

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 1 of 18

TO: Manual Recipients
FROM: Blaine Ryan-Lynch, Director of Staffing Services
SUBJECT: Revised FMLA Regulations

Table of Contents

Introduction

New Military Family Leave Entitlements

Qualifying Exigency Leave

Military Caregiver Leave

Key Revisions to Current FMLA Provisions

Effective Date

Eligibility for FMLA Leave

Service Requirements

Period of Eligibility Determination

Eligible Categories of Employees

Qualifying Reasons

Definition of Serious Health Condition Under FMLA

Use of Leave Credits for FMLA Leave

Amount of FMLA Leave to be Granted

Intermittent Leave

Impact of Work Schedule

FMLA and Overtime Worked

Requests for FMLA Leave

Designation of FMLA Leave

Notification of Eligibility

Designation Notice

Employee Status Pending Designation

Retroactive Designation

Disputes

Medical Certification of FMLA Leave

Recertification

Agency Responsibilities in Connection with FMLA Leave

Posting and Notice Requirements

Reinstatement Rights Under FMLA

Fitness for Duty Certification

Intermittent Absence and Fitness for Duty Certification

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 2 of 18

**Protections Provided by the FMLA and Enforcement Mechanisms
Failure to Properly Designate
Revised Forms**

INTRODUCTION

The revised federal Family and Medical Leave Act (FMLA) regulations become effective January 16, 2009. The revised regulations issued by the United States Department of Labor (U.S. DOL) clarify and modify current FMLA provisions, and establish two new FMLA entitlements – military caregiver leave and qualifying exigency leave which are described in greater detail below. In addition, revised FMLA forms have been promulgated; copies are attached.

This memo provides an overview of the changes in the FMLA regulations. Agencies are cautioned that provisions of the FMLA must be applied in the context of State leave policy, consistent with the Attendance Rules and negotiated agreements.

The information contained in this document summarizes our current understanding of the significant revisions to the FMLA regulations. Further guidance will be provided as issues are clarified.

In the interim, agencies should contact the Attendance and Leave Unit of this Department at 518-457-2295 if they require information when applying the revised regulations.

NEW MILITARY FAMILY LEAVE ENTITLEMENTS

Qualifying Exigency Leave

This new leave entitlement allows eligible employees to take up to 12 weeks of FMLA leave per calendar year for a qualifying exigency because the employee's spouse, son, daughter or parent meeting the definition of a covered military member is on active duty or has been notified of an impending call or order to federal active duty.

Qualifying Event

The FMLA regulations identify eight situations for which qualifying exigency leave may be taken by an eligible employee:

1. For "short-notice deployment" where a covered military member is notified of an impending call or order to active duty seven or fewer days from the date of deployment, in which case an eligible employee may take qualifying exigency leave for a

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 3 of 18

- period of seven days beginning on the date when the covered military member is notified of the impending deployment;
2. To attend official ceremonies, events or programs sponsored by the military that are related to active duty or call to active duty of a covered military member, or in advance of or during deployment to attend similarly related family support or assistance programs or informational briefings sponsored or promoted by the military, military service organizations or the Red Cross;
 3. For certain childcare and school activities necessitated by active duty or the call to active duty status of a covered military member, including to arrange for alternative childcare, provide childcare on an urgent, emergency (but not routine, regular or everyday) basis, enroll or transfer a child in a new school or day care facility, or attend meetings with school or day care staff due to circumstances arising from the deployment of the covered military member;
 4. To make or update financial or legal arrangements to address a covered military member's absence while on active duty, and act as the covered military member's representative with respect to issues involving military service benefits;
 5. To attend counseling provided by someone other than a health care provider due to active duty or call to active duty status of a covered military member;
 6. To spend time with a covered military member who is on a short-term, temporary rest and recuperation leave during the period of deployment, limited to five days for each instance of rest and recuperation;
 7. To attend certain post-deployment activities, such as arrival ceremonies and reintegration briefings and address issues arising from the death of a covered military member while on active duty status;
 8. For additional activities arising out of a covered military member's active duty or call to active duty status where the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of the leave.

