

# New FMLA Forms Have Arrived!



July 21, 2020  
By Sue Woods

With little fanfare, the U.S. Department of Labor (DOL) published revised model notices and forms for use with administering Family and Medical Leave Act (FMLA) leave requests. On January 16, 2020, the DOL posted the revised forms on its [FMLA webpage](#).

As we reported last August, the DOL sought public feedback on proposed changes to the FMLA model forms. According to its [July 16, 2020 news release](#), the DOL utilized “substantial public input” to simplify the forms and make them easier to complete by using more check boxes. Here are the highlights of the changes.

## **New Notice of FMLA Eligibility**

The DOL’s revised model Notice of Eligibility and Rights and Responsibilities under the FMLA, [Form WH-381](#) allows for more clarity around notifying employees on how FMLA will interact with other paid leaves, maintenance of health care benefits, and other employee benefits. The form starts out with a series of check boxes to specify the reason(s) for which the employee is requesting FMLA leave. The form continues with the following sections:

- Section I – Notice of Eligibility: check boxes to inform the employee if they are or are not eligible for FMLA leave
- Section II – Additional Information Needed: check boxes to indicate whether the employee must submit a certification form or other documentation to support the need for leave
- Section III – Notice of Rights and Responsibilities: specifies the employer’s 12-month leave period, key employee status, right to substitute paid leave, maintenance of health

benefits, effect of leave on other employee benefits, return-to-work requirements, and whether the employee will be required to periodically report on status while on leave.

Employers who use the DOL's model Notice of Eligibility may be able to streamline completion of Section III of the form as those rights and responsibilities are likely to be the same for all employees (or at least, for employees in specific departments, locations, etc.).

### **New FMLA Designation Notice**

The DOL's revised Designation Notice, [Form WH-382](#), is now divided into three clearer sections. Section I of the form provides boxes for how the employer will designate the requested leave. For example, the employer can either approve and designate the leave as FMLA, designate it as not approved, or can designate it as needing additional information. Section II covers what additional information is needed to make a determination, such as correcting an incomplete or insufficient certification form or obtaining a second/third opinion. Section III applies only when FMLA leave is approved. More importantly, it specifies the amount of time that will be counted against the employee's FMLA leave entitlement, addresses substitution of other paid leaves, and whether a fitness-for-duty certification will be required prior to return-to-work.

### **New FMLA Certification Forms**

The DOL revised all the model FMLA certification forms, including those used to support qualifying military exigency leaves and military caregiver leave. The revised health care provider certification form for an employee's serious health condition, [Form WH-380-E](#), provides check boxes for the provider to indicate the necessary medical information to support the leave, followed by a section on the amount of leave needed.

Intermittent leave certifications are always a tricky issue, as employers struggle to anticipate periodic absences based on the frequency and duration specified by the employee's health care provider. The revised medical certification form attempts to make it easier for providers to indicate his or her best estimate of how many times per day/week/month an employee may experience flare-ups and for how many hours/days per episode. Interestingly, the DOL bolded the phrase "best estimate" throughout the section on the amount of leave, reinforcing that the dates and amount of leave needed are not set in stone by what is written by the provider on the certification form.

### **DOL Seeking Public Input on FMLA Regulations**

The DOL also published a request for information seeking input from the public on the FMLA regulations in order to identify areas that need additional compliance assistance. Reed Group is reviewing the request for information more fully and will determine whether to submit comments and suggestions. Interested parties may submit comments [online](#) through September 15, 2020.

### **What Employers Should Do**

Employers may use the DOL's model notices and forms or may use their own versions, so long as the required information is provided. Moreover, an employer may not reject a certification that contains all the necessary information to determine if leave is FMLA-qualifying, regardless of the form or format in which the information is provided. Accordingly, employers should review their current forms to determine whether it would be helpful to use the revised model forms.

Note: the FMLA poster that must be posted in a conspicuous place at each worksite did not change.