

FAMILY AND MEDICAL LEAVE ACT

First Sweeping Regulatory Changes Since Its Enactment 15 Years Ago

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Yesterday the U.S. Department of Labor ("DOL") issued final regulations under the Family and Medical Leave Act ("FMLA"). These regulations mark the first sweeping changes made to the FMLA since its enactment in 1993.

The regulations, which may be accessed at <http://www.dol.gov/esa/whd/fmla/finalrule.pdf>, go into effect on January 16, 2009.

Employers need to understand the changes and be ready to implement them.

Overall, employers have gained some flexibility on timing and in coordinating FMLA leave with other work rules. However, employers generally hoped for more clarification on the definition of "serious health condition" and the difficulties imposed by the intermittent leave requirements.

KEY CHANGES AND CLARIFICATIONS TO THE FMLA

This Alert analyzes 15 of the regulations' most significant developments:

1. Employee Eligibility

a. Counting 12 months of service

Employees who have worked with an employer for 12 months and for at least 1,250 hours in the last 12 months are eligible for FMLA protection. The old regulations, which remain in effect through January 15, 2009, stated that an employee's 12 months of employment need not be consecutive. However, the old regulations did not put a limit on how far back in time an employer needed to go to determine if an employee worked a total of 12 months for the employer.

The new regulations state that employment periods prior to a break in service of seven (7) years or more need not be counted in determining eligibility, except in two situations: (a) where a written agreement, including a collective bargaining agreement, exists concerning the employer's intent to rehire the employee after the break in service; or (b) where the break in

service is due to fulfillment of a National Guard or military service obligation.

b. Interplay of USERRA and the FMLA

The old regulations did not discuss the interplay of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") and the FMLA. The new regulations explicitly state that time spent performing military service must be counted in determining whether the employee has been employed for at least 12 months by the employer.

c. Employee eligibility occurring while employee is on leave

The new regulations clarify that an employee who first becomes eligible for FMLA protection while on a non-FMLA leave may acquire protection during the employee's leave. Specifically, any portion of the leave taken for an FMLA-qualifying reason *after* the employee meets the eligibility requirements would be counted as FMLA protected leave.

2. Definition of a Serious Health Condition

The new regulations retain the six individual definitions of serious health condition. However, the DOL made some clarifications.

For instance, one form of "serious health condition" under the FMLA involves an incapacity of more than three consecutive calendar days and either (a) two or more treatments by a health care provider or (b) one treatment by a healthcare provider which results in a regimen of continuing treatment under the supervision of the health care provider. The new regulations clarify that (1) the period of incapacity must be "more than three, consecutive, full calendar days;" (2) treatments by a health care provider require an "in-person visit to a health care provider;" (3) treatments "two or more times" must be within the first 30 days of incapacity, absent extenuating circumstances; (4) the first treatment visit must take place within seven days of the first day of incapacity; and (5) any determinations

of whether additional treatment visits or regimens of continuing treatment are necessary shall be made by the health care provider, not the employee.

Another form of “serious health condition” under the FMLA involves periods of incapacity or treatment due to a chronic serious health condition. The old regulations required “periodic visits” for treatment by a health care provider, but did not define “periodic visits.” Now the regulations state that “periodic visits” means visits at least twice a year.

3. Changes in Notification Procedures

a. *Employee’s notice to his/her employer of the need for FMLA leave*

Under the old regulations, an employee had up to two business days after an absence to provide notice to his/her employer of a need for FMLA leave. The new regulations clarify that when an employee first becomes aware of a need for FMLA leave less than 30 days in advance, “it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day.”

The new regulations also state that an employer now may require employees to comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For instance, employees may be required to follow an employer’s normal call-in procedures and/or contact a specific individual to request leave.

b. *Employer’s notice to employees designating FMLA leave*

Under the old regulations, employers generally had two (2) business days after learning of the employee’s FMLA-qualifying condition to notify the employee that his/her leave would be designated as FMLA leave. The new regulations give employers five (5) business days to provide notice of their intention to grant FMLA leave after the employer learns of the employee’s FMLA-qualifying condition, absent extenuating circumstances.

