation, where the servicemember has three siblings, they will all be considered next of kin. 29 C.F.R. §825.127(b)(3). The employee is not required to certify that he is the only individual available to provide care for a family member. *Id.* Thus, an employer could have more than one employee taking this form of FMLA for the same servicemember without a requirement that they share the leave.

I question the validity of that particular regulation. The Act says "nearest blood relative" (singular, not plural). It seems to me that Congress expected only one person to be the next of kin. DOL agreed, at least partially, because the regulation also says that where the servicemember has three siblings but has designated a cousin as next of kin in writing, then the cousin is the only one eligible to take caregiver leave. *Id.* I don't know whether or how often

the situation will arise where one employer will have more than one employee taking military caregiver leave as “next of kin” for one servicemember. But if it does, I wouldn’t be surprised to see this regulation challenged.

I also do not see how one employer is going to know that another employer is providing FMLA for military caregiver leave to an employee for the same servicemember. The form the doctor has to sign certifying the leave requires him to say that the employee is “next of kin”. But it doesn’t stop the doctor from completing multiple forms for multiple employees who have the same or different employers. That seems to leave a tremendous amount of responsibility and discretion to the certifying physician.

If my concern about too many people being eligible for military caregiver leave seems heartless, please consider the next section.

3. How Much Leave do Caregivers Get?

Eligible employees are entitled to take a “total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.” 29 U.S.C. § 2612(a)(3) (emphasis supplied). That is double the amount of leave for regular FMLA. Many commenters to the proposed rule believed the underscored provision indicated Congress’ intent that an employee gets to take military caregiver leave only once. However, after a lengthy discussion, the DOL concluded, “The Department agrees that the military caregiver leave provisions, while a one-time entitlement, should be applied on a per-covered-servicemember, per-injury basis.” 73 Fed. Reg. 67969 (emphasis supplied); 29 C.F.R. § 825.127(c)(2). This interpretation is consistent with the grim reality that our military men and women get injured, recover, and get injured again.

Two examples explain the regulation. Where a servicemember is deployed and sustains a serious injury and then incurs another serious injury during a second deployment, an eligible employee would be entitled to two separate 26-week leaves during separate “single 12-month periods.” 73 Fed. Reg. 67969. But where a servicemember suffers both a serious arm injury and a serious leg injury in the same incident, an employee is only entitled to one 26-week leave. *Id.* And if an employee has already taken 26 weeks of leave for a servicemember’s serious injury and the servicemember later has a complication or aggravation of the same injury, the employee is not entitled to any additional caregiver leave. *Id.*

It is extremely important to note that the “single 12-month period” is rarely going to be the same as your regular FMLA year. The 12-month period for military caregiver leave must be “measured forward from the date an employee’s first FMLA leave to care for the covered servicemember begins.” 29 C.F.R. § 825.200(f). That means if you use the calendar year for the FMLA year, then the 12-month period for military caregiver leave will not be the same except in the unlikely event that the military caregiver leave begins on January 1. I predict that keeping track of two separate FMLA periods might be pretty challenging.

An employee is only entitled to take a combined total of 26 weeks of leave for **any** FMLA qualifying reason in the “single 12-month period.” For example, an employee could take

16 weeks of FMLA for military caregiver leave and 10 weeks of FMLA for the birth of a child in one “single 12-month period.” But the employee could not take more than 12 weeks of FMLA for the birth of a child even if she had used fewer than 14 weeks for caregiver leave. 29 C.F.R. § 825.127(c)(3).

If the employee does not use all of the 26 weeks of leave in one 12-month period, the unused weeks are forfeited. *Id.* Finally, if the covered servicemember is also covered under regular FMLA, the employer may not simultaneously designate the 26 weeks as caregiver leave and “regular FMLA”. Instead, the employer is required to designate the leave as caregiver leave first. 29 C.F.R. § 825.127(c)(4).

Practice Tip # 4

Rules for tracking FMLA for military caregiver leave.

1. The “single 12-month period” for military caregiver leave must start on the first day of the leave.
2. The FMLA year for all other qualifying events will most likely be a different 12-month period.
3. An employee may only use a combined total of 26 weeks of leave for any FMLA qualifying reason during the “single 12-month period.”
4. If the military caregiver leave also qualifies as regular FMLA, the employer must track it as caregiver leave first and must not simultaneously count it as regular FMLA.

