How to Approve or Deny a Request for FMLA Leave

Employees may have a right to unpaid, job-protected leave under the federal Family and Medical Leave Act (FMLA). Under the FMLA, covered employers must provide eligible employees with specific notices pertaining to their FMLA rights and responsibilities and designate leave as FMLA when appropriate. This guide provides the typical steps in approving or denying an FMLA leave request.

**STEP 1: PROVIDE EDUCATION AND NOTICES**

Under the FMLA, covered employers are required to post a general notice of the FMLA provisions for employees. In addition, if there are eligible employees, covered employers are required to distribute the general notice to employees. This notice is typically included in employee handbooks, procedure manuals or new-hire paperwork or is posted on the organization’s intranet. Employers should develop and facilitate training for employees and supervisors on what FMLA means; when, where and how to request FMLA leave; and the procedures for filing complaints of violations of the act.

**STEP 2: RESPOND TO A REQUEST FOR FMLA LEAVE**

An employer may learn of a request for FMLA leave when the employee submits a request or when the employer acquires knowledge that an employee needs leave that may be for an FMLA-qualifying reason. According to FMLA regulations, “An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements.”

The employer is required to respond to the employee within five business days of receiving a request or of becoming aware of the need for FMLA leave. The easiest way to comply with this response requirement is to use the FMLA model form Notice of Eligibility and Rights & Responsibilities (WH-381) (PDF).
The employer’s response must establish whether the employee is eligible for FMLA leave and notify the employee of his or her rights and responsibilities under the FMLA. An employee is eligible for FMLA leave only if the employee meets all three of the following eligibility requirements: “(1) Has been employed by the employer for at least 12 months, and (2) has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and (3) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.” An employee who works remotely (75 miles or more from the employer’s office) is covered under the FMLA if the office to which the employee reports and from which assignments are made has 50 or more employees working within 75 miles of its location. The FMLA regulations state, “An employee’s personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.”

If the employee does not meet these three criteria, the employer’s responsibility is to notify the employee of ineligibility for FMLA leave by specifying at least one criterion the employee does not meet on Form WH-381.

**STEP 3: DETERMINE CERTIFICATION NEEDS**

Employers typically respond to FMLA leave requests by providing the employee with the Notice of Eligibility and Rights & Responsibilities (Form WH-381) and a medical certification form. There is no requirement for an employer to request medical certification if an employer has enough information to know that an employee’s absence is FMLA qualifying (e.g., birth of a child, workers’ compensation injury). Employers should be consistent, though, in the policy and practice of requiring medical certifications from employees requesting FMLA leave.

The Department of Labor (DOL) has published four different model certification forms. The forms are simply tools to help employers in the administration of FMLA leave. When requiring a medical certification, employers should select the appropriate form below to include with the Notice of Eligibility and Rights & Responsibilities (Form WH-381). Employers must be allowed up to 15 calendar days to complete and return their certification form. See:

- Certification of Health Care Provider for Employee’s Serious Health Condition (Form WH-380E)
- Certification of Health Care Provider for Family Member’s Serious Health Condition (Form WH-380F)
- Certification of Qualifying Exigency for Military Family Leave (Form WH-384)
- Certification for Serious Injury or Illness of Covered Servicemember for Military Family (Form WH-385)

Employers usually hand-deliver FMLA forms to employees. If that is not possible, FMLA forms may be mailed to the employee’s address of record.

**STEP 4: DETERMINE CLARIFICATION AND AUTHENTICATION NEEDS, IF ANY**

On occasion, certification forms are returned to the employer incomplete or with insufficient information. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification
is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or nonresponsive. The employer must provide the employee seven calendar days (unless not practicable under the particular circumstances despite the employee’s diligent good-faith efforts) to correct any such deficiency, and the employer must inform the employee of the consequences for failure to provide the certification. If the employee fails to provide the certification, the employer (i.e., a health care provider, human resource professional, leave administrator or management official) may contact the employee’s health care provider directly for purposes of clarification and authentication. The employee’s direct supervisor may not, under any circumstance, contact the employee’s health care provider. If the deficiencies specified by the employer are not corrected in the resubmitted certification, the employer may deny the taking of FMLA leave.

**STEP 5: OBTAIN SECOND AND THIRD OPINIONS, IF NEEDED**

Sometimes an employer may doubt the validity of a medical certification. In this situation, an employer may be able to obtain a second medical opinion at the employer’s expense. An employer may designate the health care provider for the second opinion; however, the health care provider may not be someone who is regularly used or employed by the employer, unless health care is limited in the geographic area. Pending the outcome of the second opinion, an employee is entitled to the protections of the FMLA. If the second opinion does not entitle the employee to FMLA leave or if the employee or family member’s health care provider refuses to release relevant information to the employer’s designated health care provider on request, the FMLA leave may be denied.

