

# New FMLA Regulations effective January 16, 2009

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# UNUM'S TOP 10 FMLA CHANGES





# 1. Size of Increment of Leave

- Old regulations: Employers were required to track intermittent leave in the smallest increment recognized by their timekeeping system.
- New regulations (*825.205*): Employers may now track intermittent leave in the smallest increment used to track other forms of leave, provided it is not more than 1 hour.
- Example: An employee wants to come in 15 minutes late. The employer's timekeeping system codes time in 15 minute increments. Under the old regulations, the employer could only deduct 15 minutes of FMLA time. Under the new regulations, if the employer's other leave policies require that employees take leave in 1 hour increments, the employer can mandate that the employee take 1 hour of FMLA.



## 2. Substitution of Paid Leave

- Old regulations: If the employee wanted to substitute paid leave for unpaid FMLA, the employer could not impose more stringent requirements for taking the leave than permitted by the paid leave plan, even if the FMLA allowed more stringent requirements.
- New regulations (*825.207*): If the employee wants to substitute paid leave for unpaid FMLA, the employee must comply with all of the terms and conditions of the employer's paid leave policy or take unpaid leave.
- Example: If an employer's paid leave policy requires that employees use paid time off in 4 hour increments, an employee who wants to substitute paid time off for unpaid FMLA must take FMLA in 4 hour increments. If the employer's paid leave plan requires that an employee give 2 day notice of taking leave, the employee must give 2 days' notice if substituting paid leave for unpaid FMLA.



### 3. Employer Awards and Incentives

- Old regulations: If an award is based on achievement of a goal not met due to FMLA, the employer could not withhold the award.
- New regulations (825.215): If an award or bonus is based on the achievement of a goal (e.g. perfect attendance or hours worked), the employer does not have to give the award to employees on FMLA, unless the employer gives the award to employees on equivalent leave status.
- Example: An employer grants perfect attendance awards. But for FMLA leave, an employee would have achieved perfect attendance. The employer does not have to give the award to the employee. However, if the employee is substituting PTO for unpaid FMLA and the employer does not count PTO absences against the award, the employer cannot count the FMLA absences.

## 4. Waivers/Releases

- Old regulations: Some case law interpreted the old regulations to prohibit the release of FMLA claims without Department of Labor approval.
- New regulations (*825.220*): Clarified that an employee can release past FMLA claims, whether known or unknown. Employee cannot release prospective claims.
- Example: An employer and employee negotiate the settlement of various employment claims. As part of the settlement, the employee can release all past FMLA claims, even if the employee is unaware that such claims exist. The employee cannot, however, release prospective FMLA claims.

## 5. Employee Notice Requirements

- Old regulations: Employees could give notice of need for unforeseeable FMLA leave up to 2 days after returning from leave. Employee need not mention FMLA when requesting leave.
- New regulations (*825.302; 825.303*): Absent unusual circumstances, employees must comply with the employer's customary notice requirements when requesting leave, such as amount of notice and whom to call to report leave. Employees who are taking leave previously approved as FMLA must mention that they are taking FMLA leave.
- Example: An employer's leave policy requires employees to call in before the start of a shift and to call a 1-800 number to report absences. Absent extenuating circumstances, the employee must call in FMLA absences to the 1-800 number prior to the start of a shift.

## 6. Employer Notice Requirements

- Old regulations: Notice of FMLA rights given within 2 days. Conditional designation. Failure to designate resulted in employee getting an additional 12 weeks of leave.
- New regulations (825.300): Employers have to give 4 notices:
  - GENERAL NOTICE
    - general rights under the FMLA
  - ELIGIBILITY NOTICE
    - send within 5 days of request for leave
    - state at least one reason why if ineligible
    - once eligible, remains eligible for remainder of the leave year for that leave reason (although may exhaust entitlement).

## 6. Employer Notice Requirements (cont.)



- New regulations: Employers have to give 4 notices (cont.):
  - RIGHTS & RESPONSIBILITIES NOTICE
    - provide at same time as eligibility notice
    - advise of method used for 12-month period
    - use of paid leave & conditions
    - must explain that if employee wants, can go unpaid
  - DESIGNATION NOTICE
    - within 5 business days of determining that leave qualifies as FMLA, send notice as to exactly how much time is designated
    - if not possible to determine how much time will be used, provide every 30 days on request of employee if leave was taken w/in 30 day period
    - must inform employees of Fit For Duty requirements and essential functions of job if those are to be addressed in Fit For Duty
    - failure to designate—employer is liable only if employee can demonstrate harm



## 7. Family Military Leaves

- Old regulations: No family military FMLA. Family military FMLA entitlements were added as part of the National Defense Authorization Act.
- New regulations (*825.124 et seq.*): 2 types of Family Military FMLA:
  - Military Caregiver Leave-26 weeks of leave to care for family member who is injured servicemember:
    - 26 weeks in a single 12-month period rolling forward (regardless of method used for FMLA)
    - Per servicemember, per injury
    - Servicemember must be injured in line of duty on active duty
    - Family member includes next of kin, son, daughter, spouse, parent