C. Other Changes to the FMLA Regulations

In recent years, employers both large and small, have become increasingly frustrated with the original FMLA regulations, which often seem to favor employees and leave plenty of room for abuse. Of course, the flipside is that employees and many advocacy groups have repeatedly attempted to increase employee FMLA rights in Congress and through parallel state statutes. The preamble to the Final Rule discusses both sides of each issue addressed in the regulations and sets out the reasons for the regulations the DOL ultimately adopted.

Remember, all of the provisions below apply to leave taken for any of the original qualifying events as well as for the new qualifying exigency leave and military caregiver leave.

1. Eligibility Criteria

An *eligible employee* under the FMLA is one who:

- has been employed by the employer for a total of at least 12 months;
- has actually worked at least 1,250 hours within the 12-month period before the leave begins; and
- is employed at a worksite where 50 or more employees are employed within 75 miles. 29 U.S.C. § 2611(2)(A).

The 12 months of employment do not have to be consecutive. The new regulations add a twist.

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation. The time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, *et seq.*; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes.)

29 C.F.R. § 825.110(b).

Practice Tip # 5

Generally, a seven year gap in employment breaks the continuous service requirement of the eligibility rule. Of course, employers can waive that eligibility rule.

2. Clarifying Definition of Serious Health Conditions

To be protected for regular FMLA, the employee or her *spouse, parent, or child* must have a *serious health condition*. The term *serious health condition* is divided into two broad categories:

- inpatient care in a hospital, hospice, or residential medical care facility or
- continuing treatment by a health care provider.

29 U.S.C. § 2611(11). Inpatient care is fairly simple: it is easy for the employer to verify if somebody has been admitted into a facility. The definition of *continuing treatment*, though, covers many more situations. *Continuing treatment* is subdivided into five categories, described below. I've noted where the definition has been clarified.

Incapacity and Treatment

29 C.F.R. § 825.115(a)

I refer to this category as “the Formula.” Originally, it was defined as any period of incapacity for more than three consecutive days and any subsequent treatment or period of incapacity relating to the same condition that involved:

- treatment two or more times by a health care provider; OR
- treatment by a health care provider at least once which results in a regimen of continuing treatment under the supervision of the healthcare provider.
 - A *regimen of continuing treatment* includes a prescription but not, by itself, treatment with over-the-counter medications.

Many employers complained that the regulation did not specify when the doctor visits had to be. While I haven't noticed any abuse on this particular issue, the DOL must have recognized some legitimacy to the argument because the new regulations specify that:

- the treatment must be “in-person” and
- the first (or only) trip to the doctor must take place within seven days of the first day of incapacity; or
- if the treatment was two visits, the second visit must be within 30 days of the first day of incapacity, unless extenuating circumstances exist

Pregnancy or Prenatal Care

29 C.F.R. § 825.115(b)

FMLA protects any period of incapacity due to pregnancy or for prenatal care. That's easy to apply for the woman. But note that while eligible men can take FMLA for the birth of a child regardless of marital status, only a husband (including common law husband) is eligible to

take FMLA to care for a pregnant wife who is incapacitated (i.e., on bed rest) or if needed to care for her during her prenatal care (i.e., driving her to an ultrasound appointment).

Chronic Conditions
29 C.F.R. § 825.115(c)

Chronic conditions are undoubtedly the most problematic of all of the FMLA qualifying events. FMLA protects any period of incapacity or treatment for a *chronic serious health condition*. A *chronic serious health condition* is one that:

- requires periodic visits for treatment by a health care provider;
- continues over an extended period of time (including recurring episodes of a single underlying condition); and
- may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

While the vast majority of chronic serious health conditions are valid, it is particularly frustrating for an employer when an employee is certified for intermittent FMLA and can come and go from the workplace as he desires. The new regulations attempted to limit the potential for abuse by clarifying the definition to require at least two doctor visits per year for the chronic condition. 29 C.F.R. § 825.115(c). I do not think that clarification will provide much relief, if any. My experience (both personal and professional) has been that people who have a chronic serious health condition must see a doctor once a year to renew their prescription(s) for maintenance medications. Then, if the person experiences symptoms that cause them to miss work, he almost always goes to the doctor again. That takes care of the new requirement for two doctor visits per year. It's not the qualification of a chronic serious health condition that causes the employer's frustration - it's the scheduling issue.

