



CITY OF PORT ST. LUCIE

Human Resources



A CITY FOR ALL AGES

HIGHLIGHTS OF THE REGULATORY CHANGES IN

The Department of Labor's Final Rule On Family and Medical Leave

On November 17, 2008, the Department of Labor (DOL) published its final rule to implement the first-ever amendments to the Family and Medical Leave Act (FMLA), which were signed into law by President Bush in January 2008. These amendments not only incorporate changes and clarification to the 15-year old FMLA regulations, but also provide for new military family leave entitlements. They are effective on January 16, 2009.

Below are highlights of the regulatory changes in the DOL's Final Rule. These highlights will be posted on the City's employee website and emailed to each City department for posting. The City's FMLA Leave Policy will also be posted on the City's website upon completion of all changes and updates.

HIGHLIGHTS OF THE REGULATORY CHANGES

➤ **Military Family Leave**: FMLA was amended to provide two new leave entitlements:

1. Military Caregiver Leave(a.k.a Covered Service Member Leave):

Eligible employees who are family members of covered servicemembers may 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 active duty.

2. Qualifying Exigency Leave:

Eligible employees with a covered military member serving in the National Guard or Reserves may request up to 12 workweeks of FMLA leave 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 DOL defines qualifying exigency categories for FMLA leave to include: (1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities not encompassed in the other categories, but agreed to by the employer and the employee.

- **Serious Health Condition**: The final rule retains the six individual definitions of serious health condition while adding guidance on three regulatory matters. Under the final rule, one of the definitions of serious health condition involves more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider” that must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within 7 days of the first day of incapacity. Secondly, for the serious health condition definition that involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment, the final rules clarifies that the first visit to the health care provider must take place within 7 days of the first day of incapacity. Thirdly, the final rule defined “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year.

- **Employee Eligibility**: The employee must meet certain requirements to be eligible for FMLA leave benefits. The final rule amended the 12-month employment requirement to indicate that while the 12 months of employment need not be consecutive, employment periods prior to a break in service of 7 years or more need not be counted, unless the break is associated with the employee’s fulfillment of his/her National Guard or Reserve military obligation, or a written agreement exists indicating the employer’s intention to rehire the employee after the break in service.

- **Becoming Eligible for FMLA After Leave Begins**: Under the new regulations, for an employee on leave that was not eligible for FMLA at the start, but becomes eligible during the leave, the remaining leave will be considered FMLA leave from the date of eligibility. The leave taken prior to eligibility is not considered.

- **Employee Notice**: Under the final rule, when foreseeable, employees must provide 30 days advance notice of the need to take leave. If 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer’s normal call-in procedures. Employees must provide sufficient information to the employer to determine if the leave may qualify for FMLA protection and provide the anticipated timing and duration of the leave. Employees must also inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees may also be required to provide a certification and periodic recertification to support the need for leave. The regulations make it clear that, if the employee fails to provide timely notice, the FMLA leave request may be delayed or denied and may be subject to whatever discipline the employer’s rules provide.

- **Employer Notice Obligations**: The final rule employers will be required to provide employees with a **General Notice** about the FMLA; a **Notice of Eligibility** indicating the employee's eligibility for an FMLA leave; a **Rights and Responsibilities Notice** if they are eligible - a reason why if they are not; and a **Designation Notice** when the employee's FMLA leave request has been approved or if additional information is required. The final rule extends the time for employers to provide various notices from two business days to five business days.

- **Substitution of Paid Leave**: FMLA leave is unpaid, however, employers may require employees to use any accrued paid vacation, personal, family or sick leave concurrently with any FMLA leave, as does the City. Under the final rule, all forms of paid leave offered by an employer will be treated the same. 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.

- **Medical Certification Process (Content and Clarification)**: The final rule recognizes the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employee's health care providers. Therefore, a requirement has been added to the final rule that specifies that the employer's representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor. Further, employers may not ask health care providers for additional information beyond that required by the certification form. The final rule also improves the exchange of medical information by updating the Department's optional form WH-380 to create separate forms for the employee and covered family members and by allowing, not requiring, health care providers to provide a diagnosis of the patient's health condition as part of the certification.

In addition, the final rule specifies that 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 7 calendar days to cure the deficiency.

- **Medical Certification Process (Timing)**: The final rule allows employers to request a new medical certification each leave year for medical conditions that last longer than one year. For recertification of an ongoing condition, in all cases the final rule allows an employer to request recertification every six months in conjunction with an absence.

- **Holidays**: The new regulations state that if an employee is on FMLA leave the whole holiday week, the employer may count the holiday as FMLA, but if the employee works part of the holiday week, FMLA leave is not applicable for the holiday.
- **Overtime**: If an employee is required to work overtime but is unable to do so because of FMLA leave, then the hours of overtime that the employee would have worked are counted against the employee's FMLA entitlements. Voluntary or discretionary overtime would not count against the employee's leave.
- **Light Duty**: Under the final rule, the time an employee spends performing "light duty" work does not count against an employee's FMLA leave entitlement and the employee's right to restoration is held in abeyance 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.
- **Perfect Attendance Awards**: The final rule changes the treatment of perfect attendance awards to allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way.
- **The Ragsdale Decision**: Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave and notify the employee of the designation. The employee may not however, suffer harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA protected.
- **Waiver of Rights**: The final rule clarifies that employees may voluntarily settle or release their FMLA claims without court or DOL approval. Prospective waivers of FMLA rights continue to be prohibited under the final rule.
- **Fitness-For-Duty Certifications**: The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work (fitness-for-duty certification). The final rule makes two changes to the fitness-for-duty process. First, an employee may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, 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.