## 7. Family Military Leaves (cont.)



- New regulations: 2 types of Military FMLA (cont.):
  - Qualifying Exigency-12 weeks of FMLA due to qualifying exigency caused by family member's call to active duty.
    - Not regular Armed Forces – only Reserves, National Guard, retirees
      - » 8 types of Qualifying Exigency
    - Short notice deployment (7 days leave if less than 7 days notice)
    - Military events/related activities
    - Childcare/school activities
    - Financial/legal
    - Counseling
    - Post-deployment activities (90 days)
    - Rest and Recuperation-5 days of leave
    - Additional reasons if the employer and employee agree to timing and duration

## 8. Certification Changes

Definition for qualifying leave:

- Old regulations: Continuing Treatment – Incapacitation of more than 3 consecutive calendar days with either 2 or more treatments by a health care provider or 1 treatment by a health care provider resulting in a regimen of continuing treatment.
- New regulations (825.115): Continuing Treatment – Incapacitation of more than 3 consecutive full calendar days with either 2 or more treatments by a health care provider **within 30 days** or 1 treatment by a health care provider resulting in a regimen of continuing treatment. **The first or only treatment must take place within 7 days of the first date of incapacity.**

## 8. Certification Changes (cont.)

Definition for qualifying leave:

- Old regulations: Chronic Conditions – Requires periodic visits for treatment by a health care provider or nurse under direct supervision by health care provider, may incapacitate employee for less than 3 days, continues over an extended period of time, may cause episodic rather than a continuing period of incapacity.
- New regulations (825.115): Chronic Conditions – Requires periodic visits **(defined as at least twice a year)** for treatment by a health care provider or nurse under direct supervision by health care provider, may incapacitate employee for less than 3 days, continues over an extended period of time, may cause episodic rather than a continuing period of incapacity.

## 8. Certification Changes (cont.)

### Certification Forms

- Old regulations: Single Department of Labor Certification of Health Care Provider form; was not well formatted or worded; difficult to make informed decisions regarding qualified leave
- New regulations (*825.305 et seq.*): Multiple Department of Labor forms dependent on the reason for leave; well worded and formatted; should result in more complete information from the health care provider enabling better decisions regarding qualified leave
  - Employee Serious Health Condition
  - Family Member Serious Health Condition
  - Qualifying Exigency
  - Covered Servicemember/Military Caregiver

## 8. Certification Changes (cont.)

### Incomplete/Insufficient Certification

- Old regulations: Employer shall advise an employee whenever the certification is incomplete and provide a reasonable opportunity to cure any deficiency.
- New regulations (*825.305*): Employer must provide employee written notice that a certification is incomplete or insufficient including what additional information is necessary to make the certification complete and sufficient. The employer must provide the employee seven (7) days to cure any deficiencies.



## 8. Certification Changes (cont.)

### Recertification

- Old regulations: No more often than every 30 days unless an extension is requested, an employer has reason to doubt the validity, the circumstances of the leave have changed, or the minimum duration has expired.
- New regulations (*825.308*): No more often than every 30 days unless an extension is requested, an employer has reason to doubt the validity, the circumstances of the leave have changed, or the minimum duration has expired; **but no less often than every six months**

## 9. Fit for Duty Requirements

- Old regulations: Employers could only require a simple statement that the employee was fit to return to duty.
- New regulations (825.312): If employer provides essential functions with the designation notice, the employer can require that the Fit For Duty specifically reference which essential job functions the employee can perform. An employer can ask for Fit For Duty every 30 days for intermittent absences if reasonable safety concerns exist if there has been an absence within 30 days. If Fit For Duty not provided, no right to reinstatement.

# 10. Health Care Provider Contact



- Old regulations: Only a Health Care Provider could contact employee's Health Care Provider to clarify and authenticate a certification.
- New regulations (*825.307*): Employer can contact Health Care Provider for clarification or authentication. Contact can be made by a human resources professional, a leave administrator, or a management official - anyone but the employee's immediate supervisor.

## Eligibility:

- Tenure requirement
  - an employer does not have to include tenure prior to a 7+ year break in service except in certain circumstances
  - When a break in service is indicated on the eligibility file feed and tenure cannot be determined by Unum, we will request (via email) the employer provide total tenure, applying the above as applicable
- Hours worked in the last 12 months
  - For variable schedule employees, weekly scheduled hours are determined by calculating the average of hours scheduled in the past 12 months (previous hours worked in the 12 weeks preceding leave)
  - Unum will request this figure from employers (via email) for all variable schedule employees requesting leave, unless and until it can be provided on the eligibility file feed

## Employer Policies

- Employers have more options available to them to help curb FMLA abuse and/or schedule absences.
- Policies must be consistently enforced across sites and employee groups.

## Qualifying Leave

- Definitions have been refined to ensure leave is appropriate.
- Regulations have been added for Family Military reasons for leave.

## Communications

- More specific information required in Eligibility and Designation notices to employee
- Addition of “status” letter for intermittent leave
- Incomplete letter and extension required

## Certifications

- New forms for all types of leave.
- More frequent recertification.
- More specific fit for duty requirements.
- Authentication allowed without an authorization.