Permanent or Long-term Conditions
29 C.F.R. § 825.115(d)

Another example of "continuing treatment" is any period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, such as Alzheimer's, severe stroke, or terminal stages of a disease.

Conditions Requiring Multiple Treatments
29 C.F.R. § 825.115(e)

The last category of "continuing treatment" covers any period of absence to receive multiple treatments (and recovery) from a health care provider for restorative surgery after an accident or injury or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days if the person didn't get the treatment (chemo, radiation, physical therapy for severe arthritis, dialysis).

3. Employer Notice Requirements

The DOL pulled all of the employer notice requirements from various places in the old regulations and put them into one section. That re-organization is helpful. Theoretically, employers and employees both benefit from better communication. The new notice forms have more details and I am somewhat hopeful that they will make FMLA administration a little easier. You can get the DOL forms from their website. Harris County tweaked the DOL-provided forms to fit our policy. If you would like a copy of our forms, please e-mail me.

General Notice

29 C.F.R. § 825.300(a)

Covered employers must post a notice explaining the Act's provisions in conspicuous places where employees work. The Most Helpful Page (page 2) has a link to the DOL poster page. If the employer has any eligible employees, the employer also has to provide general notice in the employee handbook, if the employer has one. This can be done electronically if all employees have access to a computer.⁴

Eligibility Notice⁵

29 C.F.R. § 825.300(b)

Employers must tell the employee whether he is eligible to take FMLA leave within five business days (absent extenuating circumstances) of his request for leave or "when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason." If the employee is ineligible, the employer has to identify the specific reason why.

The employer only has to give the eligibility notice once per FMLA year unless the employee's eligibility status changes during the year. For instance, if an employee asks for FMLA when he has only been employed 10 months, the first eligibility notice will say he is not covered. If the same employee asks for FMLA three months later, the employer will have to give a new eligibility notice.

Rights and Responsibilities

29 C.F.R. § 825.300(c)

This form provides written details about the specific expectations and obligations of the employee and explains the consequences for failing to meet those obligations. The timing is the same as for the eligibility notice (within five business days.) Often the employee has already started leave. In that case, mail it to her home. Otherwise, you can send it electronically. 29 C.F.R. § 825.300(c)(6). The Rights and Responsibilities Form tells the employee whether she is going to have to provide a certification (whether of a serious health condition or qualifying exigency). So, send the appropriate certification form with the Notice of Rights and Responsibilities. 29 C.F.R. § 825.300(c)(3).

⁴ We have tried to make a few computers available in common areas for our employees who do not sit at a desk all day.

⁵ The DOL combined the Eligibility Notice with the Rights and Responsibilities Notice. So, that is only one form.

Designation Notice
29 C.F.R. § 825.300(d)

The employer also has to give the employee a notice explaining whether the leave will be designated and counted as FMLA. Give the Designation Notice within five business days after determining the leave is for an FMLA-qualifying event.⁶ If the employer is not going to designate the leave as FMLA, the form has to state why. This form also tells the employee:

- whether the employer requires the employee to use paid leave;
- if the employee will be required to present a fitness-for-duty certification before returning to work; and
- the amount of leave that will be counted against the employee's FMLA entitlement (unless it is uncertain).

4. Certifying the Need for FMLA Based on a Serious Health Condition

The DOL has changed several provisions in the regulations in an attempt to protect the employer with regard to medical certifications. I'm looking forward to seeing whether any of these new provisions actually provide some relief.

