

PERSPECTIVES

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Highlights of the Final Revised FMLA Regulations

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On January 16, 2009, the Department of Labor's ("DOL") final revised FMLA regulations, which were published on November 17, 2008, become effective. A review of this summary will help employers determine what policy and procedural changes need to be made to remain in compliance with the FMLA and its implementing regulations. Highlights of the key changes being made by the final regulations are discussed below.

Effective Date

The new regulations take effect on January 16, 2009, which is sixty (60) days from the date they were published by the DOL.

Military Family Leave

In January of 2008, President Bush signed the National Defense Authorization Act into law, which amended the FMLA to add two types of military family related leave to FMLA qualifying leave. The DOL's final regulations provide guidance to employers on the complexities of the new military family leave as summarized in the following paragraphs.

- **Military Caregiver Leave.** Eligible employees who are family members of covered service members are entitled to use **up to 26 workweeks of leave in a "single twelve-month period"** to care for a covered service member who: (1) is on the temporary disability retired list; (2) has a serious injury or illness "incurred in the line of duty on active duty" for which the service member is undergoing medical treatment, recuperation or therapy; or (3) is otherwise on outpatient status. The regulation states that for purposes of calculating leave entitlement the single 12-month period "begins on the first day the eligible employee takes FMLA leave to care for a covered service member," regardless of the method used by the employer to determine the employee's twelve workweeks of leave entitlement for other FMLA-qualifying reasons. Employers need to remember that military caregiver leave is unique from other types of FMLA leave both in terms of the length of the leave and in terms of calculating the 12 month period during which leave can be taken.
- **Qualifying Exigency Leave.** The new regulations outline the parameters of qualifying exigency leave. The regulations specify that the normal twelve workweeks of FMLA job-protected leave shall be provided to eligible employees with a covered military member serving in the National Guard or Reserves to use for any "qualifying exigency" arising out of the fact that such member is on active duty or called to active duty status. The term "qualifying exigencies" is defined to include the following eight categories (with various limitations and conditions): (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" not addressed in the other categories, **provided** that both the employer and the employee agree to the timing and duration of such leave.

General Changes to the FMLA Regulations

In addition to providing guidance on the new military family member leave, the final regulations also update the general FMLA regulations which have been in effect for 15 years. Highlights of those changes are discussed below.

Eligible Employees. To be an eligible employee, the employee still must: (1) have been employed by the covered employer for at least twelve months, (2) have worked at least 1,250 hours during the twelve-month period immediately preceding the start of leave, and (3) be employed at a work site that has fifty or more employees within a seventy-five mile radius. The new regulations provide that if an employee has a break in service that lasts seven years or less, the employee's previous employment must be counted when determining if the employee has been employed for at least twelve months. As always, there is an exception to every rule. Therefore previous employment prior to a break in service of *more* than seven years also must be counted when the break is caused by the fulfillment of National Guard or Reserve military service obligations or "a written agreement, including a collective bargaining agreement, exists governing the employer's intent to re-hire the employee after the break."

Serious Health Condition. The six counterparts of the definition of a "serious health condition" continue with no significant revisions. The DOL, however, has provided clarification with respect to three of the counterparts. With respect to conditions involving more than three consecutive, full calendar days of incapacity plus two or more treatment visits to a healthcare provider, the regulations now require that the two visits must occur in-person within 30 days of the first day of incapacity (unless extenuating circumstances exist), and the first in-person visit must take place within seven days of the start of incapacity. Similarly, with respect to serious health conditions involving three consecutive, full calendar days of incapacity plus a regimen of continuing treatment, the first visit to the healthcare provider must occur in-person within seven days of the first day of incapacity. Additionally, "chronic conditions" must involve at least two visits for treatment by a healthcare provider annually.

Employee Notice Obligations

- **Foreseeable Leave.** Employees are still expected to provide employers with at least thirty (30) days advance notice before FMLA is to begin in the event of foreseeable leave. If such notice is not practicable (e.g., because of lack of knowledge of approximately when leave will begin), notice must be given "as soon as practicable." The DOL has clarified that it generally should be "practicable" for the employee to provide notice "either the same day or the next business day" of when the employee becomes aware of the need for the leave.
- **Unforeseeable Leave.** In the event of unforeseeable leave, employees must provide notice to the employer "as soon as practicable." The new regulations state that "it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave" (e.g., calling in to a specified number or contact individual). Employers should make sure that they clearly delineate in writing the specific call-in procedures that any employee should follow to report an absence.
- **Content of Employee Notice.** Pursuant to the revised regulations, for foreseeable leave, employees must provide sufficient information for an employer to be "aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." As to unforeseeable leave, employees are required to provide "sufficient information for an employer to reasonably determine whether the FMLA will apply to the leave request." However, employees, when seeking leave for the first time for a FMLA-qualifying reason, are not required to expressly assert or reference their rights under the FMLA. The regulations now specify that employees seeking leave due to a qualifying reason for which the employer has granted FMLA leave to the employee in the past "must specifically reference either the qualifying reason for leave or the need for FMLA leave." The new regulations further clarify that "calling in 'sick' without providing more information" is not sufficient notice to trigger an employer's obligations under the FMLA.