4. Medical Certifications

The old regulations only permitted physicians representing the employer to seek clarification and/or authentication of medical certifications. The new regulations permit an employer to contact an employee’s health care provider directly for clarification and authentication of medical certifications (other than those related to military leaves) once certain conditions have been met. First, the employer must specify in writing what information is lacking from the medical certification and provide the employee with seven calendar days to cure the deficiencies and/or

authorize the employer to contact the employee’s health care provider. Second, if the employer has the necessary authorization, the new regulations specify that the employer’s contact must be a health care provider, human resource professional, leave administrator or a management official, and cannot be an employee’s direct supervisor.

Employers generally continue to be prohibited from requesting additional information from an employee’s health care provider. However, the new regulations provide that if an employee’s serious health condition may also be a disability under the Americans with Disabilities Act (“ADA”), that the FMLA “does not prevent the employer from following the procedures for requesting medical information under the ADA” and that any information received may be used in determining an employee’s entitlement to FMLA leave.

5. Definition of Health Care Provider

Under the old regulations, physician assistants were not explicitly mentioned in the definition of health care provider, although they generally fell under the provision of “any other person determined by the Secretary to be capable of providing health care services.” The new regulations clarify that physician assistants fall within the definition of health care provider.

6. Substitution of Paid Leave

Under the old regulations, employers were prohibited from imposing any limits on the substitution of paid vacation or personal leave for unpaid-FMLA leave. The new regulations state that an employee’s ability to substitute accrued paid leave for unpaid FMLA leave is determined by the terms and conditions of the employers’ normal leave policy. This change increases employer flexibility by allowing more consistent application of workplace policies.

For instance, if an employer requires employees to provide two days’ notice of the need for paid personal time off, such notice requirements may be applied to the substitution of accrued, paid personal time off for unpaid FMLA leave. Similarly, if an employer requires paid sick leave to be used in full day increments, and the employee requests FMLA leave for a shorter duration of time but wants to substitute paid sick leave, the employee must take the larger increment of leave required under the paid leave policy unless the employer chooses to waive the requirement.

7. Intermittent Leave

The old regulations stated that employees on intermittent FMLA leave must make an attempt to schedule treatments so as not to disrupt an employer’s operations. The new

regulations clarify that an employee must make a “reasonable effort” to schedule treatment so as not to disrupt unduly the employer’s operations.

The new regulations also clarify that employers are not required to account for FMLA leave in increments smaller than one hour just because their payroll systems are capable of tracking smaller time increments. Rather, an employer may choose to account for FMLA leave in any increment not to exceed one hour so long as it matches the smallest increment used by the employer to track any other type of leave. For instance, if an employer accounts for sick leave in 30-minute increments and vacation time in one-hour increments, FMLA leave must be accounted for in 30-minute increments.

Significantly, employers still may not charge FMLA leave for any period of time during which an employee performs work. For example, if an employee needs FMLA leave 45 minutes before the end of the employee’s shift, but the employer tracks all time off in increments of one hour, the employee only can be charged 45 minutes of FMLA leave. Accordingly, employers must be cautious in how they account for FMLA leave.

8. Fitness-for-Duty Certifications

The old regulations generally limited fitness-for-duty certifications to a simple statement of an employee’s ability to return to work. The new regulations permit employers to require employees returning from FMLA leave to provide fitness-for-duty certifications that address an employee’s ability to perform the essential functions of the employee’s job. In order to take advantage of this new provision, employers must have a uniformly applied policy that requires all similarly situated employees who take leaves of absence for such conditions to provide a fitness-for-duty certification, and the certification must be limited to the health condition that caused the need for FMLA leave. Moreover, the employer must provide the employee with a list of essential job functions at the same time the employer provides designation of FMLA leave to the employee.

Employers also may require fitness-for-duty certifications up to once every 30 days if an employee used intermittent or reduced schedule leave during that period and if the employer has reasonable safety concerns about the employee’s ability to perform his or her job duties based on the serious health condition for which the employee took FMLA leave. “Reasonable safety concerns” means a reasonable belief of a significant risk of harm to the individual employee or others. Specifically, the employer

should consider the nature and severity of the potential harm and the likelihood that the potential harm will occur.

As under the old regulations, employees must bear the cost of obtaining any fitness-for-duty certifications. Employers, as before, may not require second or third opinions on such certifications. An employer’s health care provider, human resource professional, leave administrator or a management official may, however, contact an employee’s health care provider for clarification of a fitness-for-duty certification so long as it does not delay an employee’s return to work.