✓ **Employee's Responsibility to Provide Certification**

The old regulations had conflicting provisions. One provision said that an employee who did not provide a medical certification was not entitled to leave. 29 C.F.R. § 825.311(a)(foreseeable leave) and (b)(unforeseeable leave)(2006). But another provision insisted that where an employer had "requisite knowledge" that an absence was because of a qualifying event and failed to designate the absence as FMLA, then the absences were still protected but did not count against the employee's 12-week entitlement. 29 C.F.R. § 825.208(c)(2006). While I'm not aware of a published case that ever invalidated § 825.208(c), the Supreme Court did strike down one similar regulation. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In *Ragsdale*, the Court found that 29 C.F.R. § 825.700(a)(2006) was invalid because it granted employees more than 12 workweeks of leave. The invalid regulation said, "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." The "requisite knowledge" provision did the same thing.

The new regulations emphasize the employee's ultimate responsibility to cooperate in the certification process and make clear that the consequence for not doing so is that the employer may deny the leave. 29 C.F.R. § 825.305(d). A later section, 29 C.F.R. § 825.313, explains the specific circumstances under which an employer may deny leave because of an employee's failure to provide required documentation. I'm anxious to see whether employers start denying leave and, if they do, whether they will win if they get sued.

⁶ The old regs required designation notice within two business days. 29 C.F.R. § 825.208(b)(1)(2006).

Practice Tip # 6

Keep a written log that tracks when Notices were sent and how (*e.g.* e-mail, hand delivery, regular mail). That will be important if you deny FMLA leave because the employee failed to provide the proper certification. Hopefully, your lawyer will be able to use the log to in a summary judgment motion.

✓ **Certification Must be “Complete and Sufficient”**

One of my favorite parts of the new rule is: “A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. 29 C.F.R. § 825.304(c)(emphasis supplied). We have continuously struggled with reading and interpreting the words, phrases, and symbols some doctors use on these forms.

✓ **Employee Gets Seven Calendar Days to Cure a Deficiency**

If the employer receives a deficient medical certification, then use the Designation Notice to identify the specific deficiency. The employee is entitled to seven calendar days to cure the deficiency. 29 C.F.R. § 825.304(c).

✓ **Employer Gets Easy Authentication**

While the employer has always had the right to authenticate and/or clarify a medical certification, the old regulation was needlessly burdensome so employers very rarely took advantage of it. First, the employer could not do it without the employee’s permission. Second, the regulation prohibited the employer from contacting the medical provider directly. Instead, the employer had to have a health care provider make the contact. 29 C.F.R. § 825.307 (2006).

The new regulation eliminates those requirements, although it still prohibits the employee’s “direct supervisor” from making the contact. Now, an employer does not need the employee’s permission to authenticate a medical certification. 29 C.F.R. § 825.307(a). A health care provider, a human resources professional, a leave administrator, or a management official other than the employee’s direct supervisor can authenticate the document. *Id.*

“Authentication” means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.

Id. Attachment 5 is a form letter you can use to authenticate a medical certification.

Practice Tip # 7

Let employees know that management gets to authenticate an FMLA certification without their permission. Put it everywhere. I'm hopeful that this one change will prevent some abuse.

✓ **Employer Can Clarify With a HIPAA Release**

The old regulation provided very little guidance on the proper way to clarify a medical certification. The new regulation allows the employer to contact the health care provider “to understand the handwriting ... or to understand the meaning of a response.” 29 C.F.R. § 825.307(a). Employers may not ask for additional information beyond that required by the form. Attachment 4 is a form letter you can adapt to clarify a medical certification. Again, basically anyone besides the employee direct supervisor can make this contact with the doctor.

Also, note that if the doctor is going to release personally identifiable health information, then the employee is required to sign a HIPAA release. Attachment 3 is a HIPAA release you can use. If the employee refuses to sign the release “and does not otherwise clarify the certification,” then the employer can deny the FMLA leave. *Id.* That means the employee could sign a HIPAA release provided by the doctor.

