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# Employers Must Act Promptly to Comply with the Revised Family and Medical Leave Act Regulations

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For the first time since the enactment of the Family and Medical Leave Act ("FMLA") in the early 1990s, the U.S. Department of Labor ("DOL") has published revised FMLA regulations, making significant changes to the rules that govern FMLA leave. The DOL's overhaul of the FMLA regulations was prompted by several factors, including the passage of the National Defense Authorization Act in early 2008 and frustration (by both employers and employees) with the complex and often confusing rules and regulations regarding FMLA leave. The revised FMLA regulations will become effective on January 16, 2009. Employers face the challenging task of reviewing and updating their FMLA policies and procedures in a very short time frame, a task likely made even more daunting by the recent changes to the Americans with Disabilities Act ("ADA") that also may require attention in the coming weeks. [See our previous Alert: The Americans with Disabilities Act Amendments Require Employers to Promptly Review Policies and Procedures to Ensure Compliance with Employee-Favorable Revisions.]

The revised FMLA regulations are extensive, and this Alert highlights only a few of the major changes from the old regulations. Employers should seek counsel for a comprehensive review of their FMLA policies and procedures. This Alert also addresses the more significant changes to several components of traditional FMLA leave and the new regulations regarding military family leave.

## A. Traditional FMLA

### Eligibility Requirements

As stated above, the final revised regulations modify certain FMLA eligibility requirements. With regard to determining whether an employee has worked the required 1,250 hours of service in the preceding 12 months, the regulations now state that employees returning from National Guard or Reserves military obligations are to be credited with the hours of service that would have been performed but for the period of military service.

Additionally, the regulations regarding what qualifies as a "serious health condition" have been revised to clarify the required timing for treatment. The regulations clarify the definition of "continuing treatment by a health care provider." When the "continuing treatment" is based on the employee's incapacity of more than three consecutive days combined with two doctor visits, the first doctor's visit must occur within seven days of the first day of incapacity and the second must occur within 30 days of the first day of incapacity, unless extenuating circumstances exist. Similarly, in order to qualify as a "serious health condition" based on the employee's incapacity of more than three consecutive days combined with a "regimen of continuing treatment," the first (or only) in-person doctor's visit must take place within seven days of the first day of incapacity. Also, in order for a condition to qualify as "chronic," an employee must make "periodic visits" for treatment by a healthcare provider. The new regulations clarify that "periodic visits" mean at least two visits per year.

### Notice Requirements

The new regulations also make a number of changes to employer and employee notice requirements, some of which are highlighted here. First, every employer covered by the FMLA must post on its premises a general FMLA notice even if it does not have any FMLA-eligible employees. Also, general FMLA notice must be provided to new employees in an employee handbook or similar written materials that describe benefits. If the employer does not maintain a handbook or other similar materials, the employer must provide the general FMLA notice to each new employee at the time of hire. These requirements may be satisfied by an electronic-only posting, provided employees and applicants have access to electronic information.

With regard to individual leave designations, once an employee requests FMLA leave or the employer acquires knowledge that the leave may be for an FMLA-qualifying reason, the employer has five business days to notify the employee of his or her FMLA eligibility. Under the old regulations, employers had only two business days to respond to an employee's FMLA leave request. The notice required to be given to individuals has been separated into two new notice phases. The first notice is the "Eligibility/Rights and Responsibilities" notice to advise employees of their FMLA eligibility and rights; and the second notice is the "Designation" notice that formally designates the leave as FMLA leave.

In yet another modification from the old regulations, an employee seeking additional leave for a condition previously designated as FMLA-qualified leave must specifically notify the employer of the qualifying reason for the leave. Simply calling in sick for subsequent absences is not sufficient notice to trigger an employer's FMLA obligations. Also, with respect to unforeseeable leaves, employees will be required to give notice of the need for FMLA leave the same day they learn of the need for leave, or the next business day. Employers may delay or even deny leave to an employee who does not comply with the employer's standard requirements for requesting leave or calling in sick, absent unusual circumstances.

