

## **Reminder: Today, January 16, 2009, is the Day New FMLA Regulations Go Into Effect**

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### **Breaking Developments In Labor and Employment Law 01/16/09**

The U.S. Department of Labor ("DOL") has issued new regulations interpreting the Family and Medical Leave Act ("FMLA"). The new regulations are extensive; the regulations and the accompanying comments by the DOL occupy more than 200 pages of the Federal Register. In addition, the long awaited regulations on the new forms of leave for military families have been finalized and adopted. A copy of the new regulations, which go into effect Friday, January 16, 2009, and the DOL's comments on the regulations, along with the revised poster, new forms and "FAQ" informational material related to both military and nonmilitary related leaves, may be found at the DOL [website](#).

**Summary of New FMLA Regulations.** With respect to FMLA leave, the new regulations make numerous changes, including changes to the rules addressing "serious health condition," notice requirements, medical certification and light duty work. Some of the more significant changes and clarifications include:

- **"Serious Health Condition."** An employee who is unable to work for three consecutive full calendar days qualifies as having a serious health condition if the employee makes two visits to a health care provider within 30 days of the first day of incapacity. The new rules require that the first visit occur within seven days of the first day of incapacity. A "chronic" serious health condition requires two visits to a healthcare provider per year.
- **Employer Paid Leave Policy.** In a change that favors employers, the new regulations provide that an employee who elects to take paid leave must follow the same terms and conditions of the employer's paid leave policies that apply to other employees. If the employee does not qualify for paid leave under the employer's policy, the employee may take unpaid leave. The employer is free to waive the requirements for paid leave.
- **Notice Requirements.** The new regulations provide that an employee requiring FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence. Also, the time period for an employer to notify an employee concerning the designation of FMLA leave has been extended from two business days to five business days.
- **Certification Process.** The DOL-approved forms for medical certification have been replaced with new forms, one to be used for employees' own serious health conditions (WH-380-E) and the other for employees who seek leave to care for a family member (WH-380-F). Employers may not ask the employee's healthcare provider for information beyond that required by the certification form. Further, the employee's healthcare provider may only be contacted by the employer's healthcare provider, a human resources professional, a leave administrator or a management official of the employer. In no case may the employee's direct supervisor contact the employee's health care provider. Employers must give employees seven calendar days (or longer

- under certain circumstances) to complete an incomplete or insufficient medical certification form.
- **Light Duty.** Time spent performing light duty work does not count against an employee's FMLA leave entitlement. Taking a light duty position is not a waiver of the employee's right to future reinstatement to his or her same or equivalent position.
  - **Releases.** The new rules provide that employees may voluntarily release and waive their existing FMLA claims without court or DOL approval. Some courts had previously held that such claims could not be released. Prospective waivers of FMLA rights are still prohibited.

**New Posters and Forms.** The new FMLA regulations provide for a new poster and new forms. The general "Notice to Employees of Rights Under FMLA" poster is Form WH-1420. The new form for notice of eligibility and rights and responsibilities is Form WH-381, and the designation of FMLA leave notice form is now Form WH-382. The new poster and forms can be found at the DOL website address noted above.

**New Regulations Regarding Exigency Leave for Military Families.** There are also new regulations for employees to take up to 12 weeks for "qualifying exigency leave" arising from an employee's spouse, child or parent being called up to active duty from a non-regular armed forces position, such as members of the Reserves or National Guard (exigency leave is not available to family members of active duty military personnel). The new form for this type of leave (WH-384) can be found at the DOL website address noted above.

**New Regulations for Leave Related to Serious Injuries or Illnesses Incurred in Military Duty.** The new regulations also address Military Caregiver Leave, which provides for 26 work weeks of leave in a "single 12-month period" (meaning that the 26 weeks of leave must be taken in a single year starting the first day leave is taken, which differs from how a leave year is computed for other forms of FMLA-qualifying leaves) for those employees caring for family members and "next of kin" with serious injuries or illnesses incurred in military duty. The definition of "next of kin" is broader than that of "family members" under FMLA and may include grandparents, aunts and uncles. Unlike FMLA leave, an employer may not request additional medical opinions or re-certifications under Military Caregiver Leave. Again, the DOL website address noted above contains the form for this type of leave (WH-385).

**What This Means for Employers.** Employers should immediately revise their FMLA policies, whether in their handbooks or otherwise, to make sure they comply with the new regulations. Employers should obtain and use the new DOL approved forms, and the new FMLA poster should be posted by immediately. Employers should consult their counsel with any questions regarding the impact of the new regulations on particular situations.

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