4. Certifying Need for Leave for Qualifying Exigencies

As with the forms from doctors certifying the need for FMLA for the employee's or his family member's serious health condition, the forms for certifying the need for leave for a qualifying exigency are very employer friendly. The employer may require the employee to provide a copy of the covered military member's active duty orders. 29 C.F.R. § 825.309(a). The employer may also require the employee to provide information regarding the qualifying exigency, including providing available written documentation that verifies the need for leave. “[S]uch documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs.” 29 C.F.R. § 825.309(b). If the qualifying exigency involved a meeting with a third party, the form requires the employee to provide the contact information (name, title, telephone number, meeting time and place). And the employer is permitted to call to verify the appointment without the employee's permission. 29 C.F.R. § 825.309(d). The DOL did not specify who could call to verify the appointment; therefore, it appears that even the employee's direct supervisor can do that. The employer may also call the appropriate military authority to verify the call to active duty without getting the employee's permission. *Id.*

5. Retroactive Designations

The old regulation prohibited an employer from designating FMLA leave retroactively except in very limited circumstances. 29 C.F.R. § 825.208(c) – (e) (2006). Those provisions,

like § 825.700(a), resulted in an employee being able to take more than 12 weeks of leave. Pointing again to *Ragsdale*, the DOL changed the rule. Rather than a categorical penalty against the employer, the new regulation clarifies that an employer who does not provide timely notice to an employee of an FMLA designation does not violate the Act unless the employee can show an actual injury. 29 C.F.R. § 825.301(e). The regulation provides an example to explain the concept.

For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly.

29 C.F.R. § 825.301(e). While I think this is ultimately good news for the employer, I think it will be very difficult to train supervisors to analyze whether a particular retroactive designation will subject the county to liability. In Harris County, we are training supervisors to designate FMLA retroactively only with the employee's permission and to contact someone in our office for help prior to retroactively designating FMLA if the employee does not agree.

6. Mandatory Substitution of Compensatory Time for Unpaid FMLA

Originally, the regulations did not allow government employers to require an employee to substitute comp time for unpaid FMLA. And where an employee asked to use comp time for an FMLA reason, the employer who allowed the employee to use comp time was prohibited from counting the hours against the employee's FMLA entitlement. 29 C.F.R. § 825.207(i)(2006). While nobody ever challenged it, that regulation has been invalid at least since *Christiansen v. Klevenhagen*, 529 U.S. 576 (2000). Recognizing that, the new regulations allow government employers to require employees to substitute comp time. 29 C.F.R. § 825.207(f)(last sentence.).

7. Recertification Rules

It's amazing to me to see how employees change their behavior when they learn more about the law. For instance, the old regulations only allowed an employer to require an employee to recertify the need for FMLA when the original certification expired. Several years ago, Harris County started taking a more aggressive strategy regarding recertification. And, sure enough, then *some* employees started having their doctors complete the medical certification to say that the serious health condition was expected to last a "lifetime." Then they complained when we asked them to recertify at the beginning of each FMLA year.

Believe me, I know that many chronic serious health conditions truly do last a lifetime. But the potential for abuse is just too great. Imagine an employee who has intermittent leave for his mother's serious health condition of Alzheimer's. The employee comes and goes as he pleases, always claiming to be arriving late, leaving early, or being absent because he had to take care of his mother. That situation could continue even though, unbeknownst to the employer, the mother moved into a nursing home in another state or, worse, died.

The new regulations clarify the employer's right to seek recertification. The general rule is that the employer can request recertification no more frequently than every 30 days, and only in connection with an FMLA-protected absence. 29 C.F.R. § 825.308(a). If, however, the original certification indicates that the minimum duration of the condition is more than 30 days, (i.e. 40 days or "lifetime"), then the employer has to wait until the original certification expires BUT can ask for recertification every six months regardless of the expected duration of the need for leave, but only in connection with an FMLA-protected absence. 29 C.F.R. § 825.308(b).

Under the old rule, employers were permitted to seek recertification any time if circumstances changed or if the employer received information that casts doubt on the validity of the original certification. But the new rules go a step further. Employers can now send a letter to the doctor with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with that pattern. 29 C.F.R. § 825.308(e). For instance, if an employee's original certification says that he will need 1 to 2 days per month for migraine headaches and the employee takes off every Friday, then the employer can ask for recertification. Attachment 6 is a form letter for when an employee's absence pattern is suspicious.

III. Conclusion

New laws always present new challenges. The FMLA amendments provide new rights for employees and new responsibilities for employers. We all know that new rights rarely go away. Indeed, it wouldn't be surprising if the Obama administration tried to expand FMLA further in the next few years. Thus, FMLA really is part of "The Show That Never Ends."