9. Light Duty

The new regulations and comments preceding them clarify that time spent performing a light duty assignment does not count as FMLA leave. Moreover, employees who are entitled to FMLA leave are not required to accept light duty assignments while recovering from a serious health condition if they do not so choose. The new regulations also clarify that when an employee on FMLA leave decides to accept a light duty assignment, the employee does not waive his or her rights of restoration to the same position that the employee held when his/her FMLA leave commenced, but that the employee’s right to restoration ceases at the end of the applicable 12-month FMLA leave year.

10. Perfect Attendance Awards

The old regulations prohibited employers from denying perfect attendance awards to employees as a result of an absence due to FMLA leave. The new regulations permit employers to deny certain bonuses or payments to employees who took FMLA leave if such bonuses or other payments are “based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave.” Significantly, however, FMLA and similar, non-FMLA leave must be treated the same for purposes of determining such bonuses or other payments.

11. Definition of Qualified Exigency for Military FMLA Leave

President Bush signed the National Defense Authorization Act (“NDAA”) into law on January 28, 2008. The NDAA includes provisions expanding the FMLA to provide enhanced leave provisions for families of U.S. military personnel. One type of leave under the NDAA provides eligible employees up to 12 weeks of unpaid leave in a 12-month period for a “qualifying exigency” arising out of the fact that the employee’s spouse, child or parent is on active duty or has been notified of an

impending call or order to active duty. Because the DOL had not previously defined “qualified exigency,” the agency did not require employers to grant such leave until final regulations defining the term become effective.

The final FMLA regulations define “qualifying exigency” as follows: (1) short-notice deployment, which is defined as a call or order to active duty in seven or less calendar days prior to the date of 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, which is a catch-all provision covering events arising out of the military member’s active duty or call to active duty, provided the employer and employee agree such leave qualifies as an exigency and both agree as to the timing and duration of such leave. Accordingly, employers must grant leave meeting this definition as of January 16, 2009, although the DOL encourages employers not to wait until the regulations go into effect.

12. Joint Employers

The old regulations did not address joint employers in the specific context of Professional Employer Organizations (“PEOs”), which are organizations that generally contract with clients to perform administrative functions such as payroll and benefits. The new regulations address how to treat PEOs. Specifically, the DOL recognized that not all PEOs will be joint employers, stating that a determination turns on the “economic realities” of the situation. Accordingly, the new regulations state that PEOs that merely perform administrative functions for the employer are not joint employers with the employer. However, if the PEO has the right to hire, fire, assign or direct and control its client’s employees, or benefits from the work that its client’s employees perform, the PEO may be considered a joint employer, depending upon the facts and circumstances.

13. Overtime

The old regulations did not address whether failure to work mandatory overtime counted as FMLA leave. The new regulations explicitly state that where an employee normally would be required to perform overtime work, but cannot do so due to an FMLA-qualifying condition, the employee may be charged FMLA leave for the overtime hours not worked. While the DOL states that this is not a

change in policy, it is the first time that the policy is in the regulations, as opposed to the preamble.

14. Waiver of Potential and Actual FMLA Claims

The old regulations stated that employees could not waive their FMLA rights and made no distinction between prospective rights and past employer conduct. The new regulations clarify that employees may settle or release FMLA claims based on past employer conduct without the DOL or court approval. Employees still may not waive their prospective FMLA rights.

15. New FMLA Forms

The new regulations also contain new FMLA prototype forms, which will be posted at <http://www.dol.gov/esa/whd/forms/index.htm> in the near future. They are:

- Certification of Health Care Provider for Employee’s Serious Health Condition (Form WH-380E)
- Certification of Health Care Provider for Family Member’s Serious Health Condition (Form WH-380F)
- Notice to Employees of Rights under FMLA (WH Publication 1420)
- Notice of Eligibility and Rights and Responsibilities (Form WH-381)
- Designation Notice to Employees of FMLA Leave (Form WH-382)
- Certification of Qualifying Exigency for Military Family Leave (Form WH-384)
- Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave (Form WH-385)

ACTIONS FOR EMPLOYERS TO TAKE

The new regulations require employer action. First steps include:

- Reviewing and revising, as necessary, written FMLA posters, policies and forms to ensure compliance with the new regulations;
- Addressing new employer options for applying certain workplace rules to employees requesting and/or on FMLA leave; and
- Training Human Resource personnel and front line managers on how to identify, respond to and track all types of FMLA leave in accordance with the new regulations.