

# HONIGMAN

**WEBINAR**



**Honigman's Labor and Employment Department**

*presents*

## **The New FMLA Regulations – Best Practices to Ensure FMLA Compliance**

**Friday, January 9, 2009 11:30 a.m. - 12:30 p.m. EST**

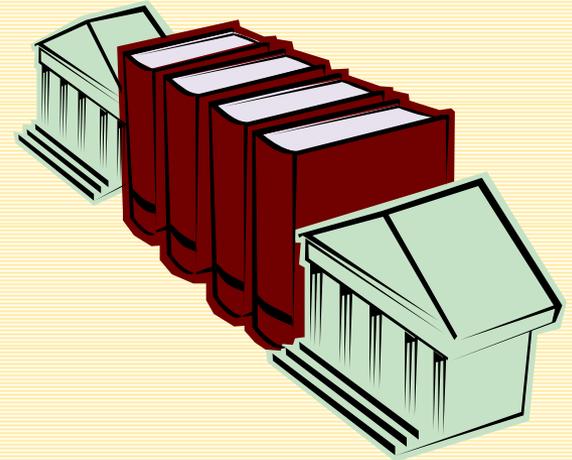
*Presenters*

**Matthew S. Disbrow**

**Trisha M. Benson**

# The Final Rule

- On November 17, 2008, the Department of Labor (“DOL”) published final rules implementing the first ever regulatory amendments to the FMLA.
- Those new regulations take effect January 16, 2009.



# Employee Eligibility

- An employee must be employed for 12 months and have worked 1,250 hours.
- The 12 months do not need to be consecutive.
  - Employment periods prior to a break of seven years do not need to be counted.
  - Exceptions to the seven-year rule.
  - An employer may elect to count employment periods beyond seven years. If the employer does so, however, it must count such time consistently for all employees.

# Employee Eligibility

- Eligibility is determined at the time FMLA leave is planned to start.
- An employee may attain FMLA eligibility while on leave.
- Cannot count non-FMLA leave towards the employee's 12-week FMLA entitlement.

# Employee Eligibility



Time spent fulfilling National Guard or Reserve military obligations counts towards FMLA eligibility.

# Serious Health Condition

The FMLA defines “serious health condition” as either an illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care, hospice, or residential medical care facility; or
2. Continuing treatment by a health care provider.



# Continuing Treatment for Incapacity

Continuing treatment includes a period of incapacity of more than three consecutive, full calendar days and subsequent treatment that involves:

1. Treatment two or more times, within 30 days of the first day of incapacity; or
2. One treatment with a health care provider, followed by a regimen of continued treatment.

“Treatment” must include an in-person visit to a health care provider within 7 days of the first day of incapacity.



# Continuing Treatment for Chronic Conditions



A chronic serious health condition is one that requires periodic visits for treatment by a health care provider at least twice a year.

# Leave for Pregnancy or Birth, Adoption or Foster Care

## The Regulations clarify several issues:

- Leave for prenatal care or before placement.
- Leave for a condition that makes an expectant mother unable to work.
- Leave to care for an expectant spouse who is incapacitated.
- Leave for the birth of a child.
- Leave for a newborn child with a serious health condition.



# Scheduling Intermittent Leave

An employee must make a “reasonable effort” to schedule planned medical treatment so as not to disrupt unduly the employer’s operations.



# Transfer of an Employee on Intermittent Leave

- Transfer must be to a position with equivalent pay and benefits.
- Transfer is permitted when intermittent leave is foreseeable for planned medical treatment.
- Transfer is not permitted when the need for intermittent leave is not foreseeable.

# Calculating Intermittent Leave

- Minimum Increments of Leave
- Mandatory Overtime
- Variable Schedules
- Counting for Holidays



# Substitution of Paid Leave

- An employer may require an employee to substitute all forms of paid leave for otherwise unpaid FMLA leave.
- An employer may apply their normal paid-leave policies and requirements, so long as the employee is provided notice of the additional requirements.

# Military Leave

## Two types

- Military Caregiver Leave
- Qualifying Exigency Leave



# Military Caregiver Leave

An employee is entitled to take up to 26 weeks of leave to care for a covered servicemember with a serious injury or illness incurred in the line of duty, while on active duty.

- Employee includes next of kin and parents of children over 18.
- Covered servicemember is defined as a current member of the Armed Forces, National Guard or Reserves who is on the temporary disability retired list, in outpatient status.
- The leave year is based on a single 12-month period, beginning the first day the employee takes leave.

# Military Caregiver Certification

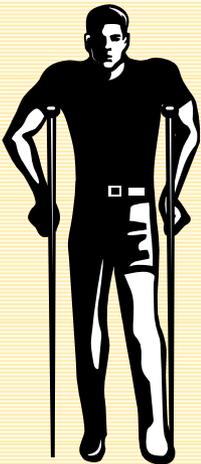


- Employers may request certification from authorized health care providers.
- The employer can require confirmation of the employee's relationship with the servicemember.

