

Question & Answer Summary

January 13, 2009 Webinar

The New FMLA Regulations: How the Changes Impact Employers' Policies and Procedures, and Best Practices for Compliance

On January 16, 2009, new regulations under the federal Family and Medical Leave Act (FMLA) took effect, overhauling the way employers administer leave under the FMLA and creating new rights and obligations for both employers and employees. On January 13, Miller Law Group presented an in-depth webinar, "The New FMLA Regulations: How the Changes Impact Employers' Policies and Procedures, and Best Practices for Compliance." The following are answers to some of the most frequently asked questions by webinar attendees, on all aspects of the new FMLA rules. We also have included a special section for California employers describing some key differences between the FMLA and the California Family Rights Act (CFRA) that California employers must be aware of.

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NOTICE

Q. DO THE NEW NOTICES REPLACE THE PRIOR NOTICES THAT EMPLOYERS WERE REQUIRED TO PROVIDE UNDER THE FMLA?

A. Effective January 16, 2009, the new FMLA notices must be used in place of the old FMLA notices. Employers can choose to use the forms published by the U.S. Department of Labor (DOL) or create their own forms. The new DOL forms are available online at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

Q. IF AN EMPLOYEE TAKES LEAVE FOR A FMLA-QUALIFYING REASON, AND THEN REQUESTS ADDITIONAL LEAVE FOR ANOTHER FMLA-QUALIFYING REASON, WHAT ARE THE EMPLOYER'S NOTICE OBLIGATIONS REGARDING THE EMPLOYEE'S ELIGIBILITY FOR THIS SECOND LEAVE?

A. The employer need not provide another eligibility notice if, at the time the employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period and for a different FMLA-qualifying reason, the employee's eligibility status has not changed. However, if the eligibility status has changed--for example, the 1,250 hours of service requirement is not met for the second leave--the employer must provide a new eligibility notice, within 5 days of the leave request, informing the employee of the change in eligibility status.

Q. WHAT IS THE TIMING FOR PROVIDING THE NEW DESIGNATION NOTICE?

A. When an employer has enough information to determine whether leave is being taken for a FMLA-qualifying reason, such as after receiving a medical certification, the employer must provide the employee with the designation notice, within five business days absent extenuating circumstances. The designation notice may be provided at the same time as the eligibility notice, if the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice from the employee of the need for leave.

Q. IF A FATHER OF A NEWBORN CALLS IN THE MORNING AFTER THE CHILD WAS BORN TO REQUEST FMLA LEAVE, WAS THE NEED FOR LEAVE FORESEEABLE, SUCH THAT THE EMPLOYEE FAILED TO PROVIDE APPROPRIATE 30-DAY ADVANCE NOTICE?

A. Generally, in the case of an expected birth, the need for leave is foreseeable and the employee is required to provide at least 30 days advance notice before the FMLA leave is to begin of the need for leave. If 30 days is not practicable, such as because of a lack of knowledge of approximately when the leave will be required to begin--for example, the baby was born a few days earlier than expected--notice must be given as soon as practicable. Note,

however, that the timing of the need for leave could be considered unforeseeable, such as if the birth was very premature, in which case the employee's obligation is to give notice of the need for leave as soon as practicable under the facts and circumstances of the situation.

MEDICAL CERTIFICATION

Q. IF AN EMPLOYEE ON INTERMITTENT FMLA LEAVE HAS A MEDICAL CERTIFICATION STATING THAT THE PROBABLE DURATION OF THE CONDITION IS SIX MONTHS, CAN THE EMPLOYER REQUEST RECERTIFICATION BEFORE THE SIX MONTH PERIOD HAS EXPIRED?

A. In this scenario, the employer may require recertification only when the original time period certified has expired and the employee requests additional leave.

Q. IF AN EMPLOYEE MAY BE ELIGIBLE FOR FMLA LEAVE FOR A SERIOUS HEALTH CONDITION BUT REFUSES TO PROVIDE A MEDICAL CERTIFICATION, CAN THE EMPLOYER DENY THE LEAVE?

