



## FINAL FMLA REGULATIONS EFFECTIVE 1/16/09 REQUIRE EMPLOYER ACTION

*On November 17, 2008 the U.S. Department of Labor issued its final regulations that change employer and employee responsibilities under the Family and Medical Leave Act (FMLA), including the recent military leave amendments. The regulations include significant changes and clarify the existing FMLA regulations.*

*The Department of Labor has stated that the new regulations were written to clarify ambiguities in the existing application of the FMLA and that the revised regulations focus on allowing a more open line of communication among employers, employees and health care providers. Certain changes and clarifications will be beneficial to employers while others include more stringent employer responsibilities.*

*This alert below outlines many of the significant provisions contained in the new regulations, such as changes to leave and notice requirements as well as explanations and clarifications of the recent FMLA amendments providing leave for family members of individuals engaged in military service.*

### EMPLOYEE ELIGIBILITY

The new regulations clarify that for purposes of calculating 12 months of employment with an employer for employee eligibility, a break in service with that employer of 7 years or less will not render the employee ineligible for leave (subject to certain exceptions). Previously the employee could take a break in service for up to 5 years and still remain eligible for FMLA leave. The regulations further clarify that an employee can attain the 12 month eligibility while out on leave, as long as the employee has satisfied the 1,250 hours of service requirement for eligibility prior to taking leave. For example if an employee has worked for the employer for 11 months and has completed 1,250 hours of service with that employer and the employee goes out on an approved leave of absence (such as sick leave or workers compensation leave for one month) the employee will become eligible to take 12 weeks of FMLA at the end of that additional month. Thus the employee will become eligible for FMLA leave after having worked for 11 months and then taken 1 month of approved leave.

### SERIOUS HEALTH CONDITION

The regulations have been changed to require that the employee be **(a.)** incapacitated from work for at least 3 consecutive business days and **(b.)** must also be receiving continuing treatment in order to satisfy the “serious health condition” requirement. Continuing treatment has been redefined to

require either **(a.)** one (1) in-person visit to a health care provider within the first 7 days of incapacity and a continuing regimen of treatment or **(b.)** two (2) in-person visits to a health care provider within 30 days of the first period of incapacity.

### **CHRONIC HEALTH CONDITION**

If the employee suffers from a chronic health condition, the employee is now required to undergo two in-person visits to a healthcare provider per year. The main revision is the requirement of “in person” visits to a health care provider.

### **CERTIFICATION AND FITNESS FOR DUTY**

The requirements and time frames for certifications and fitness for duty statements have been revised and clarified. If an employer desires a medical certification, it must request the certification from the employee within 5 days of either notice of the need for leave or the commencement of leave (this was increased from 2 days). Thereafter the employee must return the certification form within 15 days. If the employer finds the certification to be deficient, it must inform the employee, in writing, of any deficiency in the certification and allow 7 days to cure. Exceptions will be allowed if the employer and employee are making a good faith attempt to comply but are unable to do so within these time periods.

The regulations clarify that an employer may accept a simple statement of the employee’s ability to return to work, but if the employer requires a detailed fitness for duty certification, the employee must be given notice of such requirement at the time when the employee is provided with the initial notice of rights.

The Department of Labor has also issued revised forms for medical certifications.

### **MEDICAL INFORMATION AVAILABLE TO EMPLOYER**

Under the new regulations, an employer may request facts sufficient to clarify or understand the information provided on the medical certification. An important clarification is that the employer can communicate directly with the health care provider to authenticate or clarify a medical certification—but only after the employee has been given the opportunity to correct deficiencies in the certification. Please note that to the extent that the employer requires medical information in such communication with the health care provider, that will require the employee’s consent under the Health Information Portability and Accountability Act (HIPAA). Further, the regulations also now provide that contact with a health care provider cannot be made by the employee’s direct supervisor, but may be made by a company health care provider, human resources person, leave administrator or any member of management that is not the employee’s direct supervisor.

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## **BIRTH OR CARE OF CHILD**

Another clarification in the new regulations is that a father may take leave to care for a mother when she becomes unable to work or in need of care due to pregnancy or child birth. A clarification in the new regulations is that both the father and mother now may each take 12 weeks of leave due to the birth or adoption of a child, if the child has a serious health condition, even if they are both employed by the same employer. This is a change from the previous regulations which only allowed a total of 12 weeks of combined leave for parents employed by the same employer.

## **INTERMITTENT LEAVE**

The regulations have changed the employer's responsibilities relative to provision of intermittent leave. Under the new regulations an employer must account for intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided it is not greater than one hour. In this regard, the new regulations clarify that an employer is not required to account for FMLA leave in the shortest increments possible simply because their payroll systems are capable of doing so.

The general rule is still that an employee cannot be required to take more leave than necessary. There are some new exceptions in the regulations.

An exception that might prove beneficial to select employers is that if an employee takes a partial day of intermittent leave and then arrives at the worksite after the work day has begun, the employer can charge the employee with a full day of FMLA leave where it would be impossible for the employee to begin working after the shift has commenced. The regulations provide that examples of this would include situations where the employee is a flight attendant or working in a sealed environment where it would be impossible for an employee to enter the worksite and begin work after the shift has started. The Department of Labor has stated that this is a very narrow exception which requires that it is actually impossible to allow the employee to begin the shift late and that no alternative work is available.