# Military Caregiver Certification

## Certification may also include:

- Details about the medical condition.
- Whether the condition occurred in the line of duty.
- When the condition occurred.
- The probable duration of the condition.
- The amount of time the servicemember will require care.



# Military Caregiver Certification Form

- Recertification is not permitted.
- Second/Third opinions are not permitted.

# Qualifying Exigency Leave

- An employee is entitled to take up to 12 weeks of leave for a “qualifying exigency” arising out of the fact that the employee’s spouse, child, or parent has been called up to active duty in support of a contingency operation.
- Does not apply to family members of military members of the regular armed forces – only the National Guard or Reserves.



# Qualifying Exigency Leave

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**

**Activities agreed upon  
by employer and  
employee**



# Qualifying Exigency Certification



- An employer can request certification for Qualifying Exigency Leave.
- An employer may only request a military member's active duty orders once.

# Qualifying Exigency Certification

## Certification may also include:

- Copies of the military member's duty orders or other military documentation.
- Facts regarding the exigency.
- Dates of the military servicemember's active-duty service.
- Date of commencement of the exigency.
- Where the leave is for a meeting with a third party, detailed information about the third party and the nature of the meeting.
- Where the request is for intermittent leave, the beginning and end dates and frequency or duration of the qualifying exigency.

# Employer Notices – Overview

## Employers Must Meet the Following Notice Requirements:

- Post an FMLA poster.
- Give individual notice (usually via employee handbooks).
- Provide eligibility notices.
- Provide written notice detailing employee rights and responsibilities.
- Provide designation of leave notices.

# Employer Notices – Postings

- FMLA posters are generally posted in break rooms, usually on bulletin boards used for other required postings.
- Even employers that are not typically covered by the FMLA may need to post the FMLA requirements.

**EMPLOYEE RIGHTS AND RESPONSIBILITIES  
UNDER THE FAMILY AND MEDICAL LEAVE ACT**

**Basic Leave Entitlement**  
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

**Military Family Leave Entitlements**  
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment stressor treatment.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy, or is in outpatient status, or is on the temporary disability retired list.

**Benefits and Protections**  
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent position with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefits that accrued prior to the start of an employee's leave.

**Eligibility Requirements**  
Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

**Definition of Serious Health Condition**  
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days (combined with at least one visit to a health care provider for one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition). Other conditions may meet the definition of continuing treatment.

**Use of Leave**  
As employees does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

**Substitution of Paid Leave for Unpaid Leave**  
Employees may choose or employers may require use of accrued paid leave while using FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's accrued paid leave policies.

**Employee Responsibilities**  
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 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 for the employer to determine if the leave may qualify for FMLA protection and the appropriate timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

**Employer Responsibilities**  
Covered employers must inform employees regarding leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave consumed against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

**Unlawful Acts by Employers**  
FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

**Enforcement**  
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2613f) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.309(a) may require additional disclosures.

 For additional information:  
1-866-4US-WAGE (1-866-487-7272) • TTY: 1-877-838-5627  
[WWW.WAGEHOUR.DOL.GOV](http://WWW.WAGEHOUR.DOL.GOV)

  
U.S. Wage and Hour Division

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division | 1088 P-1088-1001 Revised January 2010

# Employer Notices – Handbooks



- Covered employers must provide eligible employees with individual FMLA notices.
- Employers may meet this requirement by placing an FMLA policy in their employee handbooks and ensuring each employee receives a copy of such handbooks.
- Old FMLA policies will require updating.

# Employer Notices -- Eligibility

## Eligibility Notices:

- Must be given within 5 days of an FMLA request or other form of notice.
- Must state whether or not the employee is eligible for leave.
- Eligibility is determined on the date leave commences.
- If the employee is not eligible, the notice must provide a reason for ineligibility.
- An eligibility notice is required any time circumstances affecting eligibility change during a leave year.

Notice of Eligibility and Rights & Responsibilities  
(Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OSHA Control Number: 1515-2011  
Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

**(Part A - NOTICE OF ELIGIBILITY)**

TO: \_\_\_\_\_  
Employee

FROM: \_\_\_\_\_  
Employer Representative

DATE: \_\_\_\_\_

On \_\_\_\_\_, you informed us that you needed leave beginning on \_\_\_\_\_ for:

\_\_\_\_ The birth of a child, or placement of a child with you for adoption or foster care;

Your own serious health condition;

Because you are needed to care for your spouse, child, or parent due to his/her serious health condition.

\_\_\_\_ Because of a qualifying exigency arising out of the fact that your spouse, son or daughter, parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserve;

Because you are the spouse, son or daughter, parent, next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

\_\_\_\_ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities);

\_\_\_\_ Are not eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

\_\_\_\_ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately \_\_\_\_\_ months towards this requirement.