Eligible Employee

An eligible employee is one who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son or daughter of a servicemember who meets the definition of a covered military member.

A covered military member is an employee's spouse, son, daughter or parent in the National Guard or Reserves (or certain retired members of the Regular Armed Forces and retired Reserves) who is on active duty or has been notified of an impending call or order to active duty in the armed forces in support of a contingency operation.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 4 of 18

Qualifying exigency leave is not available to family members of soldiers in the Regular Armed Forces, or where the call to active duty comes from a State rather than the federal government.

Amount of Leave to be Granted

Eligible employees are entitled to up to 12 weeks of FMLA qualifying exigency leave per calendar year. Employees cannot exceed a combined total of 12 weeks of FMLA leave per calendar year for all qualifying reasons combined, excluding military caregiver leave.

Leave is available for a continuous period of time or on an intermittent or reduced schedule basis as necessary.

Notice

An employee's obligation to provide notice of leave due to a qualifying exigency is triggered when the employee first seeks to take such leave. Where this leave is foreseeable, eligible employees must provide notice to the employer that is reasonable and practicable.

Documentation Provisions

The U.S. DOL has developed form WH-384 to enable the employer to obtain sufficient information to confirm the need for qualifying exigency leave. The first time an employee requests qualifying exigency leave under a specific set of orders, the employer may also require the employee to provide a copy of the covered military member's active duty orders.

If the qualifying exigency involves meeting with a third party, the form requires that the employee provide contact information for that third party and explain the nature of the meeting. The employer may contact the third party to verify the appointment schedule and nature of the meeting but no additional information can be requested.

The employer may also contact an appropriate unit of the Department of Defense to verify that a covered military member is on active duty or call to active duty status but no additional information can be requested.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, an employee absent to make legal arrangements could elect to charge the absence to vacation or personal leave, but not to sick leave.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 5 of 18

Military Caregiver Leave (effective January 28, 2008)

This new leave entitlement allows eligible employees to take up to 26 weeks of military caregiver leave under the FMLA in a single 12-month period to care for a covered family member with a serious illness or injury that was incurred in the line of duty while on active duty in the Regular Armed Forces, National Guard or Reserves.

Qualifying Event

Leave is available to care for a covered servicemember who sustained a serious injury or illness in the line of duty on active duty that renders the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

For this purpose a covered servicemember is a current member of the Regular Armed Forces, including a member of the National Guard or Reserves, or a member of the Regular Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy or is otherwise in outpatient status or on the temporary disability retired list.

Eligible employees may not take leave under this provision to care for former members of the Regular Armed Forces, former members of the National Guard or Reserves, and members on the permanent disability retired list.

Eligible Employee

An employee who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, daughter or next of kin of a covered servicemember is eligible for leave for this purpose. The regulations define next of kin of a covered servicemember as the nearest blood relative other than the covered servicemember's spouse, parent, son or daughter in the following priority: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the servicemember has specifically designated in writing another blood relative for purposes of military caregiver leave under the FMLA.

A husband and wife employed by the same employer are limited to a combined 26 week military caregiver leave in a single 12-month period per servicemember per injury.

Amount of Leave to be Granted

Eligible employees are entitled to up to 26 weeks of leave in a single 12-month period per covered servicemember per injury. Additional periods of up to 26 weeks of leave may be taken

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 6 of 18

in subsequent 12-month periods to care for a different servicemember or to care for the same servicemember who has a subsequent serious illness or injury.

To determine the single 12-month period, the regulations require that the 12-month period must be measured forward from the date an employee's first military caregiver leave to care for the covered servicemember begins.

During the designated 12-month period, employees are limited to a combined total of 26 weeks of FMLA leave for any qualifying reason. Employees continue to be limited to 12 weeks of FMLA leave per calendar year for reasons other than to care for a covered servicemember.

Leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition should be designated as military caregiver leave in the first instance.

Leave is available in a continuous block of time or on an intermittent or reduced schedule basis as required.

Notice

Where leave is foreseeable based on planned medical treatment for a serious injury or illness of a servicemember, the normal FMLA notice requirement of 30 days or as soon as possible applies. Where leave is unforeseen, the normal FMLA notice requirement of as soon as practicable under the facts and circumstances of the specific case applies.

