

Department of Labor's New Regulations Under the Family and Medical Leave Act

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The U.S. Department of Labor ("DOL") recently issued new regulations under the federal Family and Medical Leave Act ("FMLA"). These new regulations took effect on January 16, 2009. Among other modifications, they change some of the employer and employee notice requirements, medical certification standards and methods of accounting for FMLA leave time. The new regulations also provide guidance on the two new types of FMLA leave, specifically, "qualifying exigency" leave and "military caregiver" leave for military servicemembers, which were more fully discussed in Arnstein & Lehr's February 2008 Employment Law E-Alert. Below are some of the highlights of the new FMLA regulations.

I. Summary of the New FMLA Regulations

Who is An Eligible Employee? The new regulations retain the same requirement that an employee be employed by the same company for at least 12 months (not necessarily continuous) and 1,250 hours in the 12 months preceding the request for leave. However, under the new regulations, if there is a break of service of 7 or more years, the time prior to the gap is not counted toward the 12-month requirement unless the break is due to military service or the employer voluntarily agrees to count the prior service.

What is a Serious Health Condition? Employers and employees have been given a little more guidance on what qualifies as a "serious health condition" under the FMLA. For example, for a serious health condition involving continuous treatment by a health care provider (as opposed to inpatient care), the employee or family member must make an in-person treatment visit with a health care provider within 7 days of the incapacity. Also, in order to qualify as a "chronic" serious health condition, the condition must require at least 2 visits to a health care provider per year.

Employer Notice Requirements. The new regulations provide to employees no fewer than four new mandatory notices that employers must now issue.

First, a general notice (WH Publication 1420) must be posted in every workplace and incorporated into any employee handbook. If a company does not maintain an employee handbook, the notice must be distributed to each employee upon their hire.

Second, employers must issue a personalized "Eligibility Notice" (Part A of Form WH-381) within 5 days (used to be 2 days) to notify the employee of his or her eligibility for leave. If the employee is not eligible, the notice must state at least one reason why the employee is not eligible.

Third, employers must also issue to an employee a written "Rights and Responsibilities Notice" (Part B of the Form WH-381) at the same time as the "Eligibility Notice."

Fourth, the new regulations provide that employers must issue a "Designation Notice" (Form WH-382) within 5 days after receiving sufficient information to inform the employee that the leave is being designated as FMLA-qualifying.

The penalty for failing to provide any of these required notices is potentially draconian. If the employee is able to prove that he or she incurred actual harm, such as lost compensation or benefits or termination of employment because of the employer's failure to give any of the required notices, the employer will be liable for those damages. These new and updated FMLA forms can currently be found on the DOL website (<http://www.dol.gov/esa/whd/fmla/>) and then typing in the form number provided above.

Employee Notice Requirements. Several changes were made to the information that employees must provide to their employers. First, the new regulations specify that the employee must provide sufficient information to enable the employer to determine whether leave is FMLA-qualifying. Therefore, an employee who simply calls in sick, without more information, is insufficient under the new regulations. Second, an employee's refusal to respond to the employer's reasonable requests for further information may also delay or disqualify an employee from FMLA-protected leave. Third, while the new regulations retain the existing requirement that employees provide at least 30 days notice if the need for leave is foreseeable and "as soon as practicable" for unforeseeable leave, the new regulations state that "as soon as practicable" is generally the same or next business day. Failure of the employee to follow these new notice requirements will allow the employer to delay the leave.

Medical Certification. The DOL developed two new medical certification forms: one for an employee's own serious health condition (Form WH-380-E), and one for the serious health condition of a qualifying family member (Form WH-380-F). Both of the forms were created to allow the employer to determine the type and duration of leave. Additionally, the time period within which an employer may request a medical certification has been extended from 2 days to 5 days after the employee gives notice of the need for FMLA leave. In turn, the employee must return the completed medical certification within 15 days. If the medical certification is inadequate, the employer must provide the employee with written notice of the deficiencies and give the employee an additional 7 days to attempt to cure the deficiency. Leave may be denied if the employee fails to cure the deficiency.

In perhaps one of the most significant modifications to the FMLA, the new regulations also allow the employer's health care provider, HR professional, leave administrator or management official (but not the employee's supervisor) to contact the employee's medical provider directly to authenticate the certification form or to obtain clarification. And, like before, a company may, at its own expense, require the employee to obtain a second medical certification from a health care provider of the employer's choosing. If the first and second medical certifications differ, then a third binding one may be obtained at the expense of the employer.

Intermittent/Reduced Schedule Leave. Undoubtedly, this is the thorniest issue related to the FMLA and the new regulations did not provide much clarification. The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule when medically necessary to care for a seriously ill family member, because of the employee's own serious health condition, to care for an injured servicemember, or for a "qualifying exigency."

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave. Significantly, employers may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less.

