

# Employers Need to Know

Employment Law Alerts from Ober|Kaler's Employment & Labor Group

**Employment  
& Labor Group**

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## **Revised Family and Medical Leave Act (FMLA) Regulations Take Effect**

On January 16, 2009, changes to the Family and Medical Leave Act (FMLA) took effect. FLMA covered employers employ at least 50 employees within a 75 mile radius of the worksite reported to by the employees, or from which assignments are distributed. The new FMLA regulations comprise 201 pages, and this e-alert is but a summary. Below are steps you, as an FMLA covered employer, can take to comply with the new regulations:

1. **Two types of military leave have been available to military families since January 28, 2008, however, the new regulations define the eligibility requirements necessary to utilize the military family leave. You should ensure managers and those supervising leave are aware of the changes.**
  - *Qualifying Exigency Leave:* A spouse, parent, or child of an eligible military service member can take up to 12 weeks of leave to deal with certain qualifying exigencies due to the service member's active duty or notice of impending call to active duty. Eligible service members are members of the National Guard, Coast Guard or National Reserve, as well as those called back from retirement status. Current members of the Regular Armed Forces are not eligible.
  - *Military Caregiver Leave:* A spouse, parent, child, or next of kin can take up to 26 weeks of leave in combination with other FMLA leave to care for an eligible service member who is recuperating, receiving treatment, therapy, otherwise in outpatient care, or on the temporary disability retirement list, due to a serious illness or injury incurred in the line of active duty. Eligible service members are current members of the Regular Armed Forces, National Guard, or National Reserve.
2. **Notify employees.**
  - Clearly post general FMLA notice so as to be seen and easily read by employment applicants and employees, even at worksites without FMLA eligible employees. The Department of Labor (DOL) has provided a compliant notification poster, entitled "Notice to Employees of Rights under the FMLA," available on its website.
  - Update employee handbooks to reflect the new FMLA leave terms. If your company does not have a handbook, each employee must be provided general notice when hired.
  - Electronic notification is permitted.
3. **Begin using the six new and revised forms issued by the DOL.**
  - *Employer Notice Requirements:* Employers have five days, from when notice of intent to take FMLA is received, to inform the employee, in writing, of possible eligibility, as well as the Rights and Responsibilities of FMLA leave. The DOL has issued a form, "Notice of Eligibility and Rights and Responsibilities," to satisfy this requirement. After the employer receives sufficient information to determine whether the employee is eligible for FMLA, the employer has five days to designate the leave as FMLA. The DOL has issued a form, "Designation Notice," to satisfy this regulation. Below is a link to each form issued by the DOL:

1. **[WH-381 Notice of Eligibility and Rights & Responsibilities \(PDF\)](#)**

2. <http://www.jdsupra.com/post/documentViewer.aspx?fid=d6c09091-62d5-4016-8a43-96c23f22f49d>  
**WH-382 Designation Notice (PDF)**

- *Certifications:* Under the new regulations, if an employer wishes to receive a medical certification in connection with a request for FMLA leave, the employer must request it within five days of receiving notice or five days from when leave begins. Certification requests are permitted if the employee is taking leave for a personal serious health condition, a family member's serious health condition, or military family leave. The DOL has four forms available on its website, and at the links below, to allow employers to comply with this regulation. After notice is received, employers must provide the employee with written notice of any discrepancies, to be corrected within seven days. Leave administrators, not a direct supervisor of the employee, may then contact an employee's health care provider to verify the submitted medical certification.