\_\_\_\_ You have not met the FMLA's 1,250-hours-worked requirement.

\_\_\_\_ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact \_\_\_\_\_ or view the FMLA poster located in \_\_\_\_\_

**(PART B - RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE)**

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by \_\_\_\_\_. (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

\_\_\_\_ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request is \_\_\_\_\_ in use enclosed.

\_\_\_\_ Sufficient documentation to establish the required relationship between you and your family member

\_\_\_\_ Other information needed: \_\_\_\_\_

Page 1 No additional information requested

CONTINUED ON NEXT PAGE

Form WH-381 Revised January 2008

# Employer Notices – Rights and Responsibilities



- A Notice of Rights and Responsibilities must be given with every eligibility notice.
- The notice must detail employee obligations and explain the consequences of the failure to meet such obligations.
- Notices must be in a language understood by the employee.

# Employer Notices – Rights and Responsibilities (Cont'd)

## Rights and Responsibilities Notices Must Include the Following:

- Notice that leave may count against the employee's annual FMLA leave entitlement.
- The applicable 12-Month period for FMLA entitlement.
- Any certification requirements.
- The employee's status as a key employee and its potential consequences.
- The employee's rights to maintain health benefits and job restoration.

# Employer Notices – Rights and Responsibilities (Cont'd)

## Rights and Responsibilities Notices Must Include the Following:

- Any consequences for the failure to provide the required certification.
- Any requirements to make premium payments to maintain health benefits.
- The employee's right or requirement to substitute paid leave for unpaid leave.
- Any consequences for the failure to make required premium payments or for the failure to return to work.

# Employer Notices – Designation

- Designation notices must be provided within 5 days of receiving enough information to determine whether the requested leave is FMLA qualifying.
- Usually such notice is provided 5 days after receiving a certification form.

## Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OMB Control Number: 1215-0183  
Expires: 12/31/2011

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.302(c).

To: \_\_\_\_\_

Date: \_\_\_\_\_

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on \_\_\_\_\_ and decided:

\_\_\_\_ Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

\_\_\_\_ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: \_\_\_\_\_

\_\_\_\_ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

### Please be advised (check if applicable):

\_\_\_\_ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

\_\_\_\_ We are requiring you to substitute or use paid leave during your FMLA leave.

\_\_\_\_ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position  is  is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

### Additional information is needed to determine if your FMLA leave request can be approved:

\_\_\_\_ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than \_\_\_\_\_ (Provide at least seven calendar days) unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

(Specify information needed to make the certification complete and sufficient)

\_\_\_\_ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

\_\_\_\_ Your FMLA Leave request is Not Approved.

\_\_\_\_ The FMLA does not apply to your leave request.

\_\_\_\_ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

### PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 - 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room 5-3502, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.

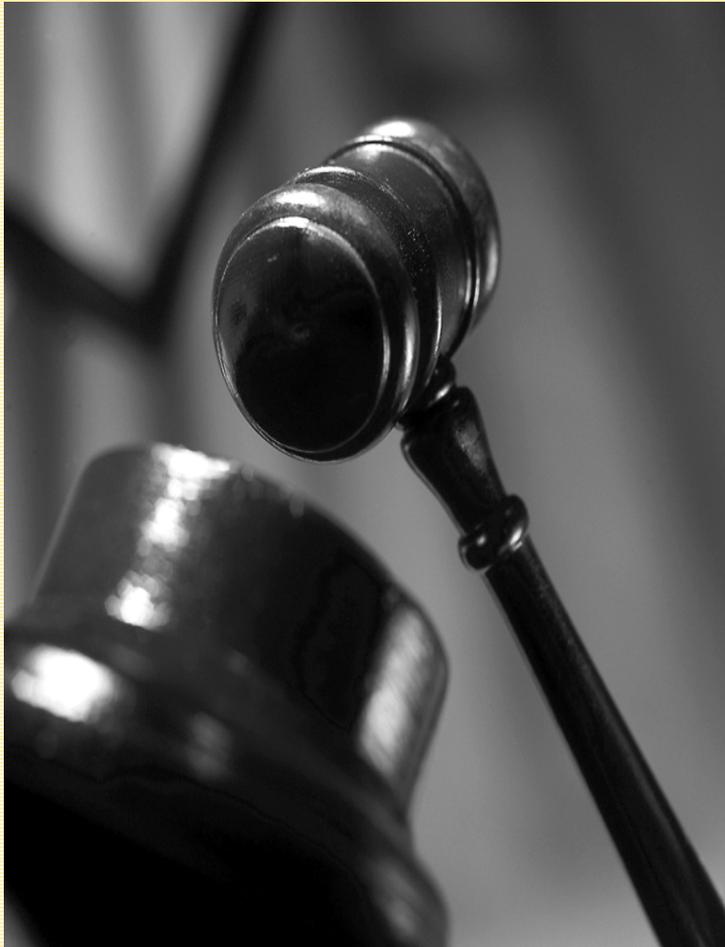
Form WH-382 January 2009

# Employer Notices – Designation

## Designation Notices Must Include:

- Whether or not the leave qualifies under the FMLA;
- The anticipated time to be counted against the employee's FMLA leave entitlement;
- Whether the employer requires substitution or use of paid leave;
- Whether the employee has requested to use paid leave; and
- Whether a Fitness-For-Duty Certificate will be required prior to job restoration.

