

Update: On February 11, 2008, the Department of Labor released proposed changes to the FMLA regulations. The public has until **APRIL 11th** to comment on these changes. We know — and the Department of Labor knows — that the FMLA has worked well for both employers and employees for 15 years and has helped tens of millions of working families take unpaid time away from work for caregiving purposes without losing their jobs or their health insurance. The FMLA is a popular and well used law. The proposed regulations are focused on scaling back access to leave for workers when in fact the FMLA needs to be expanded to cover more workers and ultimately to provide paid family and medical leave to ensure workers who need leave can take it.

The **National Partnership** and the **FMLA Coalition** will be analyzing the proposed regulations to more fully understand their implications for workers. Below is an overview of some noteworthy proposed changes.

PART ONE: PROPOSED CHANGES THAT WILL MAKE IT MORE DIFFICULT FOR WORKERS TO ACCESS FMLA LEAVE

Proposed Change #1: Limiting the Use of Accrued Paid Leave while on FMLA Leave. Being unable to afford to take unpaid leave is the most common reason that workers who qualify for and need FMLA leave do not take it. Currently, workers are relatively free to use their earned paid leave (vacation time and personal time) while on FMLA leave so they are able to be paid while on FMLA leave. Under the proposed regulations, in order to use that earned vacation or personal time while on FMLA leave, workers will have to meet the employer's rules for using vacation or personal time. This change will make it more difficult for workers to use their accrued paid time off while on FMLA leave. Many workers will not be able to take the leave because they cannot afford to miss a paycheck.

Example: Renee's multiple sclerosis flares up, and she cannot go to work. She has earned paid vacation leave she wants to tap into to cover her leave so she doesn't have to go without pay. But her employer requires her to give 5 days notice before taking vacation leave. This makes it impossible for her to use her paid vacation time while on FMLA leave and she will have to go without pay if she uses FMLA leave.

Proposed Change #2: Increased Requirements for Workers Who Seek Leave. Under the proposed regulations, workers will have less time to provide notice and will be required to provide their employer more information than previously required when requesting leave. If the worker fails to meet these requirements, her FMLA leave can be delayed or denied.

- Currently, for foreseeable leave, (for example, when an employee finds out her planned C-section must be done earlier) the worker has 2 days to tell her employer from the time she finds out she needs the leave. Under the proposed regulations, she will have to give notice the same day or the next business day.
- Currently, for unforeseeable leave (for example if a worker's child has an asthma attack), the worker has two days to give notice after she unexpectedly had to take leave. Under the

proposed regulation, absent extraordinary circumstances, she will have to call in before the shift starts.

- Currently, the FMLA does not require a worker to give specific information when calling in for FMLA leave, especially for unforeseeable leave. Under the proposed regulations, for both foreseeable and unforeseeable leave, when a worker gives notice, she will have to tell her employer that she (or her family member) is “unable to do the functions of the job”—*and* when she is going to be gone—*and* how long it’s going to take—*and* if she’s going to visit a health care provider. Just asking for leave because she is seriously ill, or because she has a sick family member, is not enough.
- Currently, a worker cannot be denied FMLA leave because she does not follow the employer’s rules regarding which supervisor she has to call for leave and how she has to submit her leave request. Under the proposed regulations, absent unusual circumstances, when a worker gives notice, she will have to follow the employer’s particular call-in rules about who must be contacted and how they have to be contacted, or the employer can deny or delay FMLA leave.
- Meanwhile, as employee requirements are increasing, the proposed regulations will give employers more time to respond to requests for FMLA leave and more time to determine if the employee is eligible for FMLA leave. Currently, employers must respond within 2 days; the proposed regulations will provide employers 5 days to respond.

Proposed Change #3: Employers have Direct Access to Employee’s Health Care Providers.

Currently, if an employer wants to clarify information on a worker’s FMLA medical certificate or authenticate the information, the employer has to follow a two step process. First, the employer has to obtain the employee’s permission to talk to her doctor and then the employer has to have a medical professional talk directly with the worker’s doctor. Under the proposed rule, to clarify information on the medical certification, an employer can contact an employee’s health care provider directly after obtaining permission from the employee. If the employer wants to check that the doctor listed on the certificate actually saw the employee and filled out the certificate, the employer can contact the health care provider directly, without getting the employee’s permission.