Documentation Provisions

The U.S. DOL has developed form WH-385, Certification for Serious Injury or Illness of Covered Servicemember, to assist the employer in obtaining documentation of the need for military caregiver leave.

Any one of the following health care providers may complete this certification:

- A United States Department of Defense (DOD) health care provider
- A United States Department of Veterans Affairs (VA) health care provider
- A DOD TRICARE network authorized private health care provider or
- A DOD non-network TRICARE authorized private health care provider.

Satisfactory medical documentation also includes "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 7 of 18

The regulations prohibit recertification during the time period specified in the documentation, and prohibit second or third medical opinions in connection with leave requested for this purpose.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, a State employee taking military caregiver leave to provide care for her wounded son is eligible to charge up to 15 days of absence in a calendar year to family sick leave and may also elect to charge other categories of leave credits.

KEY REVISIONS TO CURRENT FMLA PROVISIONS

Effective Date

The new regulations go into effect on January 16, 2009 and apply to FMLA leave on or after that date.

Eligibility for FMLA Leave

Service Requirements

In order to be eligible for FMLA leave, one of the requirements an employee must meet is to have been employed by the employer for at least 12 cumulative months or 52 cumulative weeks of service on the date the FMLA leave will begin. The new regulations clarify that, although the 12 months of employment do not have to be consecutive, employers are not required to count employment prior to a continuous break in service of seven years or more, unless the break in service was occasioned by the employee's fulfillment of military service obligations in the National Guard or Reserves, or unless a collective bargaining agreement affirmed the employer's intention to rehire the employee after the break in service.

However, New York State as an employer will continue its current policy of counting all State service regardless of the duration of any breaks in such service toward meeting the 12 months of service requirement. Accordingly, an employee's total State service must be counted when determining if the employee has completed the required 52 cumulative weeks of service, regardless of any breaks in service and regardless of the percentage of time paid during each of the 52 weeks if the employee was paid for any portion of that workweek. (For this purpose a workweek is the agency's workweek for payment of salary which is normally Thursday through Wednesday).

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 8 of 18

There is no change in the regulations that an employee must have worked a minimum of 1250 hours during the 52 consecutive weeks immediately preceding the date FMLA leave is to begin in order to be eligible for FMLA leave.

Note: For purposes of meeting the 1250 hour requirement, time spent on approved Employee Organization Leave (but not on Union Leave) must be counted, as must time the employee would have worked but for the performance of ordered military duty.

Period of Eligibility Determination

Eligibility is determined at the commencement of the first instance of leave for each FMLA-qualifying reason in the calendar year. Generally, for chronic medical conditions, all FMLA absences for the same qualifying reason are considered a single leave and the employee maintains eligibility for that reason for leave throughout the calendar year. For example, an employee with asthma may have several periods of absence during the calendar year for that same condition and need only meet the eligibility criteria for the first such absence in the calendar year. In contrast, an employee who has two episodes of flu during the calendar year must meet the eligibility criteria at the start of each period of absence.

Eligible Categories of Employees

Although not specifically addressed in the regulations, in accordance with State policy, the term “spouse” must be interpreted to include same-sex marriages that are legally performed in jurisdictions where they are legally recognized.

Qualifying Reasons

FMLA leave may now be taken for qualifying exigencies in connection with certain federal military activation of a family member and to care for a family member who is a servicemember as described under New Military Family Leave Entitlements above.

Definition of Serious Health Condition Under FMLA

The new regulations retain the six definitions of serious health condition that were already in effect and clarify three issues related to those definitions with respect to visits to health care professionals:

1. For employees taking leave under the “three consecutive calendar days of incapacity plus two visits to a healthcare provider” definition, the two visits must occur within 30 days of the period of initial incapacity, absent extenuating circumstances.
2. For employees taking leave under the “three consecutive calendar days of incapacity plus a regimen of continuing treatment” definition, the first visit to a health care professional must occur within 7 days of the initial incapacity.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 9 of 18

3. The term “periodic visits to a healthcare provider” for chronic serious health conditions means at least two visits to a healthcare provider per year.

