

DOL releases new FMLA forms — good for 3 years



The Department of Labor has released updated versions of its model FMLA certification and notice forms, carrying a new expiration date of Aug. 31, 2021.

Other than the new expiration date, the forms are identical to the previous versions, which officially expired in May 2018. After that, the DOL continued to extend the forms' expiration dates on a month-to-month basis. The Office of Management and Budget approved the new versions of the forms in August.

Employers should begin using the new forms now to certify FMLA-covered serious health conditions and notify employees of their FMLA rights.

The newly extended forms are:

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition
- WH-381 Notice of Eligibility and Rights & Responsibilities
- WH-382 Designation Notice
- WH-384 Certification of Qualifying Exigency for Military Family Leave
- WH-385 Certification for Serious Injury or Illness of Current Servicemember — for Military Family Leave
- WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

A note reading "Expires: 8/31/2021" appears in the upper right corner of each form.

Resource: Access the new versions of the FMLA forms at <https://www.fmla-forms.com/>.

**Thinking about terminating an employee who is currently out on FMLA leave?
Proceed with the greatest of care!**

If ever there was a "red lights flashing" HR moment, this is it.

Recent case: Monica developed double vision and was admitted to the hospital. There, doctors discovered that she had multiple sclerosis and recommended she complete a program of therapy designed to stabilize her condition to the point she could return to work. She informed her employer and was placed on FMLA leave.

Close to her return date, her doctors said she needed a few more weeks before she could be cleared for full-time work. Monica passed the news along to her supervisor, who told her to request additional leave. He said she should “not worry about it.”

Meanwhile, HR determined that Monica was not eligible for more FMLA leave, and informed her she would be terminated at the end of her previously approved leave if she could not return. Ultimately, she was fired.

Two months later, Monica was fully cleared to work, but the employer refused to consider reinstatement. She sued, alleging failure to reinstate and retaliation, among other claims.

The court tossed out Monica’s FMLA interference claim because she got the full 12 weeks she was entitled to. However, it said her retaliation claim could continue since it was clear the decision to terminate had been made before her FMLA leave expired. (*Losota v. Child Guidance Resource Centers*, ED PA, 2018)

Note: Monica also has an ADA claim that is still alive. Additional time off is commonly considered a reasonable accommodation for a disabling condition.

Compliance with the federal FMLA can be daunting, but many answers are found within the FMLA regulations themselves. Despite many courts’ attempts to make the FMLA into the next statute where attorneys utter the dreaded answer of “it depends,” some common mistakes can be avoided.

Resource: [**The top 10 FMLA mistakes that regularly trip up employers**](#) by Nonnie L. Shivers, an Ogletree Deakins shareholder.

Ask the Attorney with Nancy Delogu



How do we resolve this fine line between vacation leave and FMLA leave?

Reader Question: “We have an employee who has been approved for intermittent FMLA leave to care for his mother who lives in Michigan. (He has provided the medical certification.) In order for our plant to run efficiently, we only allow a limited number of employees to be on vacation at one time. Our vacation year runs from January-December and employees who do not use their vacation days lose them. This particular employee hangs on to his days (at the moment he has 14 left). He wants off the week of Thanksgiving and the days between Christmas and New Year’s, but was denied because other employees have already scheduled vacation for that time. Last year he did the same thing, and then the week before Thanksgiving he told us that he needed to use FMLA for Thanksgiving week. Can we prevent this from occurring again?” – *Gayla, Alabama*

Nancy Delogu, Esq.: The answer to your question depends upon what he is approved to use the leave for, and what he actually does with the leave. If he's needed to provide physical and emotional support for his mother, and he in fact travels to Michigan (or brings his mother to him) over the holidays to provide support, then the leave is being used appropriately.

Although the holidays are a cherished time for many families to be together, it is also true that his mother's regular caregivers may not be as available during the holiday season, making his presence more necessary. On the other hand, if he decides to use the time to visit the Caribbean, that sounds like he may be engaged in the abuse of FMLA.

I'm not sure how you administer your vacation policy, but most probably you could require employees to draw down their vacation time while on leave. That wouldn't solve your problem with end-of-year FMLA absences, but it would minimize them for individuals who don't want to miss any more work than is necessary because they aren't paid for the time off.