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DOL issues new FMLA forms

On July 16, the DOL's Wage and Hour Division issued new model forms for employers to use when administering employee leave under the FMLA and invited public comment on the effectiveness of current FMLA regulations. The revised model notice of rights, certification, and designation forms were immediately effective and are now available to assist employers and employees in meeting their FMLA notice and certification obligations.

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Background

The federal Family and Medical Leave Act (FMLA) covers private employers with 50 or more employees as well as public agencies and public and private elementary or secondary schools, regardless of the number of employees. The FMLA generally entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons and additional leave to care for a covered servicemember.

All covered employers must post a general notice about the FMLA ([FMLA poster](#)) in each workplace and distribute a notice to new hires. Additionally, covered employers who have FMLA-eligible employees must provide them with notices about: FMLA eligibility status, rights, and responsibilities; when specific leave is designated as FMLA leave; and the amount of time that will count against their FMLA leave entitlement. When an employee requests FMLA leave due to their own or a covered family member's serious health condition, or for military family leave, the employer may require appropriate certification.

Revised FMLA forms

On July 16, the DOL's Wage and Hour Division (WHD) [released](#) revised versions of its model notice of rights, certification, and designation [forms](#) under the FMLA. According to the WHD, the new forms, which are effective immediately, are "simpler and easier for employees, employers, leave administrators and healthcare providers to understand and use."

The following updated FMLA forms are now available to assist employers and employees in meeting their FMLA notification and certification obligations:

- [Eligibility & Rights and Responsibilities Notice, Form WH-381](#)
- [Designation Notice, Form WH-382](#)
- [Certification for Employee's Serious Health Condition, WH-380-E](#)
- [Certification for Family Member's Serious Health Condition, WH-380-F](#)
- [Certification for Qualifying Exigency, WH-384](#)
- [Military Caregiver, Leave of Current Servicemember, WH-385](#)
- [Military Caregiver, Leave of a Veteran, WH-385-V](#)

These optional-use forms can be used by employers to provide required notices and by employees to provide certification of their need for FMLA qualifying leave. The new forms are electronically fillable PDFs that can be saved and transmitted electronically. Employers may still use the agency's prior model forms or they may use their own forms, as long as they provide the same basic notice information and require only the same basic certification information.

To some extent, the new model forms simplify FMLA administration by substituting check boxes for some previously required written responses. The revised Notice of Eligibility & Rights and Responsibilities form contains additional information on the substitution of paid leave and concurrent leave usage during a qualifying FMLA absence. The revised certification forms similarly include additional information on the circumstances in which employers may obtain follow-up information from health care providers and are reorganized to make it easier to determine whether a serious health condition exists. As the WHD made clear, an employee who already provided the required FMLA information using the old certification form cannot be required to provide that same information using the revised form.

Notably, the WHD did not revise the FMLA poster or issue a generic "Fitness-for-Duty" certification. Further, the new forms do not address the paid sick leave or expanded FMLA leave requirements of the Family First Coronavirus Response Act (FFCRA). (See, for example, our [March 26, 2020 FYI](#) for more information on FFCRA leave.)

Request for information

The WHD also published a [Request for Information](#) (RFI) seeking public input on the effectiveness of the current FMLA regulations and what employers and employees would like to see changed. The RFI expressly solicits input on the challenges employers and employees have experienced with respect to the following:

1. The definition of a "serious health condition," including chronic conditions

2. Intermittent or reduced schedule FMLA leave and the timing of employee requests, particularly when the need for leave is unforeseeable
3. Requesting or notifying employers of the need for FMLA leave, including a FMLA-qualifying reason, the leave request, awareness of and ability to comply with employer's procedural notice requirements, and information employees must provide
4. Medical certification process, including determining whether a certification establishes the existence of a serious health condition and the amount of FMLA leave needed
5. Any other aspect of administering FMLA leave or employees' taking or attempting to take FMLA leave

The RFI also seeks input on whether additional guidance is needed on interpretations contained in any of the seven opinion letters issued since 2018 on FMLA-related topics, such as coverage for organ donation, the compensability of frequent short rest breaks when necessary due to a serious health condition, no-fault attendance policies, and the timeframe for designating FMLA-qualifying leave. Public comments will be accepted until September 15, 2020.

In closing

The WHD has issued new model notices and forms for employer use in administering employee leave under the FMLA. Employers that opt to continue using their own FMLA forms may wish to consider updating them to more closely track the new model forms. While the model notices did not alter current FMLA regulations, WHD has invited public input on the effectiveness of those regulations and what employers and employees would like to see changed.

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