require that the fitness-for-duty certification address the employee’s ability to perform the essential functions of the employee’s position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee’s position. See §295.312. If the employer handbook or other written documents (if any) describing the employer’s leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee’s first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee’s FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee’s FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee’s FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee’s FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee’s FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following pay day (unless the pay day is less than one week after the oral notice, in which case the notice must be no later than the subsequent pay day). Such written notice may be in any form, including a notation on the employee’s pay stub.

(e) Consequences of failing to provide notice. Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee’s FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See §295.400(c).

§ 825.301 Designation of FMLA leave.

(a) Employer responsibilities. The employer’s decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee’s spokesperson (e.g., if the employee is incapacitated, the employee’s spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee’s use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in §825.300(d).

(b) Employee responsibilities. An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her
obligation to provide notice, though the employee would need to state a
qualifying reason for the needed leave and otherwise satisfy the notice re-
quirements set forth in §825.302 or §825.303 depending on whether the need
for leave is foreseeable or unforesee-
able. An employee giving notice of the
need for FMLA leave must explain the
reasons for the needed leave so as to
allow the employer to determine
whether the leave qualifies under the
Act. If the employee fails to explain
the reasons, leave may be denied. In
many cases, in explaining the reasons
for a request to use leave, especially
when the need for the leave was unex-
pected or unforeseen, an employee will
provide sufficient information for the
employer to designate the leave as
FMLA leave. An employee using ac-
crued paid leave may in some cases not
spontaneously explain the reasons or
their plans for using their accrued
leave. However, if an employee request-
ing to use paid leave for a FMLA-quali-
fying reason does not explain the rea-
son for the leave and the employer de-
nies the employee’s request, the em-
ployee will need to provide sufficient
information to establish a FMLA-quali-
fying reason for the needed leave so
that the employer is aware that the
leave may not be denied and may des-
ignate that the paid leave be appro-
priately counted against (substituted for)
the employee’s FMLA leave enti-
tlement. Similarly, an employee using
accrued paid vacation leave who seeks
an extension of unpaid leave for a
FMLA-qualifying reason will need to
state the reason. If this is due to an
event which occurred during the period
of paid leave, the employer may count
the leave used after the FMLA-quali-
fying reason against the employee’s
FMLA leave entitlement.
(c) Disputes. If there is a dispute be-
tween an employer and an employee as
to whether leave qualifies as FMLA
leave, it should be resolved through
discussions between the employee and
the employer. Such discussions and the
decision must be documented.
(d) Retroactive designation. If an em-
ployer does not designate leave as re-
quired by §825.300, the employer may
retroactively designate leave as FMLA
leave with appropriate notice to the
employee as required by §825.300 pro-
vided that the employer’s failure to
timely designate leave does not cause
harm or injury to the employee. In all
cases where leave would qualify for
FMLA protections, an employer and an
employee can mutually agree that
leave be retroactively designated as
FMLA leave.
(e) Remedies. If an employer’s failure
to timely designate leave in accord-
ance with §825.300 causes the employee
to suffer harm, it may constitute an in-
terference with, restraint of, or denial
of the exercise of an employee’s FMLA
rights. An employer may be liable for
compensation and benefits lost by rea-
son of the violation, for other actual
monetary losses sustained as a direct
result of the violation, and for appro-
priate equitable or other relief, includ-
ing employment, reinstatement, pro-
motion, or any other relief tailored to
the harm suffered. See §825.400(c). For
example, if an employer that was put
on notice that an employee needed
FMLA leave failed to designate the
leave properly, but the employee’s own
serious health condition prevented him
or her from returning to work during
that time period regardless of the des-
ignation, an employee may not be able
to show that the employee suffered
harm as a result of the employer’s ac-
tions. However, if an employee took
leave to provide care for a son or
daughter with a serious health condi-
tion believing it would not count to-
ward his or her FMLA entitlement, and
the employee planned to later use that
FMLA leave to provide care for a
spouse who would need assistance when
recovering from surgery planned for a
later date, the employee may be able to
show that harm has occurred as a re-
sult of the employer’s failure to des-
ignate properly. The employee might
establish this by showing that he or
she would have arranged for an alter-
native caregiver for the seriously ill
son or daughter if the leave had been
designated timely.
§825.302 Employee notice require-
ments for foreseeable FMLA leave.
(a) Timing of notice. An employee
must provide the employer at least 30
days advance notice before FMLA
leave is to begin if the need for the

851