Use of Leave Credits for FMLA Leave

The new regulations provide that employees can be required to follow the employer’s normal procedural requirements for use of paid leave, such as advance notice except in emergency situations. The regulations also remove the previous restriction on use of accrued overtime compensatory time for hours worked beyond 40 in a workweek for use of paid FMLA leave.

The Medical Facts section of Medical Certification forms WH-380E and WH-380F provides that the healthcare provider may include a diagnosis along with other relevant facts such as symptoms, regimen of continuing treatment, etc. Agencies cannot have a blanket policy of requiring that a diagnosis be provided in order for the medical certification to be deemed sufficient. So long as the documentation contains medical facts sufficient to confirm the employee’s eligibility for FMLA leave, the agency cannot find the medical documentation deficient solely because it does not include a diagnosis. Questions about sufficiency of medical documentation should be discussed with the Attendance and Leave Unit.

While not a change, agencies are reminded of the following general provisions regarding an employee’s use of leave credits under the FMLA:

The FMLA does not require an employer to authorize the use of paid sick leave in any circumstance where it would not otherwise be authorized. As a matter of State policy, when use of leave credits would be allowed under the Attendance Rules, employees may elect to use appropriate leave credits during a period of FMLA leave or may choose not to use credits at their option. The term “appropriate leave credits” means credits that are available for absences for that specific reason. For example, no more than 15 days of accrued sick leave may be used in any calendar year for illness in the family.

The FMLA permits employees to use accrued vacation and personal leave credits and to go on leave without pay during FMLA absences even when accrued sick leave credits are available. Agencies cannot require that employees first exhaust sick leave credits before using other credits as sick leave or that all credits be exhausted before going on leave without pay. (This supercedes the normal State policy that sick leave credits must be used first.)

Agencies should use the FMLA Medical Certification for all absences subject to the FMLA, regardless of whether or not the employee elects to charge leave credits. Employers may not request additional medical information to support an employee’s choice to use accrued paid leave during a period of FMLA. The FMLA Medical Certification form contains sufficient

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 10 of 18

information on which to base approval of both the absence and the use of leave credits during that absence. Agencies should consult with the Attendance and Leave Unit regarding exceptional circumstances.

Amount of FMLA Leave to be Granted

Intermittent Leave

Under the new regulations, employees who take intermittent FMLA leave for planned medical treatment have a statutory obligation to make reasonable effort to schedule such planned medical treatment so as to not unduly disrupt workplace operations. Previously, their obligation to make such effort was triggered by a request of the employer.

Impact of Work Schedule

The new regulations clarify that the FMLA leave entitlement for an employee who works a schedule that varies from week to week is based on the weekly average over the 12-month period preceding the leave (not just the prior 12 weeks). While we believe that this will have little effect on any individual agency, agencies are advised to contact the Attendance and Leave Unit if they have a question as to whether they have an employee with a schedule requiring this computation.

FMLA Leave and Overtime Worked

Where an employee would normally be required to work overtime, but cannot do so because of a FMLA-qualifying condition, under the amended regulations the employee may now be charged FMLA leave for the hours not worked. Whether or not the hours may be counted depends on whether the employee would have been required to work the overtime hours but for the taking of FMLA leave and therefore only applies to mandatory overtime not worked due to a FMLA-qualifying condition. Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

The recently enacted regulations give the following example: An employee is using intermittent leave. The employee is a 40 hour per week employee but during a particular week will be required to work one 8 hour overtime shift. That employee is actually being required to work 48 hours in that particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week. During that workweek, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek which equals 1/6 of a workweek.

Note: Agencies are advised to keep track of mandatory overtime assignments not worked due to an employee's FMLA-qualifying leave and to contact the Attendance and Leave Unit for guidance regarding computation of FMLA usage.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 11 of 18

Lastly, the regulations make clear that an agency may not discriminate in the assignment of mandatory overtime because an employee takes FMLA leave. For example, an agency cannot schedule only FMLA leave takers for required overtime in order to deplete their FMLA leave entitlement, while allowing other employees to volunteer for overtime.