# Employer Notices – Penalties



Penalties for failing to provide the required notices may include:

- A finding of FMLA interference;
- Payment of lost wages and benefits;
- Liquidated damages;
- Attorney's fees; and/or
- Equitable relief (*i.e.*, reinstatement, promotion, order to allow FMLA leave).

# Employee Notices – Timing

- When leave is foreseeable, employees must give 30-days advance notice.
- When leave is not foreseeable, employees must give as much notice as is practicable under the circumstances.
- One to two business days generally is possible.
- Employers can require employees to follow their normal call-in and leave procedures.
- Leave may be delayed (and in limited circumstances denied) for failure to provide proper notice.



# Employee Notices – Content



- Employees must provide sufficient information for an employer to **reasonably** determine whether FMLA may apply.
- Employees do not have to expressly reference the FMLA the first time they identify a qualifying event.
- Calling in “sick” does not generally trigger FMLA rights.
- Employees must respond to questions designed to determine whether the FMLA applies.
- Failure to respond to reasonable inquiries may be reason to deny FMLA leave.

# Medical Certification



- Employers may request medical certification if the employee was given prior written notice that such certification may be required.
- The employer has 5 business days to request certification.
- The employee has 15 calendar days to provide the requested certification.

# Complete and Sufficient Certification

- An employer must notify the employee in writing if the certification is “incomplete” or “insufficient.”



- The employee has seven calendar days to cure any deficiency.

# Medical Certification Content

- The medical professional's specialty or type of practice.
- A statement of appropriate medical facts.
- Certification that intermittent or reduced-schedule leave is medically necessary.
- Information that is sufficient to establish that the employee is unable to perform an essential function of the employee's job.
- An estimate as to the frequency and duration of intermittent or reduced-schedule leave.

# Clarification and Authentication of Medical Certifications

- An employer may now directly contact an employee's health care provider for the purpose of "authenticating" or "clarifying" a medical certification – without first obtaining the employee's permission.
- A health care provider, HR professional, leave administrator, or management official may contact the health care provider on the employer's behalf.
- The employee's direct supervisor cannot contact the health care provider.

# Second and Third Opinions

- If an employer has reason to doubt the validity of a certification, it may require a second opinion at the employer's expense.
- If the opinions of the two provider's differ, a third opinion may be obtained.
- An employee must authorize the release of relevant medical information to the physician providing second/third opinions.



# Recertification

- The 30-day rule
- The 6-month rule
- The annual rule
- The exceptions
  - The circumstances have changed significantly.
  - The employer receives information that casts doubt on the stated reasons for the leave.



# Fitness-for-Duty Recertification

- In the designation of leave notice, employers must notify employees if they will be required to submit a fitness-for-duty certification prior to reinstatement.
- The health care provider may be required to verify that the employee is able to perform the “essential functions” of the job.
- Employees on intermittent or reduced leave may be asked to provide a fitness-for-duty certification every 30 days only if reasonable safety concerns exist regarding the employee’s ability to perform his/her duties.

# Joint-Employer Coverage

- Where two or more businesses exercise some control over an employee, they may be joint employers under the FMLA.
- Joint-employer status is determined by looking at the entire relationship.
- In joint-employer relationships the primary employer is responsible for giving the required FMLA notices, for providing FMLA leave, and for the maintenance of health benefits.
- Employees jointly employed by two employers must be counted by both employers in determining coverage and employee eligibility under FMLA.

# Joint-Employer Coverage

- The regulations clarify joint-employer issues concerning Professional Employer Organizations (“PEO”).
- A PEO is a joint employer if, in conjunction with the economic realities of the situation, it has the right to hire, fire, assign, or direct and control the client’s employees.
- A PEO is not a joint employer if it only performs administrative functions.
- Even where a PEO is a joint employer, the client most commonly is the primary employer.

# What you need to do

- Revise your certification or notice forms.
- Revise your employee handbooks.
- Provide updated FMLA notices and utilize the poster provided by the DOL.

# Questions

We encourage you to submit questions.

Please click on the ***Questions*** Link at the top right of your screen to ask a question of our presenters.

# Honigman's Labor and Employment Department

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**WEBINAR**



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