Employer Notice Obligations

The DOL has reorganized the four types of FMLA employer notice requirements into one section of the regulations. Furthermore, the DOL has provided employers with prototypes of each type of notice to be used or incorporated into the employer's FMLA procedures.

- **General Notice.** Covered employers are still required to post a notice explaining the FMLA's provisions and providing information concerning procedures for filing complaints with the DOL. Recognizing the realities of the modern employment environment, the new regulations note that electronic posting is sufficient, provided employees and applicants can access the electronic materials. Thus, an employer could post the FMLA information on a company website or intranet as long as its employees and job applicants could access the information. The new regulations do clarify that the general notice also must be supplied to employees in employee handbooks or other written guidance if the company has such materials or "by distributing a copy of the general notice to each new employee upon hiring."
- **Eligibility Notice.** Under the new regulations, when an employee requests FMLA leave or the employer acquires knowledge that an employee's absence may be for an FMLA-qualifying reason, "the employer must notify the employee of the employee's eligibility to take FMLA leave within five (5) business days, absent extenuating circumstances." If the employee is ineligible for FMLA leave, the employer's notice must state at least one reason why the employee is ineligible. Once an employee's eligibility is verified, "all FMLA absences for the same qualifying reason are considered a single leave," and the employee's eligibility for that reason continues and "does not change during the applicable twelve-month period."
- **Rights and Responsibilities Notice.** In addition to the eligibility notice, employers also must provide written notice to an employee "each time the eligibility notice is provided" regarding specific FMLA expectations and obligations of the employee, as well as the consequences if the employee does not comply with those obligations. This notice may be accompanied by the applicable FMLA medical certification form, if the employer is requiring a completed medical certificate in support of the FMLA leave request.
- **Designation Notice.** Employers are also required to provide notice to employees "designating leave as FMLA-qualifying." Such notice must be provided within five (5) business days after an employer "has enough information to determine whether leave is being taken for a FMLA-qualifying reason," absent extenuating circumstances. Thus, unlike the current regulations that require "provisional" FMLA leave designations in some circumstances, employers may now delay final leave designation until a completed and adequate medical certification form has been returned.

Leave Entitlement

- **Minimum Leave Increment and Physical Impossibility Rule.** Unpredictable intermittent absences cause considerable problems for employers and it was hoped that the new regulations would give employers relief from this troubling issue. Unfortunately, that did not happen and employers are left to struggle with intermittent FMLA leave problems. The new regulations do make a small change to the language involving the counting of intermittent or reduced schedule leave, such that an employer must account for leave "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave," provided it is not greater than one hour. By eliminating the language "shortest period of time that the employer's payroll system uses," employers can calculate intermittent and reduced schedule leave on the same basis they use to calculate other employee absences (i.e., regardless of lesser potential increments that a payroll system might be able to count). If it is "physically impossible" for an employee on intermittent or reduced schedule leave to start or end work mid-way through a shift, the entire shift may be designated and counted as FMLA leave. This exception is being interpreted narrowly by the DOL. Examples of the physical impossibility rule include examples "such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed clean room."
- **Compliance With Employer Policy.** An employer may require an employee to comply with the employers "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances" (e.g., leave requests directed to a particular individual). Again, employers should provide clear written guidance to employees about the company's specific call-in and leave request procedures.
- **Use of Paid Leave.** Prior to the publication of the revised regulations, the FMLA regulations applied different rules to the concurrent use of paid vacation and personal leave versus sick leave. However, according to the DOL, under the new regulations, "all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic paid time off)."
- **Light Duty Work.** The new regulations made significant changes concerning the treatment of employees placed on light duty work. As before, if a healthcare provider treating an employee for a workers' compensation injury certifies that the employee is able to return to light duty work but is unable to return to the same or an equivalent position that the employee left, the employee may decline the employer's light duty offer and continue on FMLA leave until the employee has used up all available FMLA leave. The new regulations, however, make it clear that if an employee accepts such light duty work, the time on light duty does *not* count against an employee's FMLA leave entitlement. Additionally, an employee's right to job restoration to his or her original position is "effectively held in abeyance" during the period of time that the employee works in the light duty position. However, the right to job restoration in such circumstances "ceases at the end of the applicable twelve-month FMLA leave year" used by the employer to calculate leave. In essence, "if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave" but may have FMLA job restoration protection during the entire time the employee is on light duty in that 12 month period.
- **Counting Overtime as FMLA Leave.** In response to employer concerns, if an employee would normally be required to work overtime but is unable to do so because of FMLA-qualifying reasons, "the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement." Note that this only applies to "mandatory" overtime and not to "voluntary" overtime.