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### Medical Certifications

In recognition of the differences between leave taken for an employee's own serious health condition and leave taken to care for a family member with a serious health condition, the Department of Labor created two new medical certification forms. One is for use in evaluating an employee's need for leave due to his or her own serious health condition, and the other is for use when an employee requests leave to care for a family member with a serious health condition.

Some news that is likely to be welcome to employers is that more options are available for medical inquiries, and employers are permitted to follow procedures for requesting medical information under the ADA, paid leave or workers' compensation programs without violating the FMLA. Additionally, employers may consider any information received pursuant to the ADA, paid leave or workers' compensation programs in determining an employee's entitlement to an FMLA leave.

The revised regulations also increase the time for requesting a certification from an employee from two to five days after the employee gives notice of the need for a leave (or in the case of unforeseen leave, on the date the employee commences leave). Employers are required to notify employees in writing if the employee's certification is deficient, and the notice should identify the additional information that is necessary to complete the medical certification. Employees have seven calendar days to provide the requested information. If the employee does not provide the requested information, the employer may then deny FMLA leave.

Employers should review and update policies and procedures related to FMLA eligibility, notice and certification requirements to ensure compliance with the new regulations.

### Intermittent Leave

The new regulations also make a number of clarifications in the often-confusing area of intermittent or reduced schedule leave entitlement. First, the new regulations clarify that employees who take intermittent leave for planned medical treatment when medically necessary are required to make a "reasonable effort" to schedule any such treatments so as not to disrupt unduly the employer's operations. The old regulations did not include the "reasonable effort" standard for scheduling of intermittent leave. The DOL's commentary on the new regulations confirms that while medical necessity for a particular schedule of intermittent leave may be determined by the employee's healthcare provider, if scheduling convenience for the employee is the only consideration for the timing of a particular treatment, the employee must make a reasonable effort not to disrupt unduly the employer's business operations.

The new regulations also make several clarifications with regard to the manner in which employers may calculate an employee's use of intermittent or reduced schedule leave. First, the new regulations clearly confirm that an employer may count intermittent leave usage in increments of no greater than one hour. In addition, the increment chosen by the employer must be clearly communicated and cannot be larger than the increment used by the employer for any other leave-related policy. For instance, if an employer allows employees to utilize vacation time, sick leave or PTO leave in increments of 15 or 30 minutes, the employer must use the same increment for deduction of available FMLA leave. Employers should take this opportunity to review their written policies that govern the use and calculation of all types of leave, including FMLA leave, and confirm that the policies specifically indicate the minimum increments in which leave will be deducted from an employee's allowance under each such policy.

One other notable change in the area of intermittent leave calculation is that the new regulations provide that when an employee is unable to work required overtime hours because of an FMLA qualifying condition, the employer may count those required overtime hours against the employee's FMLA entitlement.

## B. Military Family Leave

Perhaps the most significant change to the FMLA regulations is the addition of provisions related to military family leave. These changes were necessitated by the passage of the 2009 Defense Authorization Bill in January 2008, which expanded the FMLA to assist military members and their families. [See: Family and Medical Leave Act Expanded to Cover Relatives of Military Service Members]. Employers may want to make sure they are familiar and in compliance with these important provisions, which are not only likely to arise frequently as the United States continues to fight two wars, but are also likely to be a focus of plaintiffs' lawyers seeking to catch employers unprepared to deal with the changes.

### Active Duty Leave

The Defense Authorization Bill provides that employees with an immediate family member who is on active duty or is called to active duty to serve in a military operation (a "covered military member"; notably, this does not include members of the Regular Armed Forces, but instead is limited to the Reserves, National Guard, etc.) are entitled to unpaid leave for "qualifying exigencies." The new FMLA regulations set forth a list of eight reasons for "qualifying exigency" leave, including leave:

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1. When a covered military member is notified of an impending call or order to serve in support of a contingency operation;
2. To attend certain military-sponsored events or family support/assistance programs;
3. To attend to certain childcare/school-related activities;
4. To make or update financial or legal arrangements in a covered military member's absence or to act as a military member's representative with respect to military service benefits in certain circumstances;
5. To attend counseling for a military member or his or her child;
6. To spend time with a military member who is on short-term, temporary, rest and recuperation leave;
7. To attend certain military activities for 90 days following the termination of active duty status or to address issues related to the death of a military member on active duty; and
8. Additional activities for events arising from a covered military member's active duty or call to active duty status, provided the employer and employee agree to both the timing and duration of the leave, and agree that the leave qualifies as an exigency.