Requests for FMLA Leave

The new regulations clarify that employees must do the following:

1. The revised regulations make clear that an employee must provide the employer at least 30 calendar days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when the leave will begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. If such notice is not given, the regulations permit an agency to ask an employee why 30 days notice was not given and potentially delay FMLA leave until 30 days after the date the employee actually provided notice. **Agencies should consult with the Attendance and Leave Unit before they delay the start of any FMLA leave because of a failure to provide 30 days notice.** Agencies are also cautioned that even if FMLA leave is delayed, the employee may still be entitled to take leave under the Attendance Rules and applicable collective bargaining agreements.

2. Where leave is not foreseeable, the regulations clarify that employees must follow the employer's usual and customary notice and procedure for requesting leave, absent extenuating circumstances.

3. An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, the anticipated timing of such leave and the duration of the leave. Depending on the situation, an employee may have to include or the employer can ask for certain information to demonstrate the existence of a FMLA-qualifying leave. Examples of such information include but are not limited to: whether the condition renders the employee unable to perform the essential functions of the job, whether the employee has been hospitalized overnight, whether the employee or family member is under the continuing care of a health care provider, and, if the leave is for a family member, whether the condition renders the family member unable to perform daily activities.

4. When an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.

5. Employees must comply with the employer's usual and customary procedures regarding notification of absence (such as call-in procedures), except under unusual circumstances.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 12 of 18

Designation of FMLA Leave

The revised regulations have modified the procedure by which leave for an FMLA qualifying condition is approved. The new regulations eliminate the provisional or preliminary designation of FMLA leave prior to receipt of medical documentation. Instead, upon receipt of an employee's request for FMLA leave, or upon the agency becoming aware that a leave may be FMLA-qualifying, the agency must notify the employee concerning their eligibility for leave. Upon receipt of satisfactory medical documentation, the agency must notify the employee of designation of the leave as FMLA-qualifying.

Notification of Eligibility

If an employee requests FMLA leave or an agency acquires knowledge that an employee's leave request may be FMLA-qualifying, the employer must provide the employee with a Notice of Eligibility and Rights and Responsibilities form which details the employee's eligibility for such leave, specific expectations, obligations and consequences of the employee's failure to meet those obligations. This form must be provided within 5 business days of acquiring knowledge that leave may be FMLA, absent extenuating circumstances. Agencies must use the U.S. DOL Form WH-381 (Notice of Eligibility and Rights and Responsibilities) which is attached hereto. If medical certification is being sought, an agency must also send either the U.S. DOL Form WH-380E (Employee Medical Certification) or the U.S. DOL Form WH-380F (Family Member Medical Certification) with the U.S. DOL Form WH-381. Employees have 15 calendar days to provide a completed Medical Certification form, absent extenuating circumstances.

Designation Notice

When an agency has enough information to determine whether the request for leave is FMLA-qualifying (such as following the receipt of a requested medical certification), the agency now has 5 business days to designate this leave as FMLA. This designation shall be accomplished by sending the employee a fully completed Designation Notice (U.S. DOL Form WH-382). The Designation Notice requires that the agency provide the employee with specific information such as the amount of FMLA leave that will be counted toward the employee's FMLA leave entitlement, if it is known at the time of the designation. If an agency will require a fitness for duty certification of the employee's ability to resume work, the agency must so indicate on the Designation Notice. Also, if an agency will require a fitness for duty certificate that specifically addresses an employee's ability to perform the essential functions of the employee's position, an agency must so indicate on the Designation Notice and provide a list of the essential functions of the employee's position.

If the absence has already begun, the effective date of the designation is the first day of absence, provided the designation is made within the time frames established by the regulations.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 13 of 18

If the employee fails to submit the required medical certification or if the leave is determined not to qualify as FMLA leave, the employee's absence will fall under normal State policy for such absence.

If the information an agency provides to an employee in the Designation Notice changes (such as the employee exhausts his/her FMLA leave entitlement), the agency must provide written notice of such change within 5 business days of receipt of an employee's first notice of the need for leave subsequent to any change.

