



# County Technical Assistance Service

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## Required Notices and Designation of Leave

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

The University of Tennessee  
County Technical Assistance Service  
226 Capitol Blvd. Suite 400  
Nashville, TN. 37219  
615-532-3555 phone  
615-532-3699 fax  
[ctas@tennessee.edu](mailto:ctas@tennessee.edu)  
[www.ctas.tennessee.edu](http://www.ctas.tennessee.edu)

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## Required Notices and Designation of Leave

**Reference Number:** CTAS-1027

Employers are required to notify employees of their rights and obligations under the FMLA as well as providing notice of their eligibility for leave, the terms and conditions of the leave, and the consequences of not meeting these terms and conditions.

## Employer Notice Requirements

**Reference Number:** CTAS-1028

Employers are required to provide four types of notice: (1) general notice, (2) eligibility notice, (3) rights and responsibilities notice, and (4) designation notice. If an employer fails to provide the required notices, the employer can be held liable for any damages the employee incurs as a result of the lack of notice. The DOL has developed three forms the employer may use for these purposes (the eligibility notice and the rights and responsibilities notice have been combined into one notice). Employers are not required to use these forms, but it is highly recommended in order to avoid mistakes in giving the required notices.<sup>[1]</sup>

**Fact Sheet #28D: Employer Notification Requirements under the Family and Medical Leave Act**

[1] 29 C.F.R. § 825.300.

## General Notice

**Reference Number:** CTAS-1029

All employers who are covered by the FMLA are required to post a notice in a conspicuous place explaining the FMLA's provisions and explaining how employees may file complaints with the DOL's Wage and Hour Division. The notice must be posted where it can be seen by employees and applicants for employment. This notice may be given electronically as long as it meets the other requirements. An employer who willfully fails to post this notice may be assessed a civil money penalty of \$169 for each offense under 29 C.F.R. 825.300(a)(1).

The employer also is required to provide the general notice to employees by including it in the employee handbook or other written materials concerning employee benefits or leave rights, if the employer has any of these, or by distributing the general notice to each new employee upon hiring. This also may be accomplished electronically.

This notice can easily be given using the DOL's prototype notice, commonly known as the "FMLA poster" (WHD publication 1420). If the prototype is not used, the notice given must contain all information that is in the prototype notice.

## Eligibility Notice

**Reference Number:** CTAS-1030

When an employee requests FMLA leave, or when the employer learns that an employee's leave may be for an FMLA-qualifying reason, the employer is required to notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. The eligibility notice must state whether the employee is eligible to take leave under the FMLA, and if not, at least one reason why not. This notice may be oral or in writing. Employers may use the DOL's combined prototype **Notice of Eligibility and Rights and Responsibilities** (Form WH-381) for this purpose.

If an employee provides notice of a subsequent need for FMLA leave during the same 12-month period and the employee's status has not changed, no further eligibility notice is required. If the employee's status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

## Rights and Responsibilities Notice

**Reference Number:** CTAS-1031

The employer must give the employee written notice detailing the specific expectations and obligations of the employee during leave, and the consequences of failure to meet those obligations. This notice must be provided each time a Notice of Eligibility is provided. If the leave already has begun, the notice must be mailed to the employee's address of record. This notice must include the following information:

1. That the leave may be designated and counted against the employee's annual FMLA leave entitlement and the applicable 12-month period;
  2. Any certifications the employer requires, such as certification of a serious health condition, serious injury or illness, or qualifying exigency, and the consequences of failure to provide these;
  3. The employee's right to substitute paid leave, whether the employer will require the employee to take paid leave, the conditions related to any substitution of paid leave, and the employee's entitlement to take unpaid leave if the employee does not meet the requirements for paid leave under the employer's paid leave policies;
  4. Any requirements for the employee to make any insurance premium payments and the consequences of failure to make these payments timely;
  5. Whether the employee is a "key employee" and explaining the potential consequence that restoration may be denied;
  6. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
  7. The employee's potential liability for payment of any health insurance premiums paid by the employer if the employee fails to return to work after the leave.
- 29 C.F.R. § 825.300.