When regulations were established for the FMLA fifteen year ago, a decision was made that employers should *not* directly contact worker’s health care providers because DOL determined that employers were not medically qualified to ask questions to clarify medical conditions. DOL also determined that having a medical professional involved in situations of verifying medical certification would help address the privacy and ethical concerns raised by worker advocates. This proposed rule has the potential to undermine workers’ privacy and put employers who are not trained health professionals directly in contact with an employee’s physician.

Proposed Change #4: More Frequent Medical Visits. The proposed regulations will increase the number of medical visits or frequency of visits for workers. Workers will be required to pay for these visits, either outright or through co-pays, and through lost time at work. Employees will also have to pay their health care providers to fill out additional medical certification forms.

- Under the proposed regulations, a worker who uses FMLA leave for a chronic condition will have to pay for visits to a health care provider twice a year, even if there is no change in her condition. Currently, a worker with a chronic condition is required to visit a health care professional periodically.

- The proposed regulations create a new requirement for workers to medically recertify their need for FMLA leave every six months—even if their health care provider has already indicated that the condition will last for more than six months.
- Under the proposed regulations, there is a new requirement that a worker who uses intermittent leave and works at a position with safety concerns will have to provide a medical certificate showing she is ‘fit for duty’ every 30 days. This requirement is triggered if the worker uses leave during that 30 days.

Proposed Change #5: Allowing Workers to Waive their FMLA Claims without Review. Currently, courts are split as to whether employees can waive their right to sue their employers for FMLA violations without a court or DOL reviewing that waiver. DOL’s current regulations do not allow FMLA rights to be waived. Under the proposed change, a workers’ right to bring a lawsuit alleging FMLA violations could be waived as part of a settlement or severance agreement without DOL or a court validating that the waiver is fair. Workers often lack legal representation in the severance process or simply need the money too much to argue with the employer. The Fair Labor Standards Act, the labor standard upon which the FMLA is based, requires court or DOL approval before employees waive their claims.

Proposed Change # 6: FMLA Leave And Perfect Attendance. Currently, employers cannot count FMLA leave against an employee for the purposes of determining if the worker qualifies for a perfect attendance award. Under the proposed rule, employers could count FMLA leave against a worker’s attendance record for the purposes of perfect attendance awards, which often come with financial rewards including bonuses. This will create an incentive for employees to forgo using FMLA leave and potentially establish a dynamic that punishes workers for using leave.

Proposed Change # 7: Inadequate Employee Education. One of the major reasons workers claim they do not take FMLA leave is that they do not know it is available or how to ask for it. Under the proposed regulations, DOL is focusing on a small fraction of employers to increase how frequently they have to provide information to workers about FMLA leave. This is not an adequate change to ensure workers are informed of their FMLA rights.

PART TWO: PROPOSED NON-RESTRICTIVE CHANGES

Proposed Change # 8: Light Duty Does Not Count as FMLA Leave. Under current FMLA regulations, workers who accept “light duty” assignments from their employers have the time that they work on light duty counted against their 12 weeks to be reinstated to their regular position. Some courts have also counted time on light duty against an employee’s right to use 12 weeks of FMLA leave. Under the proposed regulations, light duty will not count against an employee’s right to be reinstated in their position or against their 12 weeks of FMLA leave.

Example: Steve was injured on the job and spent three weeks on FMLA leave. He was offered a light duty position and worked at that position for 9 weeks. Under current regulations, Steve would have to return to his old position after 12 weeks or risk losing it. He also may have been considered as having no FMLA leave available if he used 3 weeks of leave and spent 9 weeks in a light duty position. Under the new proposed regulations, Steve will be counted as using 3 weeks of FMLA leave only.

Proposed Change # 9: Some Increased Information to Employees. Under the new proposed regulations, employers will have to provide some increased information about the FMLA to employees. For example:

- Employees will have to be told if they cannot use their paid leave (because they did not meet the employer's rules for that leave) that they can still use FMLA leave.
- Employees will have to be told how much FMLA leave they are being charged for when they use it.
- If the employer believes the medical certification an employee provides is insufficient, the employer must tell the employee, in writing, what must be corrected.