Employers may request a third opinion, again at the employer’s expense, when the opinions of the employee’s and the employer’s designated health care providers differ. An employer and employee must agree on a third health care provider. If the organization fails to reach an agreement on a health care provider, the organization may be bound by the first certification. If the employee fails to reach an agreement on a health care provider, the employee may be bound by the second certification. If a health care provider is agreed on, the third opinion will be final and binding. If the third opinion does not entitle the employee to FMLA leave or if the employee or family member’s health care provider refuses to release relevant information to the employer’s designated health care provider on request, the FMLA leave may be denied.

**STEP 6: APPROVE OR DENY THE LEAVE**

The DOL published a model Designation Notice (Form WH-382) that can be used to notify the employee whether his or her FMLA request has been approved or denied. If employers have enough information on the initial request to approve or deny the FMLA leave, they may supply the Designation Notice (Form WH-382) at the same time as the Notice of Eligibility and Rights & Responsibilities (Form WH-381). If employers are requesting a medical certification form, they must allow 15 calendar days for the return of this document prior to designating the time off as FMLA leave. Even though employers may not formally designate the leave as approved under the FMLA until several weeks after it starts, in some circumstances, they still track FMLA leave from the start of the leave. After an employee returns the medical certification form, an employer has five business days to approve or deny FMLA leave. If the employee has not returned medical certification within 15 calendar days as stated on the Notice of Eligibility and Rights & Responsibilities (WH-381),
and the employer is not aware of extenuating circumstances, the employer should notify the employee in writing that the FMLA request has been denied, using the Designation Notice (Form WH-382) or a similar communication.

**STEP 7: RETROACTIVELY DESIGNATE LEAVE DUE TO A MISSED DEADLINE**

The DOL has recognized that employers might occasionally miss a deadline to respond to an employee’s FMLA request or FMLA designation. According to FMLA regulations, “If an employer does not designate leave as required by Sec. 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by Sec. 825.300 provided that the employer’s failure to timely designate leave 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 as FMLA leave.” Even if an employer does not designate FMLA in a timely manner, the employee must be provided the same leave benefits and job guarantees he or she should receive under the FMLA. It is always safest to make retroactive designations with the consent of the employee. If an employer wishes to make the designation retroactive despite the employee’s objections, the employer should do so only with the advice of an attorney.

**EXAMPLES**

In all scenarios below, the organization is an FMLA-covered employer with at least 50 employees within 75 miles of the employee’s worksite.

**EXAMPLE 1 | Scenario**
Jessica has worked for the employer for six months. She notifies her manager that she is pregnant and due in two months. In addition to the FMLA leave policy, the organization has a policy that provides up to six weeks of personal leave for employees who have worked at least 90 days.

**EXAMPLE 1 | Actions**
The employer should provide Jessica with the Notice of Eligibility and Rights & Responsibilities (Form WH-381). Here is how to complete Section 1 based on this scenario:

- [✓] You 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 8 months toward this requirement.

The employer should also include a letter stating that although Jessica is not eligible to use FMLA leave, she may be (or is) eligible for a personal leave of absence for up to six weeks per the company’s policies. The letter should describe any application or approval process for the personal leave of absence.

**EXAMPLE 2 | Scenario**
Ed is a full-time employee who has worked for the employer for six years. He calls in today because his father is in the hospital. Ed states that he will need time off to care for his dad and may not be back to work for several weeks.

**EXAMPLE 2 | Actions**
This call is enough information to treat it as a request for FMLA leave. The employer, within five business days, sends Ed the Notice of Eligibility and Rights & Responsibilities (Form WH-381) and the Certification of Health Care Provider for Family Member’s Serious Health Condition (Form WH-380F).
Ed returns the certification within 15 calendar days, confirming that he is needed to care for his dad for the next 12 weeks. Within five business days of receiving this certification, the employer sends Ed the Designation Notice (Form WH-382) to approve Ed’s leave under the FMLA.

If the employer had forgotten to send the designation notice within five business days of receiving the certification form, but Ed was able to take leave with no discipline, termination or loss of benefits, the employer could send the designation form late and still track the entire leave time against Ed’s 12 weeks of FMLA leave.

If the employer had not designated the leave as FMLA, and consequently Ed’s health benefits were dropped at the end of the month, the employer would have violated Ed’s rights under the FMLA. The employer should take immediate action to correct the FMLA violation and reinstate health benefits.

EXAMPLE 3 | Scenario
Ingrid, who meets all FMLA eligibility criteria, turns in a doctor’s note stating that she will be under her doctor’s care all of next week for surgery and follow-up treatment.

EXAMPLE 2 | Actions
This is clearly an FMLA-related and covered absence. The employer should send Ingrid the Notice of Eligibility and Rights & Responsibilities (Form WH-381) and the Designation Notice (Form WH-382) approving leave within five business days. There is no need to ask for a medical certification because the doctor’s note provided sufficient information, unless it is the employer’s practice to request a specific medical certification form.

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