ATTACHMENT 1

Summary of FMLA Amendments 2009

Family & Medical Leave Act Changes
Effective January 16, 2009

On January 28, 2008, the National Defense Authorization Act of 2008 was signed into law. It created two new types of leave under the Family & Medical Leave Act (“FMLA”) and authorized the Department of Labor (“DOL”) to promulgate regulations to implement the law. On November 17, 2008, DOL published the final regulations implementing the new law and amending several other FMLA regulations. The new regulations went into effect January 16, 2009. This update summarizes the major changes. If you have any questions about these changes, please contact *insert name of someone to contact*.

SUMMARY OF CHANGES AND REQUIREMENTS

- DOL designed a new [FMLA poster](#). Please check the bulletin boards in your department to remove the two old FMLA posters and replace them with this one. If you have any questions about the posters (or any other legally-required posters), please contact **insert name in insert dept at insert phone number**.
- **“Exigent circumstances”** leave is available when an eligible employee’s spouse, parent, or child is a member of the Reserve component of the Armed Forces or a retired member of the Reserves or Regular Armed Forces who is on or called to active duty. Exigent circumstances leave is divided into 8 categories: (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; and (8) Additional Activities, when agreed upon between the employee and the employer. It counts as part of the original 12-week entitlement for each FMLA year. **Insert what your FMLA year is.**
- **“Military caregiver leave”** is available when an employee needs leave to provide care to a current member of the Armed Forces, including the National Guard or Reserves, who has a serious injury or illness sustained in the line of active duty. An eligible employee who is the spouse, parent, child (any age), or next of kin of a covered service member may take leave to care for the covered service member. Next of kin includes (1) blood relatives who have been granted legal custody of the service member; (2) brothers and sisters; (3) grandparents; (4) aunts and uncles; and (5) first cousins. Eligible employees are entitled to take up to 26-weeks of military caregiver leave in any single, 12-month period, which begins the first day of the leave.
- In addition to time off work, employees on FMLA for exigent circumstances or for military caregiver leave are also entitled to benefits protection and job restoration.

If you have any questions about designating FMLA, please contact **Insert name in insert department at insert phone number**.

DETAILED INFORMATION ON
EXIGENT CIRCUMSTANCES AND MILITARY CAREGIVER LEAVE

Exigent Circumstances Leave

“Exigent circumstances” leave is available when an eligible employee’s spouse, parent, or child is a member of the reserve component of the Armed Forces or a retired member of the Reserves or Regular Armed Forces who is on or called to active duty. It does not apply for members of the Regular Armed Forces. Exigent circumstances leave is divided into 8 categories.

(1) Short-Notice Deployment.

This leave is available to address any issue that arises from a covered military member being notified of an impending call or order to active duty with notice of seven calendar days or less. This leave is limited to 7 calendar days beginning the date a covered military member is notified of the call to active duty.

(2) Military Events and Related Activities.

This leave is available to attend any official ceremony, program, or event sponsored by the military related to the call to duty and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross.

(3) Childcare and School Activities.

Eligible employees can use this exigent circumstances leave for the following circumstances, but only when the need is caused by the active duty or the call to active duty. For this provision, the word “child” is the same as under the original FMLA.¹

- (i) To arrange for alternative childcare;
- (ii) To provide childcare on an urgent, immediate need basis (not routine, regular, or everyday basis);
- (iii) To enroll in or transfer to a new school or day care facility;
- (iv) To attend meetings with staff at a school or daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with counselors.

(4) Financial and Legal Arrangements.

Eligible employees can take leave:

- (i) To make or update financial or legal arrangements to address the covered military member’s absence, such as preparing and executing financial and healthcare powers of attorney,

¹ A biological, adopted, or foster child, a stepchild or a legal ward, a child for whom the covered military member stands *in loco parentis* who is under 18 or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave begins.

transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the covered military member's representative before a federal, state, or local agency for the purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status and for a period of 90 days following the termination of the active duty status.

(5) Counseling by Someone Other Than a Health Care Professional.

Eligible employees can use leave to attend counseling if the need arises from the active duty or call to active duty.

(6) Rest and Recuperation.

Eligible employees may take leave to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. This leave is limited to 5 days for each instance of rest and recuperation for the covered military member.