The Notice of Rights and Responsibilities may, but is not required to, contain other information, such as whether the employer requires periodic reports of the employee's status and intent to return to work. This Notice should be accompanied by any certification forms that are required.

Employers may use the DOL's combined prototype [Notice of Eligibility and Rights and Responsibilities](#) (Form WH-381) for this purpose. While use of this prototype is not required, it is strongly recommended that employers use it to ensure that all required information is provided. This notice also may be distributed electronically.

## Designation Notice

**Reference Number:** CTAS-1032

The employer is responsible for designating leave as FMLA leave and for giving the employee notice of the designation. The notice is to be given within five business days after employer has enough information to determine whether the leave is for a FMLA-qualifying reason (e.g., after medical certification has been received), absent extenuating circumstances. Only one designation notice is required for each qualifying FMLA reason in a 12-month period. If the employer determines that the leave does not qualify, the employer must notify the employee of that determination.

If the employer will require a fitness for duty certification before the employee returns to work, this requirement should be included in the designation notice. If this requirement is clearly set out in the employee handbook or other written documents describing the employer's leave policies, written notice is not required with the designation notice but oral notice must be given.

The designation notice must be in writing. The DOL has a prototype [Designation Notice to Employee of FMLA Leave](#) (Form WH-382) that can be used for this purpose. The employer is not required to use the DOL form, but it is strongly recommended.

Designating Leave as FMLA Leave. An employee does not need to state rights expressly under the FMLA or even mention the FMLA giving notice of the need for leave, but the employee does need to state a qualifying reason for the leave. It is the employer's responsibility to designate the leave as FMLA leave. The employer's decision to designate leave as FMLA leave must be based solely on information received from the employee, or the employee's spokesperson if the employee is incapacitated, and if additional information is needed the employer should inquire further of the employee or spokesperson (including making a request for any appropriate certifications). When the employer has sufficient knowl-

edge that the leave is being taken for a FMLA-qualifying reason, the employer must designate the leave and the designation notice must be given within five business days, absent extenuating circumstances.

**Retroactive Designation.** An employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, but only if the employer's failure to designate the leave in a timely manner does not cause harm or injury to the employee. Failure to timely designate leave resulting in harm to the employee can be considered interference with, a restraint of, or denial of an employee's FMLA rights. If it causes harm, the employer could be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result, and for appropriate equitable or other relief such as employment, reinstatement, promotion, or other relief tailored to the harm suffered. For example, if an employee took leave to provide care for a parent with a serious health condition believing it would not count against his or her FMLA leave entitlement, and planned to use that FMLA leave later to provide care for a spouse recovering from surgery planned for a later date, the employee may be able to show harm as a result of the employer's failure to designate the leave timely. The employee could establish this by showing that he or she would have arranged alternative caregivers for the parent if the employer had designated the leave timely.

29 C.F.R. §§ 825.300 and 825.301.

## Employee Notice Requirements

**Reference Number:** CTAS-1033

The FMLA rules for employee notices<sup>[1]</sup> are not as stringent as those for the employer, but employees are required to give their employers reasonable notices related to their leave. When substituting paid leave, employees may be required to follow the employer's usual and customary notice and procedural policies for that type of paid leave.

When the need for leave is foreseeable, the employee must provide at least 30 days advance notice before the FMLA leave is to begin. If 30 days notice is not practicable, notice must be given as soon as practicable (meaning both possible and practical based on the individual circumstances). If the employee fails to give the required 30 day notice, upon request by the employer the employee must explain why giving this notice was not practicable.

The notice may be verbal. It must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.

The first time an employee requests leave for an FMLA-qualifying reason the employee need not assert rights under the FMLA or even mention the FMLA. Subsequent requests for leave for the same reason must specifically reference the qualifying reason or the need for FMLA leave.

If the employee fails to give notice as required by the FMLA without reasonable excuse the employee's leave may be delayed, but only if it is clear that the employee had actual notice of the FMLA notice requirements. This condition may be satisfied by proper posting of the general notice and distribution of the general notice either in an employee handbook or other written distribution.<sup>[2]</sup>

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<sup>[1]</sup> 29 C.F.R. § 825.302.

<sup>[2]</sup> 29 C.F.R. § 825.304.

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