

Crowe & Dunlevy

Update on the Family and Medical Leave Act

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- I. FMLA – General Overview
 - A. New Law
 - 1. National Defense Authorization Act ("NDAA")
 - 2. Regulatory Changes and Updates
 - B. NDAA: Two Types of Leave
 - 1. Military Caregiver Leave (a/k/a Covered Servicemember Leave)
 - 2. Qualifying Exigency Leave
 - C. Military Caregiver Leave
 - 1. 26 weeks of leave in a "single 12-month period"
 - 2. Eligible employees are the spouse, child, parent, or next of kin of current military personnel, including Reserves and National Guard ("covered servicemember")
 - 3. Applicable when covered servicemember is undergoing treatment, recuperation, or therapy for a serious injury or illness incurred in the line of active duty
 - 4. Extends leave to additional family members (i.e. next of kin)
 - 5. The employer may require certification of servicemembers' serious injury or illness. See Attachment A
 - 6. The single 12-month period begins on the first day of qualifying leave measured forward
 - D. Qualifying Exigency Leave
 - 1. Intended to help military families manage their affairs while the covered military member is called on active duty or called to active duty status in support of a "contingency operation"
 - 2. Covered military members only include a member of reserve components of the Armed Forces or a retired member of the Regular Armed Forces in Reserve. It does not include a member of the Regular Armed Forces
 - 3. Uses FMLA's traditional 12 weeks of leave

4. Eligible employees of reserve and national guard
 - a. Spouse
 - b. Child
 - c. Parent
 5. Applicable when the employee's spouse, child, or parent is on active duty or has been notified of an impending call to active duty
 6. Qualifying Exigency Leave
 - a. Short-notice deployment
 - b. Military events and related activities
 - c. Childcare and school activities
 - d. Financial and legal arrangements
 - e. Counseling
 - f. Rest and recuperation
 - g. Post-deployment activities
 - h. Additional activities not encompassed in other categories, but agreed to by the employer and employee
 7. Certification
 - a. The employer may require certification of the employee's need for leave. See Attachment B
 - b. Written notice of requirement is necessary
- E. FMLA Regulatory Changes
1. Notice
 - a. Removed categorical penalty provisions for failure to appropriately designate FMLA leave
 - b. New rule makes clear that when an employee suffers individualized harm because the employer failed to follow notification rules, the employer may be liable for failure to appropriately designate

- c. New DOL forms were developed for certification of need
2. Light Duty
- a. New rule provides that "light duty" work does not count against an employee's FMLA leave entitlement
 - b. During "light duty" period, the employee's right to restoration is held in abeyance (or until the end of the applicable 12 month FMLA leave year)
3. Serious Health Condition
- a. Retains the six individual definitions of a "serious health condition" with modifications
 - b. One of the definitions involves "more than three consecutive, full calendar days of incapacity," plus "two visits to a healthcare provider"
 - (1) Two visits must occur within 30 days of the beginning of the period of incapacity
 - (2) First visit must take place within 7 days of the first day of incapacity
 - c. Second definition of a "serious health condition" involves
 - (1) more than three, consecutive, full calendar days of incapacity, and
 - (2) a regimen of continuing treatment; and
 - (3) first visit must take place within 7 days of the first day of in capacity
 - d. A third definition of a "serious health condition" involves treatment of a chronic serious health condition
 - (1) "Periodic visits" is defined as at least two visits per year
4. Use of Paid Leave
- a. Old regulations applied different procedural requirements to the use of vacation or personal leave as opposed to medical or sick leave

