



**DOL Final Rule Expands FMLA for
Military Families and Clarifies
Rules for Workers and Employers**
Special Notice



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Final rule brings two-year public process to close with common sense reforms for modern workforce

The U.S. Department of Labor published a [final rule](#) on November 17, 2008 to update its regulations under the 15-year-old Family and Medical Leave Act (FMLA) - a measure that will help workers and their employers better understand their rights and responsibilities, and speed the implementation of a new law that expands FMLA coverage for military family members.

Provisions in the final rule call for increased notice obligations for employers so that employees will better understand their FMLA rights, while revising the employee notice rules to minimize workplace disruptions due to unscheduled FMLA absences. The final rule also contains technical changes that reflect decisions by the U.S. Supreme Court and lower courts.

Featured final rule actions implementing the statutory expansion of FMLA for military families:

Military Caregiver Leave: Implements the requirement to expand FMLA protections for family members caring for a covered service member with a serious injury or illness incurred in the line of duty on active duty. These family members are able to take up to 26 workweeks of leave in a 12-month period.

Leave for Qualifying Exigencies for Families of National Guard and Reserves: The law allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave to manage their affairs - "qualifying exigencies." The rule defines "qualifying exigencies" as short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities and additional activities where the employer and employee agree to the leave.

Additional Regulatory Provisions:

The Ragsdale Decision/Penalties: The updated rule contains technical changes to be consistent with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide Inc.* The court ruled that the regulation's so-called "categorical" penalty (requiring an employer to provide 12 additional weeks of FMLA-protected leave after the employee had already taken 30 weeks of leave) was inconsistent with the

statutory limit of only 12 weeks of FMLA leave and contrary to the law's remedial requirement that an employee demonstrate individual harm. The new rule removes these penalties and clarifies that if an employee suffers individual harm because the employer did not follow the notification rules, the employer may be liable.

Waiver of Rights: The department has finalized its longstanding position that employees may voluntarily settle their FMLA claims without court or departmental approval. However, prospective waivers of FMLA rights will continue to be prohibited.

Serious Health Condition: While the rule retains the six individual definitions of "serious health condition," it adds guidance on some regulatory matters. First, it clarifies that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a health care provider, the two visits must occur within 30 days of the period of incapacity. Second, it defines "periodic visits to a health care provider" for chronic serious health conditions as at least two visits to a health care provider per year.

Light Duty: At least two courts have held that an employee uses up his or her 12-week FMLA leave while on a "light duty" assignment. Under the final rule, time spent in "light duty" work does not count against an employee's FMLA leave entitlement, and the employee's right to job restoration is held in abeyance during the light duty period. If an employee is voluntarily doing light duty work, he or she is not on FMLA leave.

Perfect Attendance Awards: The final rule changes how perfect attendance awards are treated to allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because he or she took FMLA leave - but only if the employer treats employees taking non-FMLA leave in an identical way.

Employer Notice Obligations: The final rule consolidates all employer notice requirements into a "one-stop" section of the regulations to clear up some conflicting provisions and time periods. Further, the final rule clarifies and strengthens the employer notice requirements to employees in order that employers will better inform employees about their FMLA rights and obligations, and allow for a smoother exchange of information between employers and employees. **Employee Notice:** The final rule modifies the current provision that had been interpreted to allow some employees to notify their employers of their need for FMLA leave up to two full business days after an absence, even if they could provide notice sooner. Under the final rule, the employee must follow the employer's normal and customary call-in procedures, unless there are unusual circumstances.

Medical Certification Process (Content and Clarification): The final rule, which is the result of significant stakeholder feedback (including a September 2007 meeting at the department on "medical certifications"), recognizes the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of HIPAA's medical privacy rule to communications between employers and employees' health care providers. Responding to concerns about medical privacy, the rule adds a requirement that limits who may contact the health care provider and bans an employee's direct supervisor from making the contact.

For further information about the FMLA and the proposed regulations, visit the Wage and Hour Division's Web site at <http://www.dol.gov/esa/whd/fmla/index.htm>.

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