A. If an employee refuses to provide a medical certification, the employer may deny the leave provided the employer has notified the employee of the consequences of failing to comply with the certification requirement. On the other hand, if the employer approves a leave and the employee has provided sufficient information to establish that the leave is FMLA-qualifying, the employer may designate the leave as FMLA leave and count it against the employee's FMLA entitlement. (Note that under California law, if an employee requests vacation or other accrued paid time off and does not refer to a family leave-qualifying purpose, the employer cannot ask if the time off is for a family leave purpose.)

INTERMITTENT LEAVE

Q. IF AN EMPLOYEE ON INTERMITTENT LEAVE IS SCHEDULED TO WORK OVERTIME DURING A WEEK OF FMLA LEAVE, DOES THAT OVERTIME COUNT AGAINST THE EMPLOYEE'S FMLA ENTITLEMENT?

A. If an employee normally would be *required* to work overtime, but cannot do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours the employee would have been required to work may be counted against the employee's FMLA entitlement. Note, however, that voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA entitlement.

Q. CAN AN EMPLOYER REQUIRE THAT EMPLOYEES WHO QUALIFY AS EXEMPT FROM OVERTIME USE INTERMITTENT LEAVE IN MINIMUM INCREMENTS OF EIGHT HOURS?

A. An employer must account for intermittent leave using an increment that is no greater than the shortest period of time the employer uses to account for use of other forms of leave and provided the minimum increment is *no greater than* one hour. Note that an employee will not lose overtime exempt status because the employer makes deductions from the employee's salary for any hours taken as intermittent or reduced schedule leave.

MILITARY FAMILY LEAVE

Q. IF AN EMPLOYEE REQUIRES LEAVE FOR AN EXIGENCY ARISING FROM MILITARY SERVICE OF A FAMILY MEMBER WHO IS IN THE REGULAR ARMED FORCES, CAN THAT LEAVE BE COUNTED AGAINST THE EMPLOYEE'S FMLA ENTITLEMENT?

A. FMLA military family leave for a qualifying exigency is only available to families of servicemembers in the National Guard and Reserves (and some retired Armed Forces members).

Q. FOR PURPOSES OF THE NEW MILITARY CAREGIVER LEAVE, IS AN EMPLOYEE ONLY ENTITLED TO ONE 26-WEEK PERIOD DURING THE LIFETIME OF EMPLOYMENT, OR CAN THE EMPLOYEE TAKE THAT AMOUNT OF LEAVE EACH YEAR?

A. The new regulations provide that an employee may take up to 26 weeks of military caregiver leave during a *single 12-month period*. The period begins on the first day of the military caregiver leave and ends 12 months later. An employee may combine up to 12 weeks of FMLA leave for other reasons with military caregiver leave, for a *maximum* of 26 workweeks of FMLA leave during the single 12-month period. It is important to note that the 26-weeks in a single 12-month period rule does not foreclose the possibility that the employee could take additional time off to care for the same injured servicemember, as long as the additional leave is after the original 12-month period and otherwise qualifies as non-military FMLA leave to care for a family member with a serious health condition. (California employers should note that military family leave is only a FMLA entitlement, not a CFRA entitlement. Therefore, even if an employee uses up 26 weeks of FMLA military caregiver leave, it is conceivable that the employee could qualify for *additional* leave in that same leave year for another CFRA-qualifying reason.)

Although military caregiver leave is, generally, a one-time entitlement, it is important to note that the military caregiver leave benefit is applied on a "per-covered-servicemember, per-injury basis." This means that an eligible employee may be entitled to more than one period of 26 weeks of leave (after the initial 12-month period in which the employee has already used 26 weeks of leave), where the leave is to care for a different injured or ill servicemember or for the same servicemember who suffers a subsequent injury or illness.

DIFFERENCES BETWEEN CFRA AND FMLA

California employers must note that some of the new FMLA regulations will not apply to CFRA leaves, because California law in some instances remains more protective of employees. In addition, the existing CFRA rules simply do not touch on some of the changes in the FMLA regulations. Generally, the CFRA regulations express the intent to follow the FMLA rules where the two laws do not conflict. However, the references in the CFRA regulations are to the original 1995 version of the FMLA rules. Thus, currently, there are many discrepancies between the CFRA regulations and the new FMLA provisions.