An agency must also notify an employee of the amount of leave counted against an employee's leave entitlement. If known at the time of FMLA designation, this amount of FMLA leave must be included in the Designation Notice. If not known at time of designation, then the agency must provide notice of the amount of leave counted against the employee's leave entitlement upon request by the employee but not more often than once every 30 days and only if leave was taken during that period. Such notice may be oral but must be confirmed in writing by the next payday unless that payday is less than one week after the oral notice. If it is less, then written notice must be sent by the following payday.

Employee Status Pending Designation

Although the provisional designation provision has been eliminated, agencies should consider an employee's leave tentatively covered by the FMLA once the agency notifies the employee of eligibility for FMLA leave and requests medical certification.

While the regulations are silent on the employee's status during the five-day period between the employee's notice of the need for leave and the employer's required Notification of Eligibility, agencies should be guided by the fact that most requested leaves may ultimately be designated as FMLA leave. Therefore it is not generally advisable to take actions that would need to be reversed if this period of leave is subsequently designated as FMLA leave.

Employees continue to be eligible for leave pursuant to the Attendance Rules and negotiated agreements during any period while awaiting designation of leave as FMLA qualifying, and any period for which the employee is found ineligible for FMLA leave.

Questions concerning employee status pending designation of FMLA leave should be referred to the Attendance and Leave Unit.

Retroactive Designation

Under the new regulations, an employer may retroactively designate leave as FMLA with appropriate notice to the employee, provided the employer's failure to timely designate leave

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 14 of 18

within the required time period does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated.

The effective date of a timely designation made within the required time period is the first day of absence, even where the absence has already begun. Accordingly, a designation made within the established designation period is not considered to be a retroactive designation, even though the effective date is the first day of an absence that has already begun.

Disputes

The regulations state that disputes as to whether leave qualifies as FMLA leave should be resolved through discussions between employer and employee, and that such discussions should be documented.

Second and third medical opinion provisions continue to apply. Where an agency requests a second or third opinion to determine if a request for leave is FMLA-qualifying, an employee remains tentatively entitled to the benefits of the FMLA. If the request for leave is ultimately found not to qualify under the FMLA, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under established leave policies.

Medical Certification of FMLA Leave

The regulations require use of separate medical certification forms for requests for leave for an employee's own serious health condition and requests for leave for the serious health condition of a family member.

Employers should request medical certification within 5 business days of notice of or commencement of leave. The employee continues to have 15 calendar days to provide medical certification following such request.

If an employer considers the medical certification to be deficient, the employer must provide the employee with **written** notice of the deficiencies and give the employee 7 calendar days, unless not practical under the circumstances, to correct the deficiencies in the certification. That notice must also advise the employee that FMLA leave may be denied if the employee fails to provide adequate certification.

A certification is incomplete if one or more of the applicable entries have not been completed. A certification is insufficient if the information provided is vague, ambiguous, or non-responsive.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 15 of 18

The new regulations permit certain employer representatives, including human resources professionals, leave administrators and management officials (but not the direct supervisor) to contact the employee's health care provider to clarify and authenticate the medical certification provided by the employee. Prior to making any contact with the health care provider, the employer must first provide the employee an opportunity to cure any deficiencies in the certification. The employee is not required to permit his or her health care provider to communicate with the employer for purposes of clarification, but if such contact is not permitted and the employee does not otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave. For purposes of authentication, an employee may be required to execute a HIPAA waiver.

Recertification

The revised regulations do not alter an agency's ability to request a recertification when the original circumstances under which leave was granted have changed or the employer has reason to doubt that the absence is FMLA-qualifying.

However, the revised regulations clarify an agency's ability to require certification for FMLA leave within a calendar leave year in other circumstances.

With respect to all leaves, regardless of whether they are continuous or intermittent, generally, an agency may not request a recertification more often than every 30 days and only in connection with an absence when no minimum duration for the condition is specified.

However, if the medical certification states that there is a minimum duration for the condition, the agency must wait until that minimum duration passes before requiring a recertification, unless the minimum duration specified in the documentation is more than six months in the calendar leave year. If the minimum duration is more than six months in the calendar leave year, the agency may request a recertification in connection with an absence after the six-month point, even for lifetime or chronic conditions.

