

New FMLA Regulations Effective January 2009

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On November 17, 2008, the United States Department of Labor (DOL) published the final version of the new Family and Medical Leave Act (FMLA) regulations, which go into effect on January 16, 2009. The final regulations interpret and implement two new military family leave entitlements for eligible family members, as well as update the regulations under the FMLA.

On January 28, 2008, President Bush signed into law the National Defense Authorization Act, which amended the FMLA by adding the following two categories of unpaid leave for employees with family members serving in the military:

- Qualifying Exigency Leave: Eligible employees may take up to 12 weeks of FMLA leave to handle exigencies related to a family member's active duty military service or call to active duty; and
- Covered Servicemember Family Leave: Eligible employees may take up to 26 weeks of FMLA leave to care for a spouse, son, daughter, parent or next of kin who has a serious injury or illness incurred in the line of active duty.

While the Covered Servicemember Family Leave provisions went into effect earlier this year, the Qualifying Exigency Leave requirements take effect when the new regulations become effective on January 16, 2009. Under the new regulations, an eligible employee may take leave for one or more of the following "qualifying exigencies": (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 recuperations, (7) post-deployment activities and (8) additional activities to address other events that arise out of the covered servicemember's active duty or call to active duty status, provided that the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of the leave. The DOL has also provided a new optional form that employers may use for employees to self-certify that they have a qualifying exigency requiring them to take leave.

In addition to implementing the Qualifying Exigency Leave, the new regulations clarify several points related to Covered Servicemember Family Leave. The new regulations define "next of kin" of a covered servicemember as the nearest blood relative other than the covered servicemember's

spouse, parent, son or daughter in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of covered servicemember leave. Further, the new regulations provide that eligible employees can take more than one 26-week leave if the leave is to care for a different covered servicemember or if the same covered servicemember has a subsequent injury or illness. However, an eligible employee cannot take more than 26 weeks of leave in any single 12-month period.

In addition to interpreting and implementing the family military leave provisions of the FMLA, the new regulations include many updates and changes to the prior FMLA regulations. Highlights of the changes include:

- **Releases of FMLA Claims:** The final regulations settle a dispute among courts regarding the ability of employees to waive their rights under the FMLA, stating that employees may voluntarily release their past FMLA claims without court or DOL approval. As a result, employers can safely include releases of past FMLA claims in severance and settlement agreements.
- **Employer Notice Obligations:** The new regulations clarify and strengthen employer notice requirements in order to better inform employees regarding their FMLA rights and obligations. For example, the new regulations require employers to provide employees with a general notice about the FMLA upon hire (which can be done through a handbook), an eligibility notice, a rights and responsibilities notice and a designation notice. To help ensure that employers are able to comply with these requirements, the new regulations extend the time period for employers to provide various notices from two business days to five business days.
- **Employee Notice Requirements:** Under the new regulations, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances. This is a change from the prior regulations, which allowed some employees to provide notice to an employer of the need for FMLA leave up to two business days after an absence, even if they could have provided notice more quickly.
- **New Medical Certification Forms:** As part of the new regulations, the DOL has created several new medical certification forms, one for use in considering an employee's own serious health condition and another for use when an employee requests leave to care for a family member with a serious health condition. In addition, there is a new medical certification form for use in obtaining certification of covered servicemember leave.
- **Notification of Certification Deficiencies:** The final regulations require employers to notify

employees in writing if the employer determines that a medical certification is incomplete or insufficient. The employer must state in writing what additional information is necessary and give the employee seven days to cure the deficiency. If an employee does not cure the deficiency, the employer may deny FMLA leave.

- **Clarification and Authentication of Medical Certification Forms:** The new regulations provide that an employer may contact an employee's health care provider for purposes of clarification and/or authentication of the medical certification after the employer has given the employee an opportunity to cure any deficiencies. An employer must use a health care provider, human resources professional, leave administrator or management official to make such contact and may not allow the employee's direct supervisor to contact the health care provider. Employers may not ask health care providers for additional information beyond that required by the certification form. In addition, where the health care provider sharing the health information of an employee with an employer is covered by the Health Insurance Portability and Accountability Act (HIPAA), the employer must have authorization from the employee in compliance with HIPAA. However, if the employee refuses to provide the employer with authorization and does not otherwise clarify the certification, the employer may deny the FMLA leave if the certification form is unclear.
- **Prior Employment Counts for Eligibility:** Under the new regulations, employers must count an employee's non-consecutive prior service with the employer unless the break in service was for seven years or more. In limited circumstances, such as when the employee's break in service was due to military service, the employer must count prior employment periods preceding a break in service of more than seven years.
- **Light Duty:** Under the final regulations, time spent performing light duty work does not count against an employee's FMLA leave entitlement. Also, the employee's right to job restoration is on hold during the period of time the employee performs light duty. Further, if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

Given the many changes under the new FMLA regulations, employers should do the following:

- Take a close look at their FMLA policies and procedures to ensure compliance with the provisions of the new FMLA regulations prior to the effective date of January 16, 2009;
- Review any other policies (e.g. call-in; attendance) that may be implicated by these changes;
- Create or modify forms to deal with the new notice provisions;
- Train managers responsible for administering leaves and complying with the FMLA on the changes in the regulations; and

- Contact outside employment counsel to discuss any issues concerning the changes in the FMLA regulations.

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