DOL Issues Complex New FMLA Rules: Employers Given 60 Days To Comply

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November 18, 2008 - The U.S. Labor Department (DOL) has published new regulations interpreting and guiding the operation of the Family and Medical Leave Act (FMLA). These are the first significant changes to the regulations since 1994 enactment and will affect every employer subject to the law.

Within the 762 pages published by the DOL are regulations addressing two new forms of military leave created earlier this year, as well as minor tweaks, major adjustments and wholesale changes to original FMLA regulations. Not surprisingly, the result is a mixed bag for employers. Some of the more significant topics are summarized below.

Although the regulations have been years in the making and will require significant changes to policies, procedures and forms, as well as supervisor training, the DOL has given employers only 60 days (until January 16, 2009) to implement and comply with the new rules.

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New Military Leave Regulations

The new regulations implement one new type of FMLA leave (Qualifying Exigency Leave) and clarify an existing type of FMLA leave (Military Caregiver Leave), both of which are leaves for an employee with a family member in the military. FMLA-covered employers will be required to make available the Qualifying Exigency Leave beginning January 16, 2009. FMLA-covered employers are already required to provide the Military Caregiver Leave.

Apart from the different effective dates, the first major difference between these two types of leave is that Qualifying Exigency Leave will be available to an employee to handle various *non-medical* exigencies arising out of the fact that a family member is on active duty or on call to active duty status. In contrast, Military Caregiver Leave is medical-oriented leave for the employee to care for a family member who has a serious injury or illness incurred in certain types of military duty.

Another major difference between these two types of leave is that Qualifying Exigency Leave is subject to the usual maximum of 12-weeks of total FMLA leave in a year. On the other hand, Military Caregiver Leave is available to an employee for up to a maximum of 26 weeks in a "single 12-month period" as discussed further below.

Both of these types of leave are for FMLA-eligible employees under the usual eligibility requirements (including having worked at least 12 months with the employer, having at least 1250 hours of service with the employer in the 12 months preceding the FMLA leave, and so forth). Below is a summary of features of these two types of leave according to the new regulations.

*Military Caregiver Leave*Military Caregiver Leave is leave for an employee to care for a family member with a serious injury or illness related to certain types of military service. The family member must be a "covered service member" which means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is on the temporary-disability retired list because of a serious injury or illness. The term "serious injury or illness" means an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

Employees are *not* entitled to take this type of leave to care for *former* members of the Armed Forces, *former* members of the National Guard or Reserves, or service members on the *permanent* disability retired list.

To be eligible for Military Caregiver Leave, the employee must be the spouse, son, daughter, parent, or next of kin of the covered service member. The term "next of kin" is new to the FMLA, and the term does not apply to the other types of FMLA leave. "Next of kin" means the nearest blood relative of the service member, other than the service member's spouse, parent, son, or daughter. The order of priority is: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions; siblings; grandparents; aunts and uncles, and; first cousins. Service

decree or statutory provisions; siblings; grandparents; aunts and uncles; and; first cousins. Service members may specifically designate in writing another blood relative as their nearest blood relative for purposes of Military Caregiver Leave under the FMLA.

When the service member has made no designation of the nearest blood relative, and when there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. (For example, if a brother and sister ask their common employer for leave simultaneously to care for their sibling who is a covered service member, the employer would be required to provide such leave to both the brother and sister, assuming that all other eligibility criteria were met.)

On the other hand, when a next of kin designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin. (For example, if the service member in the previous example had designated the sister as the next of kin, the employer would be required only to provide leave to the sister as next of kin.) The regulations permit you to require an employee to provide confirmation of covered family relationship to the service member.

An eligible employee is entitled to 26 workweeks of leave to care for a covered service member in a "single 12-month period." The "single 12-month period" begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date, regardless of the method used to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If employees do not take all of their 26 workweeks of leave entitlement to care for a covered service member during this "single 12-month period," the remaining part of their 26 workweeks of leave entitlement to care for the covered service member is forfeited.

The leave entitlement described above is to be applied on a per-covered-service member, per-injury basis. That means that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered service members or to care for the same service member with a subsequent serious injury or illness. No more than 26 workweeks of leave may be taken within any "single 12-month period," however.

An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the "single 12-month period" described above, but the employee is entitled in that period to no more than 12 weeks of leave for any of the *other* types of FMLA leave (i.e. birth of a child, placement of a child, serious health condition of the employee or family member, or qualifying exigency). For example, an employee may, during the "single 12-month period," take 16 weeks of FMLA leave to care for a covered service member and 10 weeks of FMLA leave to care for a newborn child.

In the case of leave that qualifies as both leave to care for a covered service member and leave to care for a family member with a serious health condition during a "single 12-month period," the employer must designate such leave as leave to care for a covered service member in the first

employer must designate such leave as leave to care for a covered service member in the first instance. Such leave must not be designated and counted as both leave to care for a covered service member and leave to care for a family member with a serious health condition.

You may require the employee seeking Military Caregiver Leave to provide an appropriate certification completed by an authorized health care provider. DOL has developed an optional form which may be used for the certification by the health care provider. Or you may use your own certification forms to obtain the same basic information, but employers must not require information beyond what is specified in the regulations.

Employers may require information supporting medical necessity for intermittent or reduced-schedule leave. Unlike other types of FMLA leave related to health conditions, you are not permitted to require second and third opinions or to require recertifications. Some documents must be accepted as sufficient certification in lieu of the employer's own certification, and these are known as "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) which are issued to a family member to join an injured or ill service member at his or her bedside.

