

## FMLA – BACK TO BASICS – EMPLOYER NOTICE OBLIGATIONS AND DEADLINES

REPEAT AFTER ME: FIVE BUSINESS DAYS!

Oct 15, 2021

Many employers are familiar with the *employee* notice obligations and other deadlines relating to FMLA leave, such as the obligation to give 30 days' notice of a foreseeable need for leave, and to submit a completed medical certification within 15 calendar days of the employer's request for such certification. But employers must also be aware of the many *employer* notice obligations relating to FMLA leave, the order in which those notices must be given, and the associated deadlines for such notice, which are typically **within five business days of particular events**.

Failure to comply with these notice obligations can lead to fines and liability for compensation and benefits lost by reason of the violation, actual monetary losses, and other equitable relief.

### STEP 1: PROVIDE NOTICE OF ELIGIBILITY WITHIN 5 BUSINESS DAYS OF NOTICE OF NEED FOR FMLA LEAVE

Upon receiving "notice" of a need for FMLA leave, the employer must first determine whether the employee is *eligible* for FMLA leave and notify the employee as to their eligibility. To be eligible for FMLA leave, an employee must satisfy each of the following three requirements:

1. Have worked for the employer for at least 12 months as of the date the leave is to begin;
2. Have worked for the employer for at least 1,250 hours during the 12-month period immediately preceding the date the leave is to begin;
3. Work at a location where the employer has at least 50 employees within a 75 mile radius of the employee's worksite.

Eligibility must be determined quickly: Employers must provide the requesting employee with notice as to whether they are eligible for FMLA leave ***within five business days of being placed on notice of the need for leave*** (absent extenuating circumstances).

A common employer error is to skip past the eligibility notice requirement and respond to an employee's request for leave by simply giving the employee a copy of the FMLA certification (usually a medical certification), and then waiting until after the employee submits the completed FMLA medical certification to provide the eligibility notice. By then, the five business days from notice of a need for leave is typically long past, such that a violation of the FMLA may have occurred.

The DOL's form [Notice of Eligibility \(WH-381\)](#) can and should be used for eligibility notice purposes. Section I of the form addresses eligibility. If an employee is not eligible, the employer must check at least one of the boxes in that section explaining the reason.

If an employee requests FMLA leave for a new or different reason during the applicable 12-month period, and the employee's eligibility status has changed, the employer must notify the employee of the change within five business days (absent extenuating circumstances).

## STEP 2: PROVIDE NOTICE OF RIGHTS AND RESPONSIBILITIES AT THE SAME TIME AS NOTICE OF ELIGIBILITY

If an employee is eligible for FMLA leave, then at the *same time* that the Notice of Eligibility is provided, employers must provide the employee with notice of their FMLA rights and responsibilities. Helpfully, the DOL has combined the Notice of Eligibility and the Notice of Rights and Responsibilities into the *same form* (WH-381).

Section II of the form is used to explain what documentation, if any, is required in order for the employer to make the next determination, which is whether the employee has a qualifying reason for leave. The form includes check boxes for purposes of identifying the necessary documentation (e.g., a medical certification), space for stating the deadline by which the documentation must be submitted, and the required information about potential consequences if the employee fails to timely submit the necessary documentation.

Section III of the form is used to explain additional rights and responsibilities of the employee. If information in this section changes, the employer must give written notice of the change within five business days of the employee's first notice of need for leave subsequent to the change.

## STEP 3: PROVIDE DESIGNATION NOTICE (INCLUDING NOTICE OF FITNESS FOR DUTY CERTIFICATION TO RETURN TO WORK) WITHIN 5 BUSINESS DAYS OF RECEIVING ENOUGH INFORMATION TO KNOW THE LEAVE IS FOR A FMLA-QUALIFYING REASON

After receiving any necessary documentation, employers should review the documentation to ensure that it is complete (all applicable entries filled out) and sufficient (no vague, ambiguous, or non-responsive information) to support the need for leave. Employers also can obtain authentication (verification that the information in the certification was completed or authorized by

the health care provider who signed it), clarification (to understand the handwriting or meaning of a response), and second/third opinions (if there is reason to doubt the validity of the certification).

Employers must then provide notice to the employee that either the leave is approved or the leave is not approved (because the FMLA does not apply or because the employee has exhausted their 12 or 26 week entitlement within the applicable 12-month leave year), or that additional information is necessary to make this determination.

The DOL has provided a form – the [Designation Notice \(WH-382\)](#) – for this purpose. The Designation Notice must be provided within five business days of an employer having enough information to determine whether the leave is being taken for an FMLA-qualifying reason (absent unusual circumstances). Typically, this will mean that the Designation Notice is due within five business days of receiving the necessary medical certification.

Section I of the form identifies the employer’s decision (approved, not approved, more information needed) and directs the employee to other applicable sections of the form.

Section II should be completed when either: (a) the documentation is not complete or sufficient (the form includes space for identifying the deficiencies and the deadline to “cure” any deficiencies, which must be at least seven calendar days); or (b) the employee will be required to submit to a second and/or third opinion.

Section III should be completed when the leave is approved as FMLA leave, and includes information about how much leave will be designated as FMLA leave (if known) and about return to work requirements, such as the submission of a fitness-for-duty certification. In order to require a fitness-for-duty certification, notice of this requirement must be given with the Designation Notice; if notice is not given by this time, no fitness-for-duty certification can be required before reinstating an employee from FMLA leave. Moreover, a list of the employee’s essential functions must be included with the Designation Notice in order to require the health care provider to address the employee’s ability to perform the essential functions of the position in the fitness-for-duty certification.

If any information in the Designation Notice changes, written notice to the employee must be given within five business days of receiving notice that the employee needs leave subsequent to the change.

#### **STEP 4: PROVIDE NOTICE OF LEAVE USAGE UPON REQUEST**

If an employee’s request for leave is approved, employers should carefully track the employee’s leave usage. Where the specific amount of hours/days/weeks that would be counted against the employee’s FMLA entitlement are not known at the time the Designation Notice is provided, Employers are obligated to provide notice of the amount of leave counted against the entitlement: (a) upon request by the employee; but (b) no more often than once in a 30-day period and only if

FMLA leave was taken during that period. This notice may be oral or in writing, but must be confirmed in writing. The DOL has not provided a form for such notice.

## STEP 5: PROVIDE NOTICE OF EXHAUSTION WITHIN 5 BUSINESS DAYS OF A REQUEST FOR LEAVE FOLLOWING EXHAUSTION

Finally, employers are obligated to inform employees when they have exhausted their 12 (or 26) week FMLA leave entitlement. Written notice of exhaustion must be provided within five business days of the employee's request for FMLA leave subsequent to the exhaustion. The Designation Notice can (but is not required to) be used for this purpose.

**Recommended Next Steps:** Employers should ensure that their Human Resources personnel and/or FMLA leave administrators: (a) are aware of the applicable employer notice requirements and deadlines; and (b) have sufficient time to properly administer FMLA leave requests. For any questions, please reach out to your Bryan Cave Leighton Paisner attorney contact.

## MEET THE TEAM



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