1. [WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition \(PDF\)](#)

2. [WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition \(PDF\)](#)

3. [WH-384 Certification of Qualifying Exigency For Military Family Leave \(PDF\)](#)

4. [WH-385 Certification for Serious Injury or Illness of Covered Service member — for Military Family Leave \(PDF\)](#)

4. **Ensure management and those supervising leave are aware of each changed regulation. The regulation changes are numerous and detailed, below is a brief summary of new substantive changes:**

- *FMLA Waivers:* Under the new regulations, employees can waive FMLA rights retroactively without an employer first obtaining approval from the DOL or a court. Therefore, severance agreements can include an FMLA waiver of claims up until the date the severance agreement is signed. Prospective rights, on the other hand, cannot be waived by an employee.
- *Employee Notice Requirements:* Employees must provide 30 days notice of foreseeable FMLA leave. If less than 30 days notice is given, the new regulations allow an employer to request an explanation as to why 30 days notice was not possible. Further, less than 30 day notice must be given according to the employer's procedure for 30 day notice, whether leave is foreseeable or unforeseeable. Though employees may give notice verbally, an employer can require a written request for leave, absent extenuating circumstances, directed to a certain individual or phone number. If the employer's notice procedure is not followed, FMLA leave may be delayed and any absence between counted as a non-FMLA absence. The new regulations also allow employees to request FMLA leave without explicitly stating FMLA. However, the request for leave should provide sufficient information for the employer to determine whether the requested leave is FMLA-qualifying.
- *FMLA Eligibility Requirements:* To be eligible for FMLA leave, employees must serve at least 12 months and perform at least 1250 hours of work. The new regulations allow these 12 months to be served non-consecutively. Therefore, employers can look to past employment to satisfy FMLA requirements, unless the break in service was for seven or more years. Further, because employers are only required to keep records for three years, the burden is on the employee to prove eligible service beyond three years ago.
- *FMLA Leave Calculation:* The new regulations require employers to track FMLA leave by the shortest amount of time used by the employer to track other types of leave, not greater than an hour. However, if an employer uses varying increments of time to track various types of leave, an employee who arrives late can be docked for an hour of time, if prohibited from working during that time. If a late employee is physically unable to enter a shift part way through, the entire shift can be docked as FMLA leave up until the employee is able to enter his regular shift safely. If an employee is required to work overtime, but does not while on FMLA leave, the employer can count the overtime missed as part of the FMLA leave. Finally, the new regulations allow employers to count holidays, which occur during a full week of FMLA leave take by an employee, as

- *Substitution of Paid Leave for FMLA Leave:* Employees, under the new regulations, may substitute paid leave time while on FMLA leave if they comply with their employer's established paid time-off benefits policy. Further, if an employee receives disability payments while on FMLA leave for less than 100% of the employee's total pay, the employee and employer may agree to supplement the employee's disability pay with other paid leave available to the employee. The new regulations also permit compensatory time off (CTO) to be counted as FMLA leave when an employer requires CTO be taken before FMLA leave or an employee requests CTO for leave that qualifies as FMLA.
- *Job Assignment, Reinstatement Rights, and Compensation of Employees:* The new regulations allow an employer to transfer an employee, with recurring periods of FMLA leave due to planned medical treatment for the employee or family member, to another, better-suited position. In the alternative, if an employee accepts light duty, while eligible for FMLA leave, the employee can opt for reinstatement up until the end of the 12 month period in which that FMLA leave is calculated. Also, bonuses or awards that require employees to meet a certain time goal, not achieved due to FMLA leave, may be denied by the employer.
- *FMLA Duties* Employers and employees alike have duties under the new regulations. Employers must respond to questions from employees concerning FMLA leave, resolve disputes over FMLA leave issues, and document all discussion, which then must be held for a period of three years. Likewise, employees must respond to questions from an employer regarding FMLA qualifying absences, resolve FMLA issues, and make a reasonable effort to schedule leave for intermittent planned medical treatment in an undistruptive fashion.
- *New Definitions:* Many definitions have been updated or added by the new regulations including; "prenatal care," "exigent circumstances," and "serious health condition."

For FMLA compliance assistance, questions, or a detailed overview of the new regulations as they apply to your company, contact your Ober|Kaler attorney or any member of [Ober|Kaler's Employment & Labor Group](#).

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