- b. Family leave was also treated differently than vacation or personal leave
 - c. Now, all forms of paid leave are treated the same, regardless of the type of leave substituted
5. Perfect Attendance Awards
- a. New regulations allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave so long as it treats all employees taking non-FMLA leave in the same way
 - b. For example, if employees using paid time off qualify for the award, then employees substituting paid time off for FMLA cannot be disqualified because of that FMLA time
6. Employer Notice Obligations
- a. Consolidates all employer notice requirements into a "one-stop" section of the regulations
7. Employers are required to provide employees
- a. General notice about the FMLA (e.g. a poster and employee handbook upon hire)
 - b. Eligibility notice
 - c. Rights and responsibilities notice
 - d. Designation notice
 - e. Time for providing notice is extended to 5 days (previously 2 days)
 - f. New DOL forms for complying with notice requirements were created
8. Employee Notice
- a. Old rule was interpreted to allow employees to provide notice of the need for FMLA leave up to two full business days after an absence
 - b. Now, employees needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances

9. Medical Certification Process (Content and Clarification)
 - a. Recognizes HIPPA implications and medical privacy concerns
 - b. Expanded the type of person who can contact employee's medical provider
 - c. Employer's representative contacting the employee's healthcare provider must be (1) a healthcare provider themselves; (2) H.R. professional; (3) a leave administrator; or (4) a management official
 - d. May not be the employee's direct supervisor under any circumstance
 - e. Employers may not ask the healthcare provider for any information beyond what is required for the certification form
 - f. Updates DOL form WH-380 and created separate forms for the employee and covered family members that allow healthcare provider to provide a diagnosis as part of the certification. See Attachments C and D.
 - g. For incomplete certifications or for clarification or authentication of certifications the employer can contact the healthcare provide (see 9.c. above). However the employer must first:
 - (1) Specify, in writing, what information is lacking
 - (2) Give the employee 7 calendar days to cure shortcomings
10. Medical Certification Process (Timing)
 - a. Employers may request a new certification each leave year for medical conditions that last longer than one year
 - b. Intended to aid with recertification process for conditions that are of "lifetime" or "unknown" duration
 - c. If the minimum duration of the condition is 30 days or more employers may not request recertification until the minimum (or 30 days) expires and only in connection with an absence

- d. If the duration of the condition is less than 30 days, recertification can only be required if
 - (1) employee requests an extension
 - (2) circumstances of the previous certification have changed significantly
 - (3) information is received which casts doubt on the employee's stated reason of the leave or continuing validity of the certification
- e. In all cases, employers may request recertification of an ongoing condition every 6 months in conjunction with an absence

F. Fitness-for-Duty Certifications

- 1. The old rule allowed employers to enforce uniformly-applied policies or practices that require all employees who take leave to provide a fitness-for-duty certification
- 2. The new rule provides that employer may uniformly required fitness-for-duty certification to specifically address the employee's ability to perform the essential functions of the job
- 3. In order to require a fitness-for-duty certification that specifically addresses the employee's ability to perform the essential functions of the job, the employee must be provided with a list of the essential functions of the employee's job no later than when the designation notice is given to the employee.
- 4. May require fitness-for-duty certification when an employee takes intermittent leave when there are reasonable job-safety concerns

II. General Notice

A. Poster

1. Post and keep posted a notice explaining the FMLA and the procedures for filing complaints of violations of the FMLA with the USDOL Wage and Hour Division
2. Post prominently where it can be readily seen by employees and applicants for employment
3. Text must be large enough to be easily read and have fully legible text
4. Electronic posting is okay if it otherwise meets the requirements

B. Handbook

1. A notice explaining the FMLA benefit's and leave rights must be included in an employee handbook or other written notice if the employer has written materials explaining employee benefits and leave rights
2. Otherwise, a copy of a general notice must be given to each new employee upon hiring
3. In either case, distribution may be accomplished electronically

C. The notice contained in Appendix C of the FMLA regulations may be used to accomplish the general notice. See Attachment E

1. The employer must provide the notice in the language in which employees are literate if employees are not literate in English

III. Eligibility Notice

A. Notice of need for leave

1. An employer has notice of need for FMLA leave when an employee requests leave or the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason

B. Timing of Employee Notice

1. Foreseeable Leave

a. 30 days

- (1) When leave is based on expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned

medical treatment for a serious injury or illness of a covered servicemember

2. As soon as practicable
 - a. If 30 days is not practicable, such as because of a lack of knowledge, a change in circumstances, or a medical emergency
 - b. Leave due to a qualifying exigency regardless of how far in advance such leave is foreseeable
 - c. Generally, absent unusual circumstances, employees must give notice within the time prescribed by the employer's usual and customary notice requirements applicable to such leave, such as designated phone number or person
3. Complying with the employer's policy
 - a. An employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave
 - b. An employer may also require that the employee contact a specific person
 - c. Absent unusual circumstance which justify failure to comply with the employer's policy, FMLA – protected leave may be delayed or denied

C. Type of employee notice

1. The request may be verbal notice
 - a. It is sufficient if it makes the employer aware that the employee needs FMLA-qualifying leave and provides the anticipated timing and duration of the leave
 - b. It may include the condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or his/her family member is under the continuing care of a healthcare provider that renders the family member unable to perform daily activities; that military member is on active duty or call to active duty and is for one of the exigency reasons listed above; or that the family member is a covered servicemember with a serious injury

or illness; and the anticipated duration of the absence, if known

- c. Calling in sick without providing more information will not be considered sufficient notice to trigger an employers' obligations
2. The first time the employee seeks leave under the FMLA
 - a. The employee need not expressly assert rights under the FMLA or even mention the FMLA
 3. When the employee seeks leave for an FMLA-qualifying reason for which he/she has previously taken leave
 - a. When an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for the leave of the need for FMLA leave
- D. Employer Obligation
1. Notice of eligibility or change of eligibility status
 - a. Within 5 business days, absent extenuating circumstances, of acquiring knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee whether or not the employee is eligible to take FMLA
 - b. Eligibility means that the employee has worked for the employer 12 months and 1250 hours and is employed at a worksite where 50 or more employees are employed within 75 miles
 - c. It may be oral or in writing (written notice is recommended)
 - d. Appendix D to the FMLA rules may be used. See Attachment F
 - e. It must state whether or not the employee is eligible. If the employee is not eligible, it must state at least one reason why the employee is not eligible, including the applicable number of months worked, hours of service worked, and whether or not the employee is employed at a worksite

where 50 or more employees are employed within a 75 mile radius

- f. Only one notice of eligibility status is required during the 12-month period even if FMLA leave is taken for a different qualifying reason, unless eligibility status has changed
 - g. If eligibility status has changed, such as the employee has worked less than 1250 hours, the employer must give notice of the change
- 2. Notice of rights and responsibilities
 - a. Each time eligibility notice discussed above is provided
 - b. The notice must be in writing and must include all of the rights and responsibilities set out in Appendix D to the FMLA regulations. See Attachment F
- E. Designation Notice
- 1. Written notice that the leave has or has not qualified for FMLA must be provided when the employer has enough information to determine that the leave is being taken for an FMLA-qualifying event, such as after receiving a certification
 - 2. The notice must be given within 5 business days, absent extenuating circumstances
 - 3. Only one notice is required for each FMLA-qualifying reason during the applicable 12-month period, regardless of whether the leave is taken in a block of time or on an intermittent or reduced leave schedule
 - 4. If paid leave is required to be substituted from FMLA notice must be given at the time of the designation
 - 5. The notice may be given with the eligibility notice if the employer has sufficient information
 - 6. If a fitness for duty certification will be required before the employee is restored to duty it must be given at this time. If the certification must address the employee's ability to perform the essential functions of the employee's job, the employer must include a list of the essential functions of the position

7. Appendix E of the FMLA regulations can be used. See Attachment G
 8. If information given in the notice changes, such as the employee exhausts the FMLA leave, the employer must provide written notice of the change within 5 business days of receipt of the employer's first notice of need for leave subsequent to any change
 9. The notice must include the amount of leave that will be counted against the employee's FMLA leave entitlement, if known. If not known, then the employer must provide notice of the amount of leave counted upon the request by the employee, but not more often than once in a 30 day period, and only if leave taken in that period
- F. Retroactive Designation
1. The employer may retroactively designate leave provided that the failure to timely designate leave does not cause harm or injury to the employee or where the employer and employee mutually agree