



## The New Regulation Countdown

[Dan M. Forman](#)

It's almost January 16th, have you posted your new FMLA notices?

The Department of Labor ("DOL") issued new regulations interpreting the FMLA, all of which become effective on **January 16, 2009** and which apply to all employers covered by the FMLA. In many areas, these regulations provide more and clearer guidance to employers about both employee and employer rights and obligations under the FMLA. The regulations are far ranging and this bulletin does not serve to identify all of the changes, but to alert you to a number of key revisions:

- **Notice of FMLA Rights:** The DOL has created new posters and a new Form Notice to ensure that employees are getting full and complete information about their rights and obligations under the FMLA. Under the new regulations, employers must now distribute the notice to new employees at time of hire;
- **Calculation of Leave Time:** The new regulations provide guidance regarding how to calculate an employee's 12 weeks of leave time, with interceding holidays, employer closings, and mandatory overtime;
- **Bonuses:** FMLA leave, if treated like all other types of leave, may disqualify employees from bonuses, even perfect attendance bonuses;
- **Light Duty:** Employees may accept light duty assignments that accommodate their serious health condition without losing their right to job restoration, but time spent on light duty assignments does not count against an employee's 12 weeks of FMLA leave;

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- **Releases:** Employees may settle or release claims (in settlement or severance agreements, for example) without DOL or Court approval;
- **Other Employer Notices and Forms:** The DOL has new forms and is providing more time, up to five business days, for employers to provide Notice of Eligibility and Designation Notices to employees. It is important to update notices because unless notice is properly given, an employee cannot be required to submit to a fitness-for-duty examination prior to reinstatement;
- **“Continuing Treatment” Definition:** Employees, generally, will be required to see, in person, a health care provider within seven days of the “incapacity” and obtain further treatment within 30 days of the first visit or follow a treatment prescription;
- **Pregnancy Clarifications:** Spouses, and only spouses (not boyfriends, fiancés, or fathers), may take FMLA leave to care for expectant mothers who are incapacitated. For California employers, while FMLA might be preempted, remember that California requires that you treat Registered Domestic Partners as a spouse for all purposes;
- **Caring for Family Members:** The employee need not be the *only* person available to care for the family member to be eligible to take FMLA leave;
- **Timing of Employee Notice:** Employees must give notice as soon as practicable of their situation;
- **Employer’s Notice Requirements:** Employees must, generally, comply with an employer’s notice and procedural requirements for requesting leave;
- **Denial of Leave:** Failing to comply with employer’s leave procedures may be grounds to deny leave;
- **Health Care Provider Contact by Employers:** Employers (such as those in human resources), but not direct supervisors, may contact health care providers to authenticate information and to clarify information provided on the medical certification form. If an employee does not authorize direct contact, employers may deny leave. California employers must be aware that, as of this article, there is no guidance from California about how these new regulations will be treated under California law. Given that California grants employees greater rights to privacy than the privacy rights granted under the FMLA, California employers covered by the California Family Rights Act

should exercise caution before contacting health care providers.

In addition, the new regulations address another new type of leave, the Injured Servicemember Leave act which went into effect on January 28, 2008. Here are some specifics:

- Employees may take a leave of up to 26 weeks in a single 12-month period to care for a servicemember who is the employee's spouse, parent, child and "next of kin" with a serious injury or illness. The injured servicemember must be a blood relative or spouse;
- The 12-month period is not flexible and starts on the first day the employee must take the leave (i.e., employers may not define how the 12-month period is calculated as they can under the "original" type of FMLA leave);
- If the leave qualifies as servicemember leave, employers must so designate it (i.e., employers cannot try to claim that the employee is only eligible for 12 weeks of leave under the "original" type of FMLA leave to care for injured or ill family members merely because the leave qualifies as protected leave under more than one section of the FMLA);
- The DOL has created certification forms and other methods by which employers may obtain information about the injured servicemember and the relationship to the employee that are new and which should be used for servicemember leave situations.

Finally, the regulations also cover "Exigency Leave" arising from an employee's spouse, child or parent being called up to active military duty. Such leave only applies if the family member is a non-regular armed forces member (i.e., National Guard, Reserves, etc...) and the employee may take up to 12 weeks of leave under a number of "qualifying exigencies" per year.

- There are many qualifying exigencies, including "short notice deployment," call to active duty, childcare and teacher meetings, financial and legal arrangements, counseling, spending time with the military member while he or she is on leave, and others;
- The DOL has created separate certification forms for this type of FMLA leave and employers are entitled to obtain information about the servicemember's orders and dates and to verify information about the employee's meetings with third parties, such as accountants or teacher meetings (to ensure the

employee actually attended to these “exigencies”).

All in all, these new regulations provide for drastic changes and give employers the opportunity in this new year to undertake a partial or complete policy and/or handbook review to better ensure that the employer’s policies and handbooks are in compliance with all applicable laws and regulations.

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**FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:**



**Dan M. Forman** Mr. Forman, an AV-rated trial attorney, has a depth of experience in California and federal courts and arbitrations. Mr. Forman’s experience includes all aspects of employment, entertainment and business disputes, with a focus on unfair business practices, contract disputes, covenants not to compete, harassment and discrimination claims, confidentiality and trade secret issues, and putative class actions. When practical, Mr. Forman utilizes mediation and other alternative dispute resolution procedures to resolve disputes.