These changes do not alter an agency's ability to require a new medical certification at the beginning of each calendar leave year for individuals who have conditions which will require leave in the next calendar year. Such annual certifications may be requested separate and apart from an absence.

Agencies are reminded that FMLA eligibility expires at the end of each calendar year and must be re-determined at the start of each new calendar year. Agencies must notify employees of eligibility and designate leave as appropriate at the start of each new calendar year.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 16 of 18

Agency Responsibilities in Connection with FMLA Leave

Posting and Notice Requirements

The regulations clarify that electronic posting of the FMLA notice of employee rights and responsibilities that covered employers are required to post on their premises may be sufficient in certain circumstances, with paper posting for employees without electronic access. A copy of that notice, WH Publication 1420, Employee Rights and Responsibilities under the Family and Medical Leave Act, is attached.

Where the employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general FMLA notice in the language in which the employees are literate.

The general notice must also be included in employee handbooks or other materials about employee benefits. Employers who do not have an employee handbook must provide employees with a copy of the general notice at time of hire in either paper or electronic form.

Reinstatement Rights Under FMLA

Fitness for Duty Certification

Employer policies or practices requiring fitness for duty certification must be uniformly applied for all similarly-situated employees (i.e., same serious health condition, same occupation).

Whenever the employer intends to require the employee to provide a fitness for duty certification to return to work, the employee must be so notified in the Designation Notice. Where the employer requires that the certification notice specifically address the employee's ability to perform the essential functions of the employee's job, the Designation Notice must so specify and the employer must provide the employee with a list of these essential functions along with the Designation Notice.

The employer may contact the employee's healthcare provider to clarify and authenticate the fitness for duty certification but may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions may be required.

Intermittent Absence and Fitness for Duty Certification

Where reasonable job safety concerns exist regarding the employee's ability to perform his/her job duties based on the serious health condition for which the employee took leave, employers may now request, no more than once every 30 days, a fitness for duty certification before allowing an employee to return to work from intermittent leave. If the employer chooses

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 17 of 18

to require such certification, the employer must inform the employee at the time it issues the Designation Notice that for each instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness for duty certification unless one has already been submitted within the past 30 days.

The employer can set a different interval for requiring a fitness for duty certification but not more frequently than once every 30 days, as long as the employee is so notified in advance of the employee taking the intermittent leave.

Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others and should take into account the likelihood, nature and severity of the potential harm.

Questions concerning the employee's status in cases where a fitness for duty certification is not provided should be directed to the Attendance and Leave Unit.

Protections Provided by the FMLA and Enforcement Mechanisms

Failure to Properly Designate

The previous rule that required employers who failed to properly designate FMLA leave to offer an employee an additional 12 weeks of FMLA protected leave has been eliminated. The new regulations clarify that an employer may be liable if the employee suffered harm as the result of the employer's failure to properly designate FMLA leave.

The new regulations confirm that failure to provide the employee with the required written notice can be considered "interference" with the employee's FMLA rights.

The regulations also confirm that the remedy for interfering with an employee's FMLA rights may include liability "for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered."

NEW FORMS TO BE USED

As a matter of State policy, agencies are required to use the following forms developed by the U.S. DOL. Any additional information agencies need to provide to employees, such as Health Care Spending Account information for employees on FMLA leave (see Advisory Memo 2001-02), should be included in an attachment or in a cover letter.

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
ATTENDANCE AND LEAVE MANUAL
POLICY BULLETIN NO. 2009-01**

Appendix I

January 2009

Page 18 of 18

Attachments

Employee Rights and Responsibilities Under the Family and Medical Leave Act (WH Publication 1420)

Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380-E)

Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380-F)

Notice of Eligibility and Rights and Responsibilities (Form WH-381)

Designation Notice (Form WH-382)

Certification of Qualifying Exigency for Military Family Leave (Form WH-384)

Certification for Serious Injury of Illness of Covered Servicemember for Military Family Leave (Form WH-385)