Medical Certification

- **Timing.** Employers now have five (versus two) business days after the employee gives notice of the need for leave (or the date that leave begins in the event of unforeseeable leave) to request that an employee furnish medical certification.
- **Separate Employee and Family Member Forms.** Under the new regulations, the DOL has created two separate medical certification forms – one for an employee's own serious health condition, and one for that of a family member.
- **Incomplete / Vague Certification.** If an employer receives an incomplete or "vague, ambiguous or non-responsive" medical certification, the employer must provide the employee seven (7) calendar days to cure any deficiency (unless "not practicable under the particular circumstances despite the employee's diligent good faith efforts"). If the deficiencies identified by the employer are not cured by the employee within the time frame required, the employer may deny the FMLA leave. The DOL has clarified that a certification that is never returned is not considered incomplete or insufficient, but "constitutes a failure to provide certification."
- **Healthcare Provider Follow-Up.** A major change provided by the revised regulations allows an employer representative to contact the employee's healthcare provider *directly* for purposes of clarification and authentication of medical certification forms after giving an employee the opportunity to cure any deficiencies. Such contact must be made through a healthcare provider, a human resources professional, a leave administrator or some other management official of the employer. Under no circumstances may the contact to the healthcare provider be made by the employee's direct supervisor.
- **Extended / Chronic Conditions.** Where a serious health condition (for an employee's own condition or that of a family member) lasts beyond a single leave year, employers may now require employees to provide a new medical certification each new leave year.
- **ADA / Workers' Compensation Data.** The new regulations confirm that employers may consider information provided by employees and their healthcare providers in connection with Americans With Disabilities Act (ADA) disability or reasonable accommo-

dation requests and/or workers' compensation claims. Such medical information also may be used to evaluate medical certifications and determine an employee's entitlement to FMLA-qualifying leave.

- ***Fitness for Duty Certification / Essential Job Functions.*** The new regulations specifically allow employers to "require that the [fitness for duty] certifications specifically address the employee's ability to perform the essential functions of the employee's job."
- ***Fitness for Duty Certification / Job Safety Exception.*** The new regulations continue the current prohibition against employers requesting fitness to return to duty certificates for employees on intermittent or reduced leave schedules. Employers, however, may request a fitness for duty certificate for such absences up to once every 30 days "if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave."

Job Restoration / Incentive Awards. The new regulations still provide that with some limited exceptions, employees have a right to job restoration to the same or an equivalent position upon return from authorized FMLA leave. This job restoration right includes the right to the same or equivalent pay, benefits and working conditions. However, the new regulations provide that if an employer award or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance which the employee has not met due to FMLA leave, "then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave."

Liability Waivers. Contrary to a previous opinion from the 4th Circuit Court of Appeals, the new regulations clarify that employees may voluntarily settle or release any actual or potential FMLA claims against an employer without the requirement of court or DOL approval. It should be noted, however, that prospective waivers of FMLA rights continue to be prohibited.

Employer Next Steps

While the new regulations provide additional guidance on specific issues under the FMLA, questions about proper interpretation of the FMLA will continue to arise for employers. To prepare to implement the new regulations as FMLA issues develop in your company, employers should:

- Not panic.
- Review and familiarize themselves with the new regulations.
- Evaluate their current FMLA policies and practices in light of the new regulations and revise their current policies, notices and forms accordingly to comply with the new FMLA requirements.
- Consult with the company's employment law legal counsel about any questions or assistance that the company may need to remain in compliance under the revised FMLA regulations.
- Create a list of questions that you anticipate employees will ask about the new FMLA regulations and related changes that you may make to your policies so that you can prepare a list of frequently asked questions and answers to distribute to supervisors and possibly employees in the company.
- Evaluate any FMLA situations that you have currently pending at your company so you can determine whether any modifications need to be implemented.
- Schedule training for human resource professionals, front-line managers and other personnel involved in day-to-day implementation of the FMLA so that they understand the changes wrought by the new regulations.

If you have questions about the new regulations, or need assistance in updating your current FMLA policies and procedures or training your supervisors and employees on the requirements of the new FMLA regulations, please contact a member of the Dickinson Law Firm employment law group.

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