

**What Employers Need to Know About
Federal and State FMLA:
*Action Steps and DOL Guidance***

PULLMAN & COMLEY, LLC

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with special guest -- Heidi Lane, CT DOL

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Welcome

- Agenda
 - Overview of Basic FMLA/CTFMLA
 - Guidance from Connecticut Dept. of Labor
 - Key Distinctions Between State/Federal
 - Action Steps for Employers
- Materials available at www.ctemploymentlawblog.com
- Webinars continue the 2d Wednesday of every month

Which Employers Must Comply with the State and/or Federal Family Medical Leave Act?



- 50 or more employees within a 75-mile radius
- Includes a state, a municipality, a local or regional board of education and a private or parochial school



- 75 or more employees
- The number of employees includes only those in Connecticut
- **DOES NOT INCLUDE** the state, a municipality, a local or regional board of education and a private or parochial school

What if Both the State and Federal FMLA are Applicable and a Certain Provision is Different?

- General rule of thumb:

Whichever provides more protection to the employee controls.

Connecticut Department of Labor Guidance

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By: Heidi Lane

When are Employees Eligible for Protected Leave?

- Two components
 - Timing
 - Qualifying Event

Timing Requirements



- Has the employee worked long enough for the employer before requesting leave?
 - Has he/she worked there for at least 12 months?
 - Do the 12 months need to be consecutive?
 - How far may the employer look back to count the 12 months?
(Under both– 7 years)
 - Has he/she worked the required hours of service during the preceding 12 month period?
 - State – at least 1,000 hours
 - Federal – at least 1,250 hours

What Events Qualify for Leave?



- Under the Connecticut FMLA:
 - The birth of a son or daughter of the employee (or prior to birth if necessary);
 - the placement of a son or daughter with the employee for adoption or foster care (or prior to placement if necessary);
 - in order to care for a spouse or a son, daughter or parent of the employee, if he or she has a serious health condition;
 - because of a serious health condition of the employee; or
 - in order to serve as an organ donor.
 - CT law for covered service member

What Events Qualify for Leave?

- Under the federal FMLA
 - Similar events qualify as the Connecticut FMLA
 - But spouse does not include “same sex couple”
 - Adds military exigency leave

Common Eligibility Issues



- Is an employee's condition a serious health condition?
 - The new federal rule expands and clarifies the definition of serious health condition. It also creates time frames for doctor's visits.
 - The CT DOL has adopted these changes:

A serious health condition is an illness, injury, impairment or mental condition which involves:

- Inpatient care
- **Incapacity more than 3 full consecutive calendar days plus 2 health care provider visits (1st- within 7 days, 2nd- within 30 days)**

OR

- **Incapacity more than 3 full consecutive calendar days plus 1 health care provider visit (within 7 days) with a regimen of continuing treatment (prescription medical, physical therapy, etc.)**
- **Chronic condition- NEW – requires 2 visits for treatment per year (i.e. asthma, migraines)**
- Pregnancy
- Restorative surgery/illness which if left untreated will result in incapacity for more than 3 consecutive calendar days (i.e. chemotherapy or radiation or dialysis)
- Long term condition under the continuing supervision of a health care provider (i.e. Alzheimer's, stroke)

Other Common Eligibility Issues



- What about substance abuse?
- What about intermittent leave?
 - When is an employee entitled to it?

New Notice Requirements Employers Must Give under the Federal Rule



- New Federal Notice Requirements and Forms
 - General Notice
 - Eligibility Notice
 - Rights and Responsibility Notice
 - Designation Notice(available at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>)
- These new federal notices are different from the state FMLA notices, but they contain most of the same information.
- If just the federal act applies, you can use the new forms “as is.”
- If the state act applies as well, you can use the new federal forms, but make sure to adjust them in order to comply with the Connecticut FMLA.

A graphic of a white rectangular sign with a blue header containing the word "NOTICE" in white, bold, sans-serif capital letters. The rest of the sign is white and empty.

Changes to CT-Based Notices

- **General Notice (WH Publication 1420)**
 - The federal rule requires that all covered employers must display a poster prepared by the Department of Labor summarizing the major provisions of the FMLA and telling employees how to file a complaint.
 - Under the state law, you don't have to post this information, but you do need to provide written notice regarding your FMLA policies to employees when hiring them (in handbook).

Changes to CT-Based Notices

- **Eligibility Notice and Rights and Responsibility Notice (Form WH 381)**
 - Change the number of days for providing the form from 5 to 2.
 - Replace the 1,250 service hours requirement with a 1,000 hours requirement.
 - Replace the portions of the form which state the federal eligibility requirements to make sure they comply with the state act too. For instance, replace that the employee is entitled to 12 weeks in a 12 month period with 16 weeks in a 24 month period.
 - Remove the “key employee” exception because the state act doesn’t have it.
 - Replace the provision that states “ you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA protected leave” with “you must be reinstated to your same job with the same pay, benefits, and terms and conditions of employment on your return from FMLA protected leave, unless that job is not available, in which case your employer can return you to an equivalent position.”

Changes to CT-Based Notices

- **Designation Notice (Form WH 382)**
 - Delete the provision that requires the employee to present a fitness for duty certificate that addresses whether the employee can perform the essential functions of his/her job and attaches a list of essential functions. Replace it with a provision that requires a simple statement of the employee's ability to return to work.
 - Change the days for providing notice to the employee from 5 to 2.

Medical Certifications



- New Federal FMLA medical certification forms (WH-380E and WH-380F)
- **If just federal FMLA applies:** Use them “as is.”
- **If both state and federal FMLA apply,** you must:
 - remove “the request for diagnosis” portion of the form;
 - change the form to provide that an employer should request a medical certification within 2 days, instead of the 5 under the federal rule

Medical Certifications (cont.)



- What if the medical certification is incomplete or incorrect?
 - Under **both** the state and federal FMLAs, the employee now has 7 days to fix it.
- What can the employer do if it needs a medical certification authenticated or clarified?
 - **FMLA:** An employer may now contact an employee's doctor or other health care provider directly after giving the employee the chance to fix or clarify the form.
 - **If BOTH FMLA and CTFMLA apply:** Employer can't contact employee's doctor directly. Only a health care provider representing the employer may contact employee's doctor.

Fitness for Duty Certifications



- The federal regulations now allow employers to ask for more information in the fitness for duty certification.
- **FMLA:** An employer may now require that the doctor specifically address the employee's ability to perform the essential functions of his or her job. To do this, the employer must provide the employee with a list of essential job functions.
- If **both FMLA and CTFMLA apply:** An employer may only ask for is a “simple statement” that the employee is fit to return to work.

Equivalent Position and Pay Issue upon Return to Work – Perfect Attendance Awards

- The revised federal rule now allows employers to deny employees bonuses that are based on achievement of a specified goal, such as hours or attendance, if they have not met that goal due to an FMLA absence.

What Does This Mean?

- **If FMLA applies**, the employer may disqualify employees from these bonuses.
- **If both apply**, an employer cannot.



Action Steps to Assure Compliance

- Review and update employer policies.
- Review and update FMLA notice procedures.
- Update FMLA notices.
- Train HR managers and other managers who may be responsible for responding to leave requests under the new rules.
- Educate employees on new FMLA rules.
- Continue to monitor Connecticut FMLA and regulations to keep abreast of any changes made to conform to the new federal regulations.

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