Another exception is that an employer cannot charge an employee a portion of an increment of leave if the employee is allowed to work any portion of that increment. For example if an employee is taking an hour of leave from 9:00 a.m. to 10:00 a.m. each morning for doctors appointments under a period of intermittent leave, but one day the employee shows up at 9:30 a.m. and wants to begin work—the employer may not charge the employee for FMLA leave from 9:00 a.m. to 9:30 a.m. if the employer allows the employee to work from 9:30 a.m. to 10:00 a.m. If the employee is allowed to work any portion of the increment, the employer cannot charge the employee for any FMLA leave for that increment.

Other changes are that mandatory overtime can be counted toward the employee's total FMLA leave

taken and that an employer cannot force an employee to transfer to another position to accommodate an employee's request for intermittent leave. There are also clarifications to the provisions regarding light duty, including that an employee can return to light duty work, but such work does not count toward FMLA leave. The right to return to the employee's previous position and the right to take any remaining FMLA leave are suspended during the period during which the employee is working light duty.

Additionally, where an employee works on a variable schedule where hours of work change from week to week, the employer is to calculate the employee's "average work week" for purposes of counting intermittent leave by taking the average of the hours worked over the last 12 months of work (previously the employer looked at the last 12 weeks).

### **SUBSTITUTION OF LEAVE**

The new regulations clarify that an employer can require an employee to take paid leave in any increment in which they otherwise allow paid leave to be taken (such as one day) or the employee may take a partial day of unpaid FMLA leave. Thus an employee would not be entitled to take a partial day of paid leave if the employer's policies did not allow employees not taking FMLA leave to do so.

The new regulations also deleted a portion of the section on substituted leave which provided different rules for substitution of different types of paid leave, such as substitution of vacation time rather than sick leave. The new regulations have changed this so that the employer may require an employee to take any form of paid leave (for which the employee is eligible) concurrently with FMLA leave.

Employers may require that employees follow paid leave policies in requesting leave in order to substitute paid leave. However, the regulations clarify that if an employee fails to follow those paid leave rules, the employee is still entitled to take unpaid FMLA leave.

### **ATTENDANCE AND PRODUCTION BONUSES**

Under the new regulations, an employer may count absences due to FMLA leave against an employee for the purpose of determining attendance bonuses as long as the employer counts all other types of approved absences against such bonuses. This is a major clarification which should benefit employers.

## **EMPLOYER NOTICE REQUIREMENTS**

The most immediate change in the notice requirements for employers is that the employer must post the new FMLA notice that takes effect on January 16, 2009. A general notice such as an FMLA poster or revised handbook provisions are sufficient to satisfy the new notice requirements. The new regulations also clarify that if the employer has an employee handbook, that the handbook must contain the general notice and a notice of the employee's right to file a claim against the employer. The general notice of FMLA rights may be given to employees electronically, but it must be available to applicants as well as current employees. This is a clarification of the prior regulations. A new requirement of the regulations is also that the employer is required to post the general notice in a language in which a majority of the employees are fluent.

The new regulations make significant changes to the time periods for providing the various notices to employees. The notice of eligibility must now be provided within 5 days of an employee's request for leave or the employer's acquisition of knowledge that the employee needs leave which may qualify under the FMLA. A major change in the notice requirements is that an employer must now tell an employee if the employee is not eligible for leave and state at least one reason why the employee is not eligible for leave. However, both the employee's request for leave and the employer's response regarding whether the employee is eligible for leave may be made orally.

Along with the notice regarding eligibility, the employer must provide the employee with written notice of rights and responsibilities. This notice must provide information regarding leave requirements such as: the employer's rules regarding medical certifications; rules for payment of health insurance premiums including the right to restoration of health benefits upon return to work if the employee does not pay the premiums; job restoration rights; right to substitution of paid leave where applicable; and the right to take unpaid leave if employee fails to comply with paid leave policies. The employer must now provide an amended notice of rights and responsibilities within 5 business days of any changes in the employer's rules or the employee's rights.

The time for providing an employee with a designation notice stating whether the leave being taken will count toward FMLA leave has also changed. When employees request FMLA leave, or when employers acquire knowledge that an employee's leave may be for an FMLA-qualifying reason, employers must notify employees whether the leave is being designated as FMLA leave within 5 business days, (formerly 2 days). The time periods that apply to employee notice requirements may be extended if exigent circumstances exist.

## **RETROACTIVE DESIGNATION OF LEAVE**

Of significance, the new regulations provide that an employer may now retroactively designate leave as FMLA leave as long as the employee is not prejudiced or harmed as a result of the employer's failure to designate the leave as FMLA leave right away.

## **EMPLOYEE NOTICE REQUIREMENTS**

Employee leave notice periods have also been substantially revised under the new regulations. Many of the revisions benefit employers, by requiring more specific notices by employees and by requiring that employees follow standard leave notice policies when taking FMLA leave.

