

## Family and Medical Leave Act (FMLA)

# Final Rule—What It Means to You

On January 16, 2009, the first comprehensive overhaul of the U.S. Department of Labor's Family Medical Leave Act will take effect. Responding to two years of comments by employers, industry groups, employee representatives, and litigation pursued around FMLA issues, the final rule incorporates hundreds of changes, clarifications, modifications, and updates—some of which may be challenging to employers and confusing to employees.

Liberty Mutual Group Benefits closely followed and engaged in contingency planning during the comment period before the DOL issued its final rule in November.

We have created this brief FAQ to highlight just a few of the changes that have taken place. While by no means complete, the following are notable:

### What is the FMLA Final Rule?

On November 17, 2008, the U.S. Department of Labor (DOL) capped a two-year public comment period and published "The Family and Medical Leave Act of 1993; Final Rule" in the Federal Register (<http://www.dol.gov/esa/whd/fmla/final-rule.htm>).

The final rule contains modifications, clarifications, and adjustments to the current rules and contains appendices with eligibility notices and certification forms for employers, employees, and caregivers.

### When does it take effect?

The final rule will take effect on January 16, 2009.

### Are there new FMLA posting requirements?

Employers will be required to provide employees with:

- A general notice about FMLA (through a poster, an employee handbook, and upon hire)
- An eligibility notice
- A rights and responsibilities notice
- A designation notice

### What are employee obligations to provide notice to the employer under FMLA?

- An employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, except in unusual circumstances.

***Liberty Mutual Group Benefits is ready for the FMLA Final Rule.***

***Liberty Mutual Leave Services formed an internal task force to review and update processes and procedures that will address the new final rule.***

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#### **Training:**

- Updated training modules to assure compliance with DOL changes in processes and procedures
- Updated training for specialists to ensure familiarity with:
  - New Medical Certification forms
  - New leave relationships for Military Leave
  - Updated guidelines for the processing of incoming documentation
  - Updated guidelines to ensure new Leave requests are not associated with a Leave request that was submitted in the previous 12 months
  - Updated guidelines regarding the processing of rejected medical forms
  - Updated guidelines for the processing of Second and Third Opinion requests

- Employees must make a “reasonable effort” to avoid disruption of an employer’s operations.
- Employers must handle FMLA leave requests in a manner consistent with other leave policies.
- The final rule extends the time for employers to provide notice of eligibility or ineligibility from **two** business days to **five**. Electronic posting is permitted provided the notice is “conspicuous” and employees have access to computers where the notice is posted. Employers are “expected to responsively answer questions” from employees about FMLA leave.

#### **What is Military Family Leave?**

There are two new leave entitlements for covered military service members and their spouse, child, parent, or next of kin: Military Caregiver Leave and Qualifying Exigency Leave.

#### **Military Caregiver Leave**—also known as Covered Servicemember Leave

- Entitles family members of covered service members to take up to 26 workweeks of leave in a “single 12-month period” to care for a covered service member with a serious illness or injury incurred in the line of duty while on active duty.
- This entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave.

#### **Qualifying Exigency Leave**—helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation.

- Makes the normal 12 workweeks of FMLA job-protected leave available to employees with a covered military member serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation.
- The definition of a qualifying exigency includes:
  - Short-notice deployment
  - Military events and related activities
  - Childcare and school activities
  - Financial and legal arrangements
  - Counseling
  - Rest and recuperation
  - Post-deployment activities
  - Additional activities not encompassed in the other categories, but agreed to by the employer and employee
  - Exigency leave applies to members of the National Guard, active Reservists, and retired members of the Regular Army or Reserves. It does not apply to employees who have a family member on active duty in the Regular Armed Forces.

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#### **Communications:**

- Leave Acknowledgment letters will include updated medical forms
- Supervisors and Managers will communicate new recertification guidelines with current customers to ensure compliance

- The final rule defines “next of kin” as the nearest blood relative, other than the covered service member’s spouse, parent, son, or daughter, in the following order of priority:
  - Blood relatives with legal custody of the service member
  - Brothers and sisters
  - Grandparents
  - Aunts and uncles
  - First cousins
- The covered service member may specifically designate in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave. In those cases, only that designated next of kin may take FMLA leave to care for the covered service member.

#### **How is intermittent leave determined?**

An employer must grant FMLA leave in its smallest payroll increment, i.e., the shortest period of time that the employer’s payroll system uses to account for absences or use of leave, provided it is one hour or less.

#### **Does the final rule address medical certification?**

- The final rule recognizes the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employees’ health care providers.
- The employer’s representative contacting the employee’s health care provider must be a health care provider, human resource professional, a leave administrator, or a management official. In no case may it be the employee’s direct supervisor.
- Employers may not ask health care providers for additional information beyond that required by the certification form.
- Health care providers may, but are not required to provide a diagnosis of the patient’s health condition as part of the certification.
- If an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency.
- Employers may request a new medical certification each leave year for medical conditions that last longer than one year, and may request recertification of an ongoing condition every six months.
- For fitness-for-duty certification, an employer may require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job; and, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

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#### **System Upgrades:**

- New Military Leave Types
- Next of Kin Relationship Types
- Intake to capture Military Leave Types
- Additional Letters added to the library for Military Leave Types
- Three separate Medical Forms for Leave Types of Own, Family, and Military

#### **What exactly is “light duty”?**

- Time spent performing light duty work does not count against an employee’s FMLA leave entitlement.
- The employee’s right to restoration is suspended during the period of time the employee performs light duty (or until the end of the applicable 12-month FMLA leave year).
- If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

#### **Does the definition of a “serious condition” change?**

- A serious health condition involves more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider.”
- The two visits must occur within 30 days of the beginning of the period of incapacity.
- The first visit to the health care provider must take place within seven days of the first day of incapacity.
- “Periodic visits” for chronic serious health conditions are defined as at least two visits to a health care provider per year.

#### **What about substitution of paid leave?**

- FMLA leave is unpaid. However, employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, as offered by their employer, concurrently with any FMLA leave. This is called “substitution of paid leave.”
- All forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic “paid time off”).
- An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave.
- The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer’s conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.

#### **Do FMLA recipients qualify for attendance awards?**

The final rule changes the treatment of incentive bonuses and awards (such as perfect attendance awards) to allow employers to deny a bonus or award to an employee who does not qualify because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way.

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### ***About Liberty Mutual Group Benefits***

***Liberty Mutual Group Benefits provides a broad array of benefits to meet the diverse needs of the employee group benefits market. Our group insurance portfolio includes Life, AD&D, STD, LTD, Leave Services, and Integrated Disability Solutions.***

### **When may employees waive FMLA rights?**

Employees may waive FMLA rights retroactively (any rights or claims arising in the past) but not prospectively (any rights or claims arising in the future).

### **Have the courts been involved?**

The final rule includes a number of technical regulatory changes to reflect current law. It also removes categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.

**The information contained in this FAQ highlights only a few of the major changes made by the U.S. Department of Labor in the revised FMLA regulations. Employers should contact their own legal counsel for a comprehensive review of their FMLA policies and procedures.**

***If you have additional questions, please don't hesitate to contact your Liberty Mutual Group Benefits Account Representative.***