



# The GSH 60-Second Memo

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## Who, What, Where, When and How? What do the New FMLA Notice Requirements Mean to Me?

By Kerrie Murphy, Esq.

As we mentioned at the outset of the year, in the article "[The New FMLA Regulations - A Priority for 2009](#)," after fifteen years, the U.S. Department of Labor revised the regulations governing the Family and Medical Leave Act (FMLA). One of the key revisions involved notice requirements. The final regulations continue to require employers to post a notice explaining the FMLA's provisions and complaint filing procedures. If the employer has an employee handbook or written policies on leave and benefits, those written materials must include the general notice information. If there is no employee handbook or written materials, the employer must give the general notice to each new employee when he or she is hired. An employer may use a copy of the Department of Labor's prototype general notice or it may draft its own, as long as the information in the Department of Labor form is included.

The regulations allow posting of the general information to be done electronically. This is only permitted, however, if the information is made accessible to all applicants and employees. If

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there are some workers without access to an employer provided computer, the information must be posted in paper form in a central location where it can be seen and read. The provision allowing electronic posting does not excuse the employer from the statutory requirement that the notice be posted in a location viewable by applicants as well. In addition, the notices may need to be posted in different languages if a significant portion of workers are not literate in English.

The new regulations separate the employers notice obligation after a leave request has been made into two separate types. First, employers must provide what is called the "eligibility notice". An employer must notify the employee of his or her eligibility to take FMLA leave within five business days. That notice must state whether the employee is eligible for FMLA leave, and if not, it must give at least one reason why not. An eligibility notice should be in writing and the employer may use the Department of Labor's prototype form. The eligibility notice addresses only whether the employee meets the statutory eligibility criteria for leave: has worked 12 months for a minimum of 1,250 hours at a worksite with 50 or more employees within a 75-mile radius. Notice of the employee's rights and responsibilities must be provided at the same time the eligibility notice is given. That notice is required to state that the leave may be designated and counted against the employee's annual FMLA entitlement and the applicable 12-month period the employer uses for determining FMLA leave entitlement. It must also state whether the employee is required to provide certification of a serious health condition.

The new regulations also now require an employer to give a designation notice. Employers have five business days after obtaining sufficient information to determine whether the requested leave is FMLA-qualifying to give employees this notice. The designation notice informs the employee whether the particular leave requested will be designated as FMLA leave. It must contain the number of hours, days or weeks that will be designated as FMLA leave. If the exact amount of leave is unknown and expected to continue for an extended period of time, the employer should provide this notice every 30 days. This notice must also include information about a fitness-for-duty certification requirement, if the employer has one, and a list of essential job duties if the employer requires the certification to address the employee's ability to perform essential job functions. This notice must be provided even if it is determined that the leave is not FMLA-qualifying and must inform the employee why the leave was not deemed FMLA-qualifying.

A failure to comply with the notice requirements may constitute "an interference with, restraint, or denial of the exercise of an employee's FMLA rights."

**\*\*\*The U.S. Department of Labor has provided sample eligibility and designation notice forms that employers can download and use. These forms are available in the Appendices of the regulations:**

<http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf>

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