

Family and Medical Leave Act Summary of Final Regulations

On November 17, 2008, the Department of Labor (DOL) published its final rule implementing amendments to the Family Medical Leave Act (FMLA) regulations. The amendments are intended to improve communication between the employee, employer, and healthcare providers, which ultimately should result in the law operating more smoothly and provide clarification for employees and employers regarding their rights and responsibilities under FMLA. The Final Regulations become effective on January 16, 2009.

Some of the major changes to the FMLA regulations are summarized below.

New Required Notices: Employers have always been required to post general information about FMLA. The new regulations require a new poster identifying many of the areas described below. The DOL has updated the text of its sample general notice of rights which is attached to this update. The poster should be posted on or before January 16, 2009, and employers should update their leave policy to reflect, at a minimum, the information contained in the poster.

Military Caregiver Leave: Expands FMLA leave for family members of covered service members with a serious injury or illness sustained in the line of duty while on active duty to 26 work weeks in a 12-month period. The 12-month period is measured forward from the date an employee's leave commences, even if the employer uses a different 12-month period for other types of FMLA leave. The employee is eligible for another 26 weeks of leave during subsequent 12-month periods to care for a different covered service member or to care for the same service member if he/she incurs a subsequent injury or illness. During any 12-month period, an employee is limited to a total of 26 weeks for all qualifying reasons under FMLA and military leave. This revision also extends FMLA coverage to the nearest blood relative (i.e., next of kin). These family members are not typically covered under FMLA.

Qualifying Exigency Leave for Families of Members of the National Guard and Reserves: Allows families of members of the National Guard and Reserve to take up to 12 work weeks to manage their affairs for specific qualifying exigency while the member is on active duty. The DOL has identified "qualified exigencies" as: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities where the employer and employee agree to the leave.

Serious Health Condition: While the final rule retains the six individual definitions of serious health condition, it adds guidance on three regulatory matters. The final rule indicates that (1) if an employee is taking leave for more than three consecutive calendar days of incapacity plus 2 visits to a healthcare provider, these 2 visits must occur within 30 days of the period of incapacity, with the first visit occurring within 7 days of the first day of incapacity; (2) a serious health condition can also be more than 3 consecutive, full-calendar days of incapacity plus a regimen of continuing treatment with the first visit to a

health care provider taking place within 7 days of the first day of incapacity; and (3) defines “periodic visits to a healthcare provider” for chronic serious health conditions as at least 2 visits to a healthcare provider per year.

Employee Notice Requirements: Absent unusual circumstances, the final rule requires employees requesting foreseeable FMLA leave to provide 30 days’ notice. If 30 days is not possible, if the leave is not foreseeable, or in the case of exigency leave, then as “soon as practicable.” If an employee fails to timely notify employer, then the employer can count any absences during this time as non-FMLA absence.

Employer Notice Requirements: Employers have 5 rather than 2 business days to provide an eligibility notice to an employee seeking leave and request for medical certification. The rule expands the notice requirements to include: (1) general notice about FMLA; (2) eligibility notice; (3) rights and responsibilities notice; and (4) a designation notice.

Medical Certification: The employee must submit a complete medical certification within 15 days, and the employer is not required to notify employee that certification has not been received. If an incomplete or insufficient certification is submitted, the employer must give the employee 7 days to cure and the employer must identify information outstanding. If employee does not cure within 7 days, leave can be denied. The final rule allows employers to contact the employee’s medical provider for clarification and authentication of the medical certification only. However, the employer must first allow the employee to resolve any deficiencies related to the certification prior to contacting the healthcare provider. An employer is prohibited from requesting any additional information outside what is encompassed in the certification form.

To protect the employee’s privacy, the final rule requires that the employer’s representative contacting the healthcare provider must be a healthcare provider, a human resource professional, a leave administrator, or a member of management, but never the employee’s direct supervisor. The final rule also allows an employee to prohibit his healthcare provider from communicating with his employer. However, if an unclear certification is not resolved, the employer may deny FMLA leave.

Fitness-For-Duty Certifications: The final rule makes two changes to the fitness-for-duty certification process. First, an employer may provide the employee with a list of the essential functions of the job and require an employee to obtain a certification from his/her medical provider stating whether the employee can perform the identified essential functions of the job. Second, if safety is a reasonable concern and the employee has taken intermittent leave, the employer can require a fitness-for-duty certification before the employee returns from leave.

Light Duty: The final rule indicates that the time spent on “light duty” by an employee is not counted as FMLA leave and the employee’s right to restoration is tolled while the employee is on “light duty.” Further, if the employee voluntarily agrees to light duty, the employee is not on FMLA leave.

Bonuses and Awards: The final rule allows an employer to deny an employee a bonus, award, or other payment when an employee has not met the goal due to FMLA leave as long as the employer treats employees taking non-FMLA leave the same.

Substitution of Paid Leave: The final rule states that all forms of paid leave offered by the employer will be treated the same. The employee must comply with any of the terms and conditions associated with taking such leave as set forth in the employer’s policy. An employer must advise the employee of the terms and conditions. An employer can waive any procedural requirements for taking paid leave. Even if the employee is not entitled to paid leave due to a procedural requirement, the employee can still take unpaid FMLA leave.

Waiver of Rights: The final rule allows employees to voluntarily settle or release their FMLA claims based on past conduct without court or DOL approval. Waivers of future FMLA claims are prohibited unless approved by a court or DOL.

Joint Employment: The final rule states that the “determination of whether a PEO is a joint employer also turns on the economic realities or the situation and must be based upon all the facts and circumstances.” The final rule also clarifies that a PEO is not a joint employer if it simply performs administrative functions (payroll, benefits, and updating employment policies). The final rule also states that, unlike traditional placement agencies, the client employer with a PEO would typically be the primary employer in a joint employment relationship. Under the “50 employees within 75 miles” requirement, an employee’s worksite is the place where the employee reports to work; if none, then from which the employee’s work is assigned to him/her. In joint employment circumstances, the employee’s worksite is the primary employer’s office. There is an exception when an employee has physically worked for at least one year at a facility of the secondary employer, then the secondary employer’s office is the employee’s work site.

IF YOU HAVE ANY QUESTIONS REGARDING THE NEW REGULATIONS, PLEASE CONTACT ONE OF OUR LABOR AND EMPLOYMENT ATTORNEYS:

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