

The Designation Notice must advise the employee of how much leave time she/he is eligible for. If a fitness for duty certification is required before an employee can return to work, that requirement must be spelled out in advance and the company must provide a list of essential job duties so that the treating doctor will know what the job entails.

Employers can require a fitness for duty certificate prior to the employee's return. The employee is required to cooperate in this process. The new regulations allow the employer to seek certification regarding the employee's ability to perform the essential job functions, provided the employer first gives the employee a list of essential job functions when it provides the employee with the Designation Notice and notice that the certification must address the ability to perform requirements.

This Designation Notice regarding the amount of time available for leave may need to be updated every 30 days if the length of the leave is either unknown when it began or is to continue for an extended period. If there is adequate information, the Eligibility Notice and Designation Notice may be combined and provided within 5 business days.

Also, the new regulations remove a prior prohibition on the use of accrued paid leave when an employee is out under FMLA due to a Workers' Compensation injury. Previously, even the use of a limited amount of accrued paid sick time in such cases, simply to permit the employee to make up the difference between Workers' Compensation benefits and the full paycheck he/she normally received, meant that the employer could not count that period of absence as FMLA leave time. Many employers failed to understand this nuance in the old regulation's substitution of paid leave rules. Fortunately the DOL will now allow such supplemental use of increments of accrued paid leave during a Workers' Compensation absence, so long as the employer and the employee mutually agree to this arrangement. If they do agree, then FMLA and Workers' Compensation can continue to run concurrently and the employer can apply this form of substitution of paid leave without concern.