In intermittent/reduced schedule leave, the employee must work with their employers to schedule the leave so as to not unduly disrupt business operations. Therefore, transferring the employee to a position that accommodates periods of leave better is allowable provided that the position has equivalent pay and benefits.

Light Duty Work. The regulations clarify that the time employees spend in a voluntary, light-duty assignment does not count towards their FMLA leave allotment and that their right to job restoration is held in abeyance while the employee is performing light duty or until the end of the 12-month period. Because of this clarification, employees can potentially obtain job protection for more than 12 weeks, provided the employer allows them to work light duty prior to the employee's return to full-time status.

Qualifying Exigency Leave. Qualifying exigency leave is a new type of FMLA leave that allows an employee to take in order to handle various non-medical exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or on call to active duty status. Until now, however, the DOL had not defined what a "qualifying exigency" meant. The new regulations provide eight types of "qualifying exigencies" that may qualify for this new type of FMLA leave: (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 to address other events which arise out of a covered servicemember's active duty or call to active duty status (provided the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave).

Military Caregiver Leave. Under the FMLA, a covered employer must now grant eligible employees up to 26 weeks of unpaid leave in a 12 month period to allow the employee to care for an injured servicemember. The DOL has also answered the hotly debated issue about whether an employee who seeks leave to care for an injured servicemember is limited to only one 26-week leave period during their entire employment or one per 12-month period. In this regard, the regulations provide an eligible employee can take up to a combined total of 26 weeks of leave for military caregiver leave and leave for any other FMA-qualifying reasons during a single 12-month period, provided the employee takes no more than 12 weeks of leave because of a qualifying exigency or for any other FMLA-qualifying reason. For example, an eligible employee may, during a 12-month period, take 18 weeks of leave to care for an injured servicemember and 8 weeks of FMLA leave because of the employee's own serious health condition, but no more than 26 weeks total.

Military caregiver leave is also to be applied on a per-covered servicemember, per injury basis. In other words, an employee may be entitled to take more than one 26-week leave during his or her employment, but only if the leave is to care for a different servicemember or to care for the same servicemember with a subsequent serious injury.

A covered servicemember is defined as the spouse, child, parent or "next of kin" (nearest blood relative including siblings, grandparents, aunts and uncles and first cousins) of the employee. While employers may require the appropriate certification completed by a health care provider (and the DOL has such a form), unlike other types of FMLA leave, employers are not permitted to request second or third opinions or recertifications.

Interplay Between FMLA and Bonuses. Bonuses and incentive awards based on things such as attendance or production can be denied based on an employee taking FMLA leave. The caveat is that the employer must treat employees on non-FMLA leave the same way. For example, if paid vacation does not disqualify an employee from receiving a perfect attendance award, paid vacation used during FMLA leave cannot be

considered a disqualifying absence either. Similarly, employers are free to “prorate” bonuses premised on the achievement of a goal, such as a production bonus, to account for an employee’s absences under the FMLA, provided that it is not done in a discriminatory fashion.

FMLA Rights Can Be Waived. In a change from prior law, the new regulations clarify that an employee can now settle and waive past actual or potential FMLA claims without approval of the Department of Labor or a court.

II. Practical Tips for Employers

- 1) Post the new Department of Labor FMLA Poster with all other legally-mandated employment and labor law posters in a conspicuous location visible to both employees and applicants. If a majority of your workforce is comprised of workers who are not literate in English, the FMLA poster must be provided in a language in which the employees are literate.
- 2) If you have an Employee Handbook, revise your FMLA policy to comport with the new FMLA regulations. If you do not have an Employee Handbook, ensure that you provide each new employee with a copy of the FMLA poster upon their hire. You should have employees acknowledge receipt of the FMLA poster by having them sign a paper acknowledgment or electronically, but make sure you keep a copy of the acknowledgment.
- 3) Review other Employee Handbook policies, such as bonus policies and perfect attendance awards, to ensure they comport with the new FMLA regulations.
- 4) Start using the new FMLA forms, including the Notice of Eligibility, Rights and Responsibilities Notice, Designation Notice and Medical Certification forms (discussed above). They are mandatory.
- 5) Train supervisors, managers and individuals responsible for administering FMLA leaves about the new types of FMLA military family leaves, as well as the new regulations. The changes to the FMLA are significant so these individuals should be aware of the new regulations so that they can properly respond to FMLA leave requests without running afoul of the new law.
- 6) To the extent that you use specific health care providers for second and/or third opinion or medical certifications, ensure that they also know about the updated regulations.

III. Conclusion

This article only describes some of the most significant changes made to the FMLA regulations by the DOL. There are certainly many more. In fact, the actual regulations, as well as the DOL’s explanation of them, are over 700 pages. Employers need to be extremely vigilant to make sure they follow all of these new regulations. Therefore, should you have any questions about this article, the FMLA, the new regulations, or if you simply need assistance updating any of your FMLA policies or notices, please contact E. Jason Tremblay or any other Arnstein & Lehr LLP attorney with whom you have worked.