

Family Medical Leave Act

Watch Out for Notice Requirements

By George Raymond

Even though it's been in effect for almost 10 years, people continue to have questions concerning various provisions of the Family and Medical Leave Act of 1993 (FMLA or the act). One provision that doesn't get "noticed" much is the provision for notices.

Employer's obligations

Ideally, every "covered employer" (basically an employer with 50 or more employees) is complying with the posting requirement. Every covered employer is required to post and keep posted in a conspicuous place where it can be seen by employees and applicants for employment (emphasis added), a notice explaining the act's provisions and providing information concerning the procedures for filing complaints of violations of the act.

Also, where an employer's workforce is comprised of a significant portion of workers not literate in English, the employer must provide a notice in a language in which the employees are literate.

In addition, if an employer has any written guidance concerning employee benefits or leave rights, such as an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included. The employer must also provide written notice to an employee concerning the employee's rights and obligations under the FMLA whenever an employee gives notice that he/she wants to take FMLA leave.

This written notice must include the following:

- That the leave will be counted against the employee's annual FMLA leave entitlement
- Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so
- The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution
- Any requirement for the employee to make any premium payments to maintain health benefits, the arrangements for making payments and the possible consequences of failure to make such payments in a timely manner
- Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment
- The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave and explaining the conditions required for such denial
- The employee's right to restoration to the same or an equivalent job position upon return from leave
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid leave if the employee fails to return to

work after taking such leave

This written notice, absent extenuating circumstances, must be provided to the employee within two business days after being advised that the employee needs to take FMLA leave. Also, the written notice must be provided to the employee no less than the first time in each six-month period that the employee gives notice of the need for FMLA leave. If the information provided by the initial notice changes with respect to a subsequent period of FMLA leave during the six-month period, then the employer must give timely notice of the changed information.

The Department of Labor takes the employer's obligations to provide these various notices seriously. The pertinent regulation provides that an employer that fails to provide written notice as required may not take adverse action against an employee for the employee's failure to comply with any provision required to be set forth in such notice.



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Employee's obligations

Generally, an employee must provide at least 30 days advance notice before FMLA leave is to begin if the need for leave is foreseeable based upon an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition.

If 30 days notice is not practicable, then notice must be given "as soon as practicable," which ordinarily would mean at least verbal notice within one or two business days after the need for leave becomes known to the employee. An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated time and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but only mention the need for leave. The employer should

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Helpline Offers Assistance

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However, if you are a member of the Indiana Chamber of Commerce, you may contact the Chamber's HR Helpline (800-824-6884) to discuss FMLA or other employment law issues.

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inquire further of the employee if it is necessary to have more information about whether the leave is a FMLA-qualifying leave.

If an employee fails to give timely notice for a foreseeable leave with no reasonable excuse for the delay, then the employer has at least two options:

- The employer may waive the employee's FMLA notice obligations; or
- The employer may delay the taking of FMLA leave until at least 30 days after the date the employee provided notice to the employer

Before an employee's leave can be delayed due to the lack of the required notice, it must be clear that the employee had actual notice of the FMLA notice requirement. This condition is satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. In addition, the need for FMLA leave must have been clearly foreseeable to the employee at least 30 days in advance of the requested leave.

Having read this article, you are now "on notice" about FMLA notices.

INFORMATION LINK

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