

## QUESTIONS AND ANSWERS – FMLA

Following are answers to commonly asked questions about the new Family and Medical Leave Act (FMLA) regulations. The effective date of the revised FMLA regulations is January 16, 2009.

The California Family Rights Act (CFRA) is a State law that also provides for unpaid leaves of absence for family reasons or for the employee's own illness. Where the FMLA law and the CFRA law differ, the most generous/less restrictive leave provisions must be applied.

### **Qualifying Reasons for FMLA Leave**

1. **Q. Can I still use FMLA/CFRA leave during pregnancy or after the birth of a child?**
  - A. Yes. An employee's ability to use FMLA leave during pregnancy or after the birth of a child has not changed. Under the regulations, a mother can use 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth).

Note: Under CFRA the employee is entitled to Pregnancy Disability Leave (PDL) and an eligible employee can take 12 weeks of CFRA for bonding. The first 12 weeks of PDL can run concurrently with FMLA.

2. **Q. Are there any changes to the definition of a serious health condition under the regulations?**
  - A. No. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

### **Eligibility for FMLA Leave**

1. **Q. I have 12 months of service with my employer, but they are not consecutive. Do I still qualify for FMLA?**
  - A. You may. In order to be eligible to take leave under the FMLA, an employee must (1) work for a covered employer, (2) work 1,250 hours during the 12 months prior to the start of leave, (3) work at a location where 50 or more employees work at that location or within 75 miles of it, and (4) have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave.

2. **Q. If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?**

A. No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours an employee would have worked but for his or her military service are credited toward the employee's required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

Example:

Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting to be reinstated under the USERRA. Both the hours and the months Dean would have worked but for his military status must be counted in determining his FMLA eligibility.

### **Employer Notice Requirements**

1. **Q. What are an employer's posting and general notice requirements?**

A. Employers must post a general notice explaining the FMLA's provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants. Under the regulations, this posted notice includes additional information regarding the definition of a serious health condition, the new military family leave entitlements, and employer and employee responsibilities. Employers must also include the information in this general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. Additionally, under the regulations, an employer without a handbook or written guidance is required to provide this general notice to new employees upon hiring.

2. **Q. How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?**

A. Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

3. **Q. Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?**
- A. Yes. At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the Notice of Eligibility and Rights and Responsibilities (DPA 752) changes, the employer must inform the employee of such changes within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.
4. **Q. How soon after an employee provides notice of the need for leave must an employer notify an employee the leave will be designated and counted as FMLA leave?**
- A. Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether the employer will require the employee to provide a return-to-work release to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (i.e. where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

### **Employee Notice Requirements**

1. **Q. How much notice must an employee give before taking FMLA leave?**
- A. When the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give at least 30 days' notice. If 30 days' notice is not possible, an employee is required to provide notice "as soon as practicable." Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency; regardless of how far in advance such leave is foreseeable. The regulations clarify that it should be practicable for an employee to provide notice of the need for leave that is foreseeable either the same day or the next business

day. In all cases, the determination of when an employee could practicably provide notice must account for the individual facts and circumstances.

When the need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of the particular case, which the regulations clarify will generally be within the time prescribed by the employer's usual and customary notice requirements applicable to the leave.

Example:

When Mandy goes to her Monday physical therapy appointment for her serious health condition, she finds out that the appointment she had previously scheduled for Thursday has been changed to Friday. Upon her return to work after the Monday appointment, Mandy informs her employer that she will no longer need leave on Thursday for physical therapy, but will need leave on Friday instead. Mandy has provided notice of her need for foreseeable leave as soon as practicable.

2. **Q. What information must an employee give when providing notice of the need for FMLA leave?**

- A. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

The regulations provide additional guidance for employees regarding what is "sufficient information." Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence if known.

Additionally, the regulations require an employee seeking leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave either to reference specifically the qualifying reason for leave or the need for FMLA leave.

**Certification of Need for FMLA Leave**

1. **Q. Do I have to give my employer my medical records for leave due to a serious health condition?**

- A. No. An employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request an employee

provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

Note: Under CFRA the employer cannot ask for a diagnosis but it may be provided at the employee's option.

2. **Q. What if I do not want my employer to know about my medical condition?**
  - A. If an employer requests it, an employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition. The employer cannot ask for a diagnosis.
3. **Q. How soon after I request leave does my employer have to request a medical certification of a serious health condition?**
  - A. Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins.
4. **Q. What happens if my employer says my medical certification is incomplete?**
  - A. An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The regulations require the employer state in writing what additional information is necessary to make the certification complete and sufficient.
5. **Q. Must I sign a medical release as part of a medical certification?**
  - A. No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.
6. **Q. How often may my employer ask for medical certifications for an on-going serious health condition?**
  - A. An employee does not need to meet the eligibility tests again to requalify for extra leave within the 12-month period if the additional leave is requested for the same qualifying reason.

7. **Q. Can employers require employees to submit a fitness-for-duty/return-to-work certification before returning to work after being absent due to a serious health condition?**

A. Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions.

Note: While the general restriction on obtaining a new fitness-for-duty certification following each intermittent leave event remains intact, the final regulations allow an employer to obtain a certification of fitness to return to duty for intermittent absences up to once every 30 days if "reasonable safety concerns" exist regarding the employee's ability to perform his or her duties.

8. **Q. What happens if I do not submit a requested medical or fitness-for-duty certification?**

A. If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

### **Miscellaneous Questions**

**Q. Can I use my paid leave as FMLA leave?**

A. Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. An employee is not required to exhaust all paid leave, before choosing unpaid leave, unless otherwise required by their applicable memorandum of understanding.