(7) Post-Deployment Activities.

Eligible employees may take leave 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 the covered military member's active duty status and to address issues that arise from the death of a covered military member while on active duty, such as meeting and recovering the body and making funeral arrangements.

(8) Additional Activities.

The new regulations also allow an employee to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of such leave.

Exigent circumstances leave is included within the original 12 weeks of leave an eligible employee is entitled to each FMLA year. **(Here we inserted a sentence saying what the FMLA year is and referencing the appropriate payroll code for FMLA leave.)**

Employees must use applicable forms of paid leave for exigent circumstances leave. Therefore, employees must use available vacation and compensatory time. Further, departments are entitled and encouraged to ask employees to provide a copy of the covered military member's active duty or call to active duty documentation.

Military Caregiver Leave

The second type of leave now available is for when an employee needs leave to provide care to a current member of the Armed Forces, including the National Guard or Reserves, who

has a serious injury or illness sustained in the line of active duty. Caregiver leave does apply for members of the Regular Armed Forces. The word “current” in the first sentence means the covered service member must still be in the Armed Forces, whether regular or reserves, when the leave is taken.

An eligible employee who is the spouse, parent, child, or next of kin of a covered service member may take leave to care for the covered service member. The definitions of spouse and parent are the same as under the original FMLA. A child includes an adult son or daughter. Next of kin is the nearest blood relative other than the service member’s spouse, parent, or child, in the following order:

- blood relatives who have been granted legal custody of the service member by court decree or statutory provisions,
- brothers and sisters,
- grandparents,
- aunts and uncles, and
- first cousins

unless the service member has specifically designated in writing another blood relative as his nearest blood relative for purposes of military caregiver leave.

The employee does not have to prove that he/she is the only person available to care for the covered service member. But the employee may be required to provide confirmation of the covered family relationship as well as the qualifying serious health condition.

Eligible employees are entitled to take up to 26 workweeks of military caregiver leave in any “single, 12-month period.” This 12-month period starts the first day of the leave.

If you have an employee who might need leave for exigent circumstances or to care for a covered service member with a serious health condition, please contact **insert name and number**.

Attachment 2

Form Letter for Intermittent FMLA

Dear *Employee*:

You have been approved for intermittent FMLA for *your serious health condition / to care for your spouse/parent/child who has a serious health condition, for a qualifying exigency, or for military caregiver leave*. It is your responsibility to tell us which of your absences are related to this FMLA qualifying event. Therefore, effective immediately, each time you arrive late, leave early, or are absent altogether you must notify *name of specific person* of your absence and state whether it is related to your FMLA leave. If you do not tell *name of person* that the absence is because of your qualifying event, we will not designate the absence as FMLA leave and it will not be protected under the law. Unprotected absences can lead to disciplinary action up to and including termination. Please note that you may not use intermittent FMLA leave for any absence other than those caused by the FMLA-qualifying event.

Additionally, if your intermittent absences are for scheduled medical appointments, you must try to schedule those appointments so that they are the least disruptive to your office hours and you must notify *name someone here* as soon as you learn of the appointment so that we can plan the work around your protected absence.

If you have any questions, yada yada....

Attachment 3
HIPAA RELEASE

Authorization Form for Release of Records and Information

COMPLETE SECTION A

A. Identification

This document authorizes the use and/or disclosure of confidential protected health information about the following person:

Patient Name: _____

Patient Address: _____

Patient Date of Birth: _____

Daytime Phone Number: () _____

Patient Social Security Number: _____

COMPLETE SECTION B

B. Directions for Release

This authorization applies in accordance with my directions below. I authorize the individual or company identified below in § B. 2. To release and/or use protected health information pertaining to the Patient listed in § A to the individual or Department identified in § B. 1. I understand that the information to be disclosed and/or used may include diagnosis, whether the patient is incapacitated (as defined under the Family & Medical Leave Act), the estimated length of the period of incapacity, and any physical restrictions that may apply as well as any other information necessary to complete the FMLA form for certification by a health care provider.

