

About Olivia Goodkin



Olivia Goodkin has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for companies seeking to protect their

Employers Providing Family Medical Leave Must Revise Their Handbooks and Notice Procedures

By Olivia Goodkin

Most employers have probably heard that the Department of Labor issued revisions to the regulations that interpret the Family Medical Leave Act ("FMLA"). The FMLA applies to all employers with 50 or more employees. The revisions affect which employees are eligible, types of leave, the definition of "serious health conditions" and more. Please note that the revisions went into effect on January 16, 2009.

Significantly, the new regulations require employers who already have an employee handbook to include a certain amount of information regarding FMLA in the handbook. Employers must also post a notice explaining FMLA's provisions. Finally, there are new rules on information that must be given by employers to employees who request family leave. The specifics for notice and posting are discussed below, together with the highlights of the substantive changes to FMLA itself.

What are my obligations for updating the Company handbook?

The federal regulation states that if you are a FMLA-covered employer, and if you have a handbook, you must include a certain amount of information about FMLA in the handbook, including:

- the new rules regarding eligibility;
- the new definition of a serious health condition;
- the new rules on substitution of paid leave for unpaid leave; and
- the other leave responsibilities and obligations of employers and employees.

The federal regulations permit companies to duplicate the text

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789-1806

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Rutter Hobbs & Davidoff's experienced attorneys represent middle market companies, early stage entities, large corporations and individuals in all facets of the law. From negotiation of

of the [U.S. Wage and Hour Division \("WHD"\) Publication 1420](#) into the text of their handbooks in order to meet this requirement. At a minimum, employee handbooks must include all of the information contained in WHD Publication 1420.

In addition, if the workforce is comprised of a significant portion of workers who are not literate in English, employers must provide the information in a language in which the employees are literate.

What do I do if I do not have a handbook?

If the company does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, it must still provide written guidance to an employee concerning all of the employee's rights and obligations under the FMLA. Every FMLA-covered employer, whether one with a handbook or without a handbook, must post the new information, and must distribute it to employees. You may meet the distribution requirement by giving a copy of the general notice (WHD Publication 1420) to each new employee upon hiring. You are permitted to distribute the notice electronically.

What do I do when an employee requests medical leave under FMLA?

Employers must give employees requesting medical leave a new "Eligibility and Rights and Responsibilities" notice within five business days of the request. This notice is found in WHD Publication 381, and it includes information about whether employees must provide medical certification, substitution of paid leave, and any requirement for the employee to make premium payments to maintain health benefits, among other things.

What is required after receiving sufficient information to determine whether the leave qualifies as FMLA leave?

Employers are required to designate whether leave is FMLA-qualifying. When you have enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a medical certification), you must notify the employee whether the leave is designated and counted as FMLA leave. This "Designation Notice" must be given within five business days of having the information necessary to make the determination if the leave is FMLA-qualifying. A prototype of what needs to be included in the Designation Notice is contained in WHD Publication 382.

What happens if I failed to designate leave that an employee took in the past that was FMLA-qualifying leave?

The federal regulations now permit retroactive designation of

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leave as FMLA leave, provided that the employer's failure to designate leave timely (within the five days mentioned above) did not cause harm to the employee.

What are some of the significant substantive changes in FMLA?

There are now two new types of FMLA Military Family Leave. "Qualifying Exigency Leave" helps the family of a National Guard and Reserves member by granting up to 12 weeks of leave to eligible employees with a covered military member. A qualifying exigency includes short-notice deployment military events, child care, school activities and a broad range of other events.

"Military Caregiver Leave" allows eligible employees with covered service members to take leave to care for a covered service member with a serious illness or injury incurred in the line of duty. This allows up to 26 (instead of 12) workweeks of leave in a single 12 month period. There is a complicated calculation for a combination of Military Caregiver Leave and other FMLA leave in the 26 workweek period.

There are also new medical certification forms. Furthermore, the regulations include new definitions of a "serious health condition." For instance, a "serious health condition" includes more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The federal regulations state that the first visit to the health care provider must take place within seven days of the first day of incapacity. The new regulations provide that "periodic visits" for chronic serious conditions must include at least two visits to a health care provider per year. Another definition of "serious health condition" is one that requires more than three consecutive, full calendar days of incapacity plus two visits to a health care provider, which now must take place within seven days of the first incapacity.

I heard that employers can now require the use of paid leave during FMLA leave.

While FMLA leave is unpaid, employers can now require that employees use any and all paid time off, including vacation, personal days and sick days, concurrently with FMLA leave.

Where can I find the forms referred to in this article?

The forms referenced in this article can be found [here](#).

Please feel free to contact anyone in the labor and employment department at Rutter Hobbs & Davidoff Incorporated for more information about how to implement the new FMLA regulations.