



The Family and Medical Leave Act: The Department of Labor's Regulatory Proposal

- On February 11, 2008, the Department of Labor published a Notice of Proposed Rulemaking to update the regulations under the 15 year-old Family and Medical Leave Act to improve communication between workers, employers, and healthcare providers. This common sense proposal provides needed clarity for both workers and employers about the law's coverage and should not prevent any worker from exercising his or her right to FMLA leave. Updating and clarifying the regulations will reduce uncertainty in the workplace for everyone.
- The proposed rule was developed in response to U.S. Supreme Court and lower court cases invalidating portions of the Department's regulations, the passage of the military family leave provisions in the National Defense Authorization Act for FY 2008, H.R. 4986, and:
 - The Department's 15 years of experience enforcing and administering the FMLA;
 - Discussions with various stakeholders over the past six years (including a Fall 2007 stakeholder meeting that included health care providers); and
 - The receipt and review of over 15,000 comments in response to the Department's December 2006 Request for Information (RFI) and publication of the June 2007 FMLA Report on the RFI.
- The Department believes the FMLA is generally working well. As documented in the Report on the RFI, the Department received numerous comments reflecting the value of the FMLA to employees who take leave to care for a newborn child, for an ill family member, or for their own illness. But DOL also heard about areas where the regulations are not working well, where there is ambiguity in the regulations, and where there is increasing friction between employers and employees as a result. These areas can be improved.

The Department Proposes the Following Main Regulatory Changes:

- The Ragsdale Decision/Penalties: The Department proposes a number of technical regulatory changes to reflect current law following the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, which invalidated a penalty provision of the regulations. *Ragsdale* ruled that the regulation's "categorical" penalty, which in that case would have required the employer to provide an additional 12 weeks of FMLA-protected leave after the 30 weeks of leave the employee had already received, was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement that an employee demonstrate individual harm. Several other courts have also invalidated similar categorical penalty provisions of the current regulations. The proposed rule therefore removes these categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.
- Light Duty: At least two courts have held that an employee uses up his or her 12 week FMLA leave entitlement while on a "light duty" assignment following FMLA leave. The proposed rule clarifies that time spent performing "light duty" work does not count against an employee's FMLA leave entitlement and changes the rules so that reinstatement rights are not affected by a light duty assignment either. If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

- Waiver of Rights: The Department proposes to reinforce its longstanding position that employees may voluntarily settle their FMLA claims without court or Department approval. Although this is not a change in the law, the clarification is needed because a recent Fourth Circuit decision interpreted the Department's regulations as prohibiting employees from either prospectively or retroactively waiving their rights. Prospective waivers of FMLA rights will continue to be prohibited.
- Serious Health Condition: The proposed rule retains the six individual definitions of serious health condition while adding guidance on two regulatory terms. One of the definitions of serious health condition involves more than three consecutive calendar days of incapacity plus "two visits to a health care provider." Because the current rule is open-ended, the Tenth Circuit has held that the "two visits to a health care provider" must occur within the more-than-three-days period of incapacity. The Department proposes that the two visits must occur within 30 days of the period of incapacity. Second, the proposed rule defines "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year since it is also open-ended in the current regulations. The Department believes that employees with chronic serious health conditions generally will visit their health care providers at least that often.
- Substitution of Paid Leave: FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid leave (as offered by their employer) concurrently with any FMLA leave. This is called the "substitution of paid leave." The proposed rule applies the same requirements to the substitution of all forms of accrued paid leave. Accordingly, under the proposed rule an employee may elect to utilize accrued paid vacation or personal leave, or paid time off, concurrently with FMLA leave when the employee has met the terms and conditions of the employer's paid leave policy (as is the case under the current regulations for the substitution of paid sick leave). The employee is always entitled to unpaid FMLA leave if he or she fails to meet the employer's conditions for taking paid leave.
- Perfect Attendance Awards: The Department proposes to change the treatment of perfect attendance awards to allow employers to deny a "perfect attendance" award to an employee who takes FMLA leave (and is thus absent) as long as it treats employees taking non-FMLA leave in an identical way. This addresses the unfairness perceived by employees and employers as a result of allowing an employee to obtain a perfect attendance award for a period during which the employee was absent from the workplace on FMLA leave.
- Employer Notice Obligations: The proposed rule consolidates all the employer notice requirements into a "one-stop" section of the regulations. The proposal imposes increased notice requirements on employers in order to better enable employees to know and understand their FMLA rights. The proposal also seeks to improve communication by extending the time for employers to send out eligibility and designation notices from two business days to five business days. In addition, the proposal specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must return it to the employee, specify in writing what information is lacking, and then give the employee seven calendar days to cure the deficiency. These changes will improve FMLA communications and help ensure that the employees who need leave will get it and not be denied on a technicality.
- Employee Notice: The proposal modifies the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if they could provide notice more quickly. Lack of advance notice (*e.g.*, before the employee's shift starts) for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations. The proposal provides that in most cases an employee needing FMLA leave must follow the employer's usual and customary call-in procedures

for reporting an absence absent unusual circumstances. The proposal also highlights (without changing) the existing consequences if an employee does not provide proper notice of his or her need for FMLA leave.

- Medical Certification Process (Content and Clarification): The proposal, which is the result of significant stakeholder feedback (including a September 2007 meeting at the Department on “medical certifications” with employee groups, employer groups, and health care providers), streamlines the medical certification process. This proposal allows direct contact between the employer and the health care provider for purposes of clarification of a medical certification form so long as the requirements of the HIPAA medical privacy regulations are met. Employers may *not* ask health care providers for additional information beyond that required by the certification form. The proposal also improves the exchange of medical information by updating the Department’s optional Form WH-380 and by allowing—but not requiring—health care providers to provide a diagnosis of the patient’s health condition as part of the certification.
- Medical Certification Process (Timing): The proposal codifies a 2005 Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The proposal also clarifies the applicable time period for recertification. Under the current regulations, employers may generally request a recertification no more often than every 30 days and only in conjunction with an FMLA absence unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed. Because many stakeholders have indicated that the regulation is unclear as to the employer’s ability to require recertification when the duration of a condition is described as “lifetime” or “unknown,” the proposal restructures and clarifies the regulatory requirements for recertification. In all cases, the proposal allows an employer to request recertification of an ongoing condition at least every six months in conjunction with an absence.
- Fitness-For-Duty Certifications: The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. This is called a “fitness-for-duty” certification. The proposal makes two changes to the fitness-for-duty certification process. First, an employer may require that the certification address the employee’s ability to perform the essential functions of the employee’s job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.
- Military Family Leave: Section 585(a) of H.R. 4986, the “National Defense Authorization Act for FY 2008,” amended the Family and Medical Leave Act to provide two new leave entitlements. Under these legislative amendments, eligible employees will be able to take up to 26 workweeks of leave to care for a covered servicemember with a serious illness or injury and can use FMLA leave because of any qualifying exigency arising out of the fact that a covered family member is on active duty or called to active duty status. Because certain of the military family leave provisions of H.R. 4986 became effective immediately upon being signed into law, and certain other provisions are dependent upon the Secretary of Labor issuing regulations, the Department is seeking public comment on issues arising from these amendments to fully implement them in a final rule.