The certification process and requirements for qualifying exigency leave are different from those applicable to regular FMLA leave. The first time an employee takes leave because of a qualifying exigency, the employer may require the employee to provide a copy of the military member's active duty orders or other military-issued documentation indicating that the military member is on active duty or call to active duty status in support of a military operation, and the dates of the active duty service. Certain additional information may also be required for certification of qualifying exigency leave. The appendix to the regulations contains a new optional certification form for use by employers. While employers are not required to use this form, they may not require employees to provide any information in addition to what is requested on the form.

Employers may also verify the certification without the employee's permission by contacting the U.S. Department of Defense to request verification that the military member is on active duty or call to active duty status and, if the qualifying exigency involves meeting with a third party, contacting the third party to verify the appointment/meeting schedule and the nature of the meeting. Employers are not permitted to request additional information if a complete and sufficient certification is provided.

**Military Caregiver Leave**

The new regulations also implement the provisions of the Defense Authorization Bill that permit an employee who is a family member of a "covered servicemember" to take unpaid leave in certain circumstances to care for that servicemember if he or she has a serious injury or illness. Unlike qualifying exigency leave, family of members of the Regular Armed Forces are eligible to take caregiver leave.

An eligible employee may take no more than 26 weeks of caregiver leave in a "single 12-month period," which is defined as the 12-month period beginning on the first day the caregiver takes leave and ending 12 months later. An employee is entitled to only 26 total weeks of leave, counting both regular FMLA and military caregiver leave, with a maximum of 12 weeks of regular FMLA leave. Importantly, military caregiver leave is applied on a "per-covered servicemember, per injury basis," which means that an eligible employee may take up to 26 weeks of leave to care for one covered servicemember in a "single 12-month period," and then take up to an additional 26 weeks of leave to care for another covered servicemember or to care for the same covered servicemember with a *subsequent* injury or illness.

Certification of military caregiver leave differs significantly from certification of regular FMLA leave. The regulations specify the authorized healthcare providers – generally speaking, healthcare providers qualified to make certain military-related determinations – that may complete a certification for the covered servicemember's serious injury or illness, as well as the information that may be requested in the certification. The appendix to the regulations contains a new optional certification form for use by employers. Second and third opinions and recertifications of a covered servicemember's illness or injury are not permitted.

In addition, the regulations require an employer to accept, in lieu of a certification form, "invitational travel orders" (ITOs) or "invitational travel arrangements" (ITAs) issued to any family member, which permit the family member of an injured or ill servicemember to join the servicemember at his or her bedside at the Department of Defense's expense. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA, including both continuous and intermittent leave. Employers may seek authentication and clarification of the ITO or ITA but may not seek a second or third opinion, or recertification during the time period covered by the ITO or ITA.

## What This Means for Employers

The final revised FMLA regulations introduce a host of changes and clarifications to existing FMLA procedures. Employers should implement these changes to their policies and comply with the new regulations by January 16, 2009. In addition, employers may want to consider any relevant state law changes applicable to family or medical leave. Employers also should identify key employees to be educated on the new FMLA regulations and advise these employees of the appropriate procedures for handling FMLA-related issues.

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Given the extremely short time frame in which employers have to address the recent changes to the FMLA regulations, employers should act now to begin the process of updating employee handbooks, revising forms and developing new policies and procedures to address the leave law changes.

## For Further Information

Should you have any questions about revising your FMLA policies to comply with the DOL's revised regulations or would like more information, please contact any attorney of the Employment & Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.