

Employment Alert: Department of Labor Publishes New Rules on FMLA Leave

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On November 17, 2008, the Department of Labor published a Final Rule (the "Rule") on family and medical leave. The Rule is primarily in response to the National Defense Authorization Act, which amended the Family and Medical Leave Act (FMLA) and provided qualified leave opportunities for family members of military servicemembers. However, the Rule also makes several other important changes that will impact covered businesses nationwide. These changes will take effect on **January 16, 2009**.

Military Family Leave

Employers must provide FMLA leave to family members of covered military servicemembers. An employee may take up to 26 weeks of FMLA leave in a 12-month period to care for a family member who is a servicemember with a serious illness or injury incurred in the line of duty while on active duty. This leave allowance is substantially more generous than the 12 weeks available under the FMLA for other purposes.

An employee may also take 12 weeks of FMLA leave in a 12-month period to deal with an exigency that results from a member of the employee's family, who is a National Guard or Reserve servicemember, being on or called to active duty. The Rule defines "exigency" by referring to broad categories of events, such as short-notice deployment, military and related events, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

Employees Required to Follow Employer Notice Procedures to Take FMLA Leave

Employees who wish to take FMLA leave must follow the employer's usual and customary notice requirements for leave, unless the employee faces unusual or emergency circumstances. This is a major revision from the previous regulations, which allowed an employee to notify an employer of FMLA leave up to two days after the employee was absent for a qualifying reason, even if the employee could have given notice earlier.

"Light Duty" No Longer Counts Against FMLA Leave

An employee who returns to work on "light duty" is no longer using FMLA leave under the new Rule. Further, the employee's right to job restoration continues while the employee performs a light duty assignment or until the end of the applicable 12-month FMLA leave year (whichever is first).

Medical and Fitness-for-Duty Certification Processes Clarified

The Rule allows an employer to request that an employee have his or her health care provider recertify the employee's qualifications for leave every 30 days, unless the duration of the condition is listed in the original certification. Further, for conditions that are described as "lifetime" or of "unknown" duration, an employer may request recertification of the condition every six months in conjunction with an absence.

In addition, an employer may require an employee to have his or her healthcare provider certify that the employee can perform the essential functions of the job before returning to work from FMLA leave. Further, where a workplace safety issue may reasonably exist, an employer may ask an employee's healthcare provider to certify the employee's fitness for duty each time he or she returns to the workplace, even when the employee takes intermittent leave.

Concurrent Leave Rules Simplified

FMLA leave is unpaid. An employee may, however, elect to take paid leave available under other leave policies concurrently with FMLA leave in order to be paid for the time off. Prior Department of Labor regulations applied different procedural requirements for concurrent leave depending on the type of paid leave the employee wished to take. The new Rule clarifies that employees taking unpaid FMLA leave concurrently with another type of paid leave must qualify for the paid leave under the same procedures that all other employees follow when taking paid leave under the applicable policy.

Employer Notice Requirements Strengthened and Simplified

Employers are now required to provide a general notice about FMLA leave (both on a poster and in a handbook or through other written guidance), an eligibility notice, a rights and responsibilities notice, and a designation notice. These requirements are centralized in one section of the new Rule, where previously they were found across multiple regulations. Additionally, employers now have five days in which to provide notice to employees, rather than the two days available under prior regulations.

Clarity Added about What Constitutes a Serious Health Condition

The Rule provides further definition to the term "serious health condition." For example, the prior regulations provided that a serious health condition existed if an employee made "periodic visits" for a chronic condition. The new Rule specifies that an employee must make at least two visits to a health care provider per year to meet the "periodic visits" condition.

FMLA Leave May Disqualify an Employee from a Perfect-Attendance Award

An employer may disqualify an employee absent because of FMLA leave from a perfect-attendance award so long as the employer treats employees taking non-FMLA leave the same way. This position is a change from the Department of Labor's prior guidance, which stated that FMLA leave could not be counted against perfect-attendance-award requirements.

Clarified Penalty Structure for an Employer's Failure to Designate Leave As FMLA Leave

Employers are no longer subject to categorical penalties for a failure to designate leave as FMLA leave. Rather, an employee must show individualized harm that results from the employer's failure to designate leave as FMLA leave in order to seek penalties against the employer.

Waiver of FMLA Rights

The Rule sets forth the Department of Labor's long-standing position that employees may voluntarily settle or release FMLA claims retroactively without court or Department of Labor approval but may never release FMLA claims prospectively. This clarification eliminates the confusion caused by a decision of the United States Court of Appeals for the Fourth Circuit, which held that even retroactive claims could not be released without court or Department of Labor approval.

What Employers Should Do

The new Rule places more emphasis on policies and "usual and customary" practices to determine an employee's FMLA leave rights. It is more important than ever for employers to design and implement consistent and compliant policies—and train managers on those policies and practices—to protect themselves from claims. Clients should review their employee handbooks, posters, and leave processes to be sure they comply with the new regulations.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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