1. I authorize the disclosure of information to:

Name of Department Representative (other than an employee's direct supervisor)

2. I authorize the obtaining of information from:

Name of Health Care Provider

Address and Phone Number of Health Care Provider

Authorization Form for Release of Records and Information (page 2)

READ SECTION C

C. Right to Revoke:

I understand that I may revoke this Authorization at any time except to the extent that action has already been taken in reliance upon it. If I do not revoke it, this Authorization will expire one year after the date on which the Authorization is signed. To revoke the Authorization, I understand I must contact the following person in writing:

Name of Department Representative (other than employee's direct supervisor)

READ AND SIGN IN SECTION D

D. Authorization and Signature:

I authorize the release of my confidential protected health information as described in my directions in § B. I understand that this authorization is voluntary, that the information to be disclosed is protected by law, and the use/disclosure is to be made to conform to my directions. The information that is used and/or disclosed pursuant to this authorization may be re-disclosed by the recipient.

I, _____, have read the contents of this Authorization. I confirm that the contents are consistent with my directions. I understand that by signing this form, I am authorizing the use and/or disclosure of my confidential protected health information.

Patient's Signature

Date

COMPLETE SECTION E IF NECESSARY

E. Legal Representative:

If a legal representative (or Parent, Guardian, Conservator, or Authorized Representative) on behalf of the patient signs this authorization, complete the following:

Legal Representative's Name (PRINTED): _____

Legal Representative's Signature: _____

Date: _____ Daytime Phone Number: () _____

1. If this authorization is being signed by the patient's Legal Representative, attach a copy of the Power of Attorney or other relevant documents designating the signer as the representative.
2. Please provide a copy of this form to the patient if not the person who signed it in § D.

ATTACHMENT 4

Form Letter for Clarification of FMLA Certification

Dear Dr. _____,

We received the attached FMLA form from our employee, *insert name*. Would you please clarify the following information?

Insert location on the form for the words that you can't read or type in the phrase that you don't understand.

EX: In Section III. Part A: Medical Facts (page 1 of the form), we cannot read what is written beside "probable duration of condition:"

EX: In Section III. Part B: Amount of Leave Needed (page 2 of the form), you estimated the beginning and ending dates for the incapacity as: "2-3 days x 2". Please clarify what that means.

A HIPAA release form executed by your patient is also attached. Please note that we are not asking for any additional information beyond that required by the certification form.

We would appreciate receiving your response as soon as possible. If you have any questions, please feel free to contact *insert name of someone other than employee's direct supervisor* at *insert phone number*.

Sincerely,

Someone other than the employee's direct supervisor

ATTACHMENT 5
Form Letter for Authentication of FMLA Certification

Dear Dr. _____,

Our employee, *insert name*, presented the attached FMLA form to us. Would you please confirm the authenticity of this form by initialing one of the following lines and returning it to me?

_____ I completed (or authorized to be completed) all of the information contained on the form.

_____ I did not complete (or authorize to be completed) the information contained on the form.

_____ I completed (or authorized to be completed) only part of the information contained on the form. The part I did not complete or authorize is _____.

If you need to discuss this matter, please call me at *insert number*.

Sincerely,

Someone other than the employee's direct supervisor
Insert fax number

ATTACHMENT 6

Form Letter for Suspicious Use of FMLA

Dear Dr. *Insert Name*:

Your patient, *insert name of employee*, is our employee. *Mr./Ms. Name's* work schedule is *insert schedule, such as* Monday through Friday from 8 AM to 5 PM. We received the attached FMLA certification from you on *insert date*. Since then, *Mr./Ms. Name* has been absent on the following dates:

Insert here a list of the dates and the number of hours missed indicating whether any absences fell immediately before or after regular day off, vacation, or holidays

EX:

Monday	March 30	left at 3 PM
Friday	April 3	called in sick
Thursday	April 9	called in sick
Friday, April 10, Holiday		
Sunday, April, 12, Easter		
Monday	April 13	arrived 3 hours late

Put in as much information as you have. You might also have some document that shows the absence pattern "at a glance." You can attach that instead of delineating the absences in the body of the letter.

We have asked *Mr./Ms. Name* to re-certify the need for leave. A form for that is attached. Please indicate on the new certification whether *Mr./Ms. Name's* serious health condition and need for leave is consistent with this pattern of attendance.

Sincerely,

Someone other than the employee's direct supervisor