For unscheduled absences, employees may now be required to use normal call-in procedures when notifying an employer of the need for leave (formerly an employee had up to 2 business days after the absence to notify the employer), absent unusual circumstances. But if the need for leave is foreseeable employees are still required to give 30 days notice of the need for leave, or otherwise give notice as soon as practicable. An employee may also be required to explain why 30 day notice was not practicable. The definition of "practicable" has also now been changed from "one to two business days" to the "same day or next business day".

An employer may also require employees to follow the same leave request procedures when requesting leave as apply to requests for other types of leave. For example, an employer may require that the employee provide notice in writing and that it be given to a specific person. Failure to follow employer leave policies may now disqualify employees for leave or delay the taking of FMLA protected leave.

Employees must also now specifically reference previously designated FMLA leave when employees seek additional leave due to an FMLA-qualifying reason for which employers have previously provided FMLA-protected leave.

## **MILITARY LEAVE**

As the FMLA was only recently amended in early 2008, to add the military leave provisions, the new regulations are the first opportunity by the Department of Labor to clarify those amendments.

The military leave amendments provide that an employee is eligible for up to 12 weeks of FMLA leave because of a "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter or parent is on active duty (or has been notified of an impending call to active duty).

The new regulations now define what is meant by a "qualifying exigency". Since the 2008 amendment did not define "qualifying exigency", that portion of the amendment did not take effect until the

Department of Labor issued these regulations, setting forth that definition. Accordingly, the military leave amendments providing leave for a “qualifying exigency” will take effect on January 16, 2009 with the rest of the new regulations.

The new regulations set forth the following list of what is a “qualifying exigency”: **(a.)** short-notice deployment, **(b.)** military events and related activities, **(c.)** childcare and school activities, **(d.)** financial and legal arrangements, **(e.)** counseling, **(f.)** rest and recuperation, **(g.)** post-deployment activities and **(h.)** additional activities as agreed upon by employer and employee.

“Qualifying exigency” leave only applies to national guard, reserves and retired military—it does not apply to general armed forces. The new regulations do clarify that some certification procedures are specific to military leave—such as the need to provide active duty papers for the first instance of leave and documentation of the specific need for leave.

The new regulations also address military caregiver leave. Military caregiver leave allows an employee who is a spouse, son, daughter parent or next of kin of a “covered servicemember” who incurs a serious illness or injury in the line of active duty to take up to 26 weeks of FMLA leave to care for the covered servicemember. The amendment also provided expanded definitions for the terms “spouse”, “son”, “daughter” and “next of kin.”

Unlike “qualifying exigency” leave, military caregiver leave applies to regular armed forces plus guard and reserve—but the covered servicemember must be currently active.

The leave period under the covered servicemember leave amendments are also substantially different than traditional FMLA leave. An employee is entitled to 26 weeks of covered servicemember leave during a single 12 month period. The 26 weeks are counted based on a set 12 month period, and the employee is entitled to 26 weeks of leave in each 12 months. Unlike the traditional leave provisions, the new regulations clarify that the 26 weeks is per servicemember and per event.

The new regulations also clarify how the military leave provisions work in connection with an employee’s right to traditional FMLA leave. When an employee seeks to take traditional FMLA leave and military leave—the total leave cannot exceed 26 weeks in a 12 month period. However since the “12 month period” for purposes of traditional FMLA leave is a recurring 12 months, and the “12 month period” for military leave is a set 12 months, the set 12 month period must be used in calculating the employees entitlement to 26 weeks of total leave. For example if an employee is the father of a covered servicemember and his son suffers a serious injury while in the line of duty, resulting in the



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employee taking leave beginning on March 1, 2008 for a total of 23 weeks. If that same employee requests FMLA leave as a result of his own serious injury beginning February 1, 2009, that employee is only entitled to 3 weeks of FMLA leave during February.

The new regulations also provide new certification forms for qualifying exigency leave and military caregiver leave. The certifications must be completed by an authorized health care provider who can certify that the injury occurred in the line of duty.

Except for minor specified variations—the general FMLA provisions in the new regulations apply to military leave, such as notice requirements and substitution of paid leave.

### **LIABILITY AND PENALTY ISSUES**

The Department of Labor has generally taken the position that an employee can waive past FMLA rights and claims. However, in recent years some courts have questioned whether an employee can waive FMLA claims without court or Department of Labor approval. The new regulations confirm that past claims may be waived without court or Department of Labor approval. Employees are still unable to waive future claims or the right to future leave.

The new regulations also expand potential damages available to an employee for interference claims, including damages for “any other relief tailored to the harm suffered.” A new clarification on the issue of damages is that that an employer can be liable for harm suffered by an employee for failure to restore health benefits upon the employee’s return to work if such benefits had lapsed due to non-payment during the period of leave.

### **WHAT SHOULD EMPLOYERS DO?**

The new FMLA regulations substantially change the rights and responsibilities of both employers and employees relative to FMLA leave. Employers must comply with specific new requirements in the regulations and should also seek to take advantage of the more favorable changes. Employers are encouraged to seek legal advice to ensure that their policies, practices, notices and forms comply with the new regulations.

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