Miller Law Group has learned that the California Fair Employment and Housing Commission (FEHC), which is responsible for promulgating regulations under the CFRA, plans to revise the CFRA regulations to better conform to the new rules, and likely will adopt most of the new FMLA provisions that do not otherwise conflict with California law. The FEHC plans to take up the topic at its meeting on February 11, 2009, although it could be many months before new CFRA regulations are drafted and approved.

Here is a look at some of the key discrepancies between the new FMLA regulations and the existing CFRA requirements:

MEDICAL CERTIFICATION: While the new DOL medical certification forms permit a health care provider to indicate a diagnosis, California law does not require employees to provide a diagnosis. Thus, for CFRA-covered leaves, California employers should continue to use forms that comply with the CFRA. In particular, to obtain the necessary information to determine whether the medical condition qualifies as a serious health condition, the best practice is to attach to the certification form a sheet specifying the definition of serious health condition. The certification form should include a question asking whether the patient's condition qualifies as a serious health condition under the categories described on the attached sheet.

In addition, the new FMLA rules permit an employer to contact the health care provider to authenticate a medical certification. In California, an employer has no recourse other than to accept a completed medical certification for a family member's serious illness if the certification is complete. If an employer doubts the validity of a medical certification for an employee's own serious health condition, the employer has the option of obtaining the opinion of a second medical provider.

Going forward, employers can expect that California rules regarding medical certifications will continue to be stricter than the FMLA rules, in light of California's strong medical confidentiality and privacy laws and policy.

DEFINITION OF SERIOUS HEALTH CONDITION: The new FMLA regulations specify that the three days of incapacity for purposes of the continuing treatment test for a serious health condition must be *full* days of incapacity. The regulations also specify that required health care provider visits must be in person and occur within specified timeframes. The CFRA does not specify full days of incapacity, place time limits on medical visits, or require that such visits be in person. The CFRA rules do state that they adopt the FMLA definition of "continuing treatment," but the reference is to the 1995 FMLA rules.

The FEHC likely will revise the definitions under CFRA to conform to the FMLA. In the meantime, however, California employers should continue to apply the old definitions where they are more favorable to employees.

TIMING OF NOTICE: The new FMLA regulations specify that an employer must notify an employee who requests FMLA leave of the employee's eligibility within five days of the request. And, the employer now has five days to designate leave as FMLA-qualifying once it has enough information to determine that the leave is for a FMLA-qualifying reason, such as when the employee returns the medical certification. When taking into account the 15 days the employee has to return the medical certification, it is possible that an employer may have up to 25 days from the date an employee requests FMLA leave to make the designation (and possibly longer if the employee needs time to cure a deficiency).

The existing CFRA regulations, on the other hand, give an employer *up to* 10 calendar days to respond to an employee's request for leave. Employers should comply with the 10-day time frame for designating a leave that is CFRA-qualifying, even where the new FMLA rules give the employer more time to respond. If the 5-day FMLA rules would be more favorable to the employee, however, the employer should be certain to designate the leave within that shorter timeframe. This could be the case where the employee requests leave and immediately provides sufficient information for the employer to determine that the leave qualifies as FMLA/CFRA leave. If the employer does not have sufficient information to make a determination--for example, a medical certification has not been returned yet--the employer should make a provisional designation within the 10-day CFRA period subject to the employee providing the necessary documentation.

It is probable that the FEHC, when revising the CFRA regulations, will adopt the new FMLA notice and timeline rules. For the time being, however, employers must follow whichever rules are more favorable to the employee.

ELIGIBILITY: For purposes of determining whether an employee meets the 12-months of employment required for FMLA eligibility, the new FMLA regulations specify that any period of employment within the prior seven years must be counted (with two exceptions). The CFRA does not include this seven-year cap, instead specifying that the employee must have 12 months of service with the employer *at any time*. This is another area where new CFRA regulations likely will conform to the FMLA, but for now employers must use the more generous CFRA provisions.

FITNESS FOR DUTY: Both the old FMLA rules and the existing CFRA rules permitted an employer to request that an employee returning from FMLA leave for the employee's own medical condition to provide a return-to-work note from a health care provider. The new FMLA rules allow employers to require a more in-depth fitness-for-duty certification. Until the CFRA rules are revised, California employers may continue to request that the employee provide a release to "return-to-work" from the health care provider stating simply that the employee is able to resume work. An employer may require a return-to-work release only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability.

***This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar, and should not be considered legal advice.**