



# THE WORKPLACE WORD

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## FMLA UPDATE

### PROPOSED REGULATIONS

On February 11, 2008, the Department of Labor issued its proposed revisions to the Family and Medical Leave Act ("FMLA"). These revisions clarify the existing regulations and signal significant changes in the implementation of FMLA leave. Employers should familiarize themselves with these changes and evaluate how they will affect company policies and procedures, if they are ultimately enacted.

### Highlights of the proposed changes to the FMLA

- Employers are authorized to have direct contact with the employee's health care provider for purposes of clarification and authentication of the medical certification, but the employer may not ask for additional information beyond the certification form or infringe upon an employee's HIPAA rights.
- Employees may retroactively waive their rights under the FMLA by settling past FMLA claims, but prospective waivers are still prohibited.
- When a condition is described as lasting several years, a lifetime, or for an unknown duration, an employer may request recertification of the ongoing condition every six months.
- An employer now has five business days to designate an employee's absence as FMLA leave.
- When an employer initially fails to provide sufficient notice to the employee that the leave is designated as FMLA leave, it may retroactively designate leave unless the employee can demonstrate individualized harm.



- When determining whether an employee has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of leave, the 12-month period with the employer does not have to be consecutive. However, when there is a break in employment of over five years, the previous employment is not counted toward the hours of services unless (1) the break is the result of the fulfillment of military obligations, or (2) there is a written agreement or collective bargaining agreement concerning the employer's intent to rehire the employee.
- Military service in the National Guard or the time spent for Reserve military service obligations must be counted in determining whether the employee has been employed for at least 12 months by the employer.
- The regulations clarify that an employer may require employees to use their paid and unpaid leave concurrently with FMLA leave.
- An employer may require an employee to provide a fitness-for-duty certificate every 30 days if the employee has used intermittent leave during that period and there are reasonable safety concerns regarding the employee returning to work.
- The requirement of continuing treatment, for purposes of establishing a serious health condition, requires two visits to a health care provider that must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist. Previously, there was an open-ended time frame in which the employee was required to make the two visits.
- Employers may deny a "Perfect Attendance" award to an employee who takes FMLA and is absent from work. Previously, employers were not allowed to factor in FMLA leave to an attendance award.
- A new WH-380 form for medical certification and a new poster to notify employees of their FMLA rights has been proposed.

The Department of Labor is accepting comments to the proposed regulations through April 11, 2008. Comments can be submitted electronically at [www.regulations.gov](http://www.regulations.gov). If you have any questions regarding the content of this newsletter, please do not hesitate to contact us.