*Qualifying Exigency Leave*As noted above, Qualifying Exigency Leave becomes available to eligible employees beginning January 16, 2009. This is a new type of FMLA leave which the employee may take 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. (Notice that "next of kin" is not listed here, so this type of leave is limited to employees who have a spouse, son, daughter, or parent with the required military status.)

Qualifying Exigency Leave, like most other types of FMLA leave, is subject to the usual maximum of 12-weeks of total FMLA leave in a year (unlike Military Caregiver Leave which is subject to a maximum of 26 weeks of leave in a "single 12-month period" as explained above).

The family members who are considered "covered military members" are the employee's spouse, son, daughter, or parent who are on active duty or call to active duty status. Persons who can be ordered to active duty include retired members of the Regular Armed Forces, certain members of the retired Reserve, and various other Reserve members including the Ready Reserve, the Selected Reserve, the Individual Ready Reserve, the National Guard, state military, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard, Air Force Reserve, and Coast Guard Reserve.

Although this type of leave is available to employees whose family member is a retired member of the Regular Armed Forces, an employee whose family member is on active duty or on call to active duty status in support of a contingency operation as a member of the Regular Armed Forces, is not eligible to take leave because of a qualifying exigency. Also, a call to active duty refers to a federal call to active duty; state calls to active duty are not covered unless under order of the President of the United States pursuant to one of the laws cited in the regulations.

The regulations list eight types of "qualifying exigencies" which may qualify for this type of FMLA leave:

leave.

1. Short-notice deployment
This refers to leave to address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven calendar days or less prior to the date of deployment. Leave for this purpose can be used for up to seven calendar days beginning on the date the covered military member is notified of the impending call or order to active duty.

2. Military events and related activities
This refers to leave to attend any official military ceremony, program, or event related to the active duty or call to active duty status or to attend certain family support or assistance programs and informational briefings.

3. Childcare and school activities
This refers to leave to arrange for alternative childcare under certain circumstances; to provide childcare on an urgent, immediate need basis; to enroll in or transfer to a new school or daycare facility when necessary; or to attend meetings with staff at a school or daycare facility when necessary.

4. Financial and legal arrangements
This refers to leave to make or update various financial or legal arrangements; or to act as the covered military member's representative before a federal, state, or local agency in connection with military service benefits.

5. Counseling
This refers to leave to attend counseling (by someone other than a health care provider) for the employee, for the covered military member, or for a child or dependent when necessary as a result of the active duty or call to active duty status.

6. Rest and recuperation
This refers to leave to spend time with a covered military member who is on short-term, temporary, rest-and-recuperation leave during the period of deployment. Eligible employees may take up to five of days of leave for each instance of rest and recuperation.

7. Post-deployment activities
This refers to leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status. This also refers to leave to address issues that arise from the death of a covered military member while on active duty status.

8. Additional activities
This refers to leave to address other events arising from the military duty provided that the employer and employee agree that such leave shall qualify as an exigency and agree to the

timing and duration of such leave.

The first time an employee requests leave because of a qualifying exigency arising out of the active duty or call to active duty status of a covered military member, the employer may require the employee to provide a copy of the covered military member's active duty orders or other military documentation which indicates the appropriate military status and the dates of the active duty status. This information need only be provided to the employer once. A copy of new active duty orders or other documentation shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different covered military member.

You may require that the employee seeking Qualifying Exigency Leave provide an appropriate certification setting forth various details of such leave. DOL has developed an optional form for employers to use in obtaining an appropriate certification from the employee. Employers may use their own certification forms to obtain the same basic information, but you must not require information beyond what is specified in the regulations.

If the qualifying exigency involves the employee meeting with a third-party, you may contact the individual or entity for purposes of verifying a meeting or appointment schedule and the nature of the meeting. The employee's permission is not required, but no additional information may be requested by the employer. You may also contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or on call to active duty status. The employee's permission is not required, but again, no additional information may be requested.

Non-Military Family and Medical Leave Issues

The original FMLA regulations were passed without the benefit of the nearly 15 years of experience employers and the DOL have now had in dealing with the law. Not surprisingly, the old regulations failed to adequately address some of the more cumbersome and confusing aspects of the law and resulted in different interpretations by different courts; some were even held to be unlawful. After a two-year process that involved roughly 20,000 comments from interested parties, the new regulations address many, but not all, of these topics, some of which are highlighted below.

*Eligible Employees*The new regulations do not alter the requirement that an employee must have worked at least 12 months and 1250 hours to be eligible for FMLA leave. But they clarify the effect a break in service may have on meeting the 12-month requirement, a determinative issue in several recent lawsuits. In one case, an employee had worked for his employer for multiple years before leaving the company for nearly five years. Less than 12 months after he returned to the company's employment, he sought leave but was denied.

His employer defended its decision on the obvious ground that he had not worked the requisite 12 months. A federal court of appeals determined that the five-year break in service did *not* disqualify him from eligibility because his service to the company *five years earlier* was sufficient in and of itself to meet the 12-month requirement.

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Although the DOL initially proposed to set five years as the maximum break in service that would allow an employee to count prior service towards eligibility, the final regulation goes even further, setting out a seven-year standard (longer if the break was the result of certain military service). As a result, an employee who has worked less than 12 months during a current stint of employment may still be eligible if, during the prior seven years, he worked a total of 12 months. This new rule will have an obvious impact on how long employers must retain documents, as well as how eligibility for leave is determined.

*Serious Health Condition*Although many had hoped that the DOL would narrow the definition of "serious health condition," the new regulations retain the original six individual definitions, but clarify the requirements applicable to several. First, the regulations clarify that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a health care provider, the two visits must occur within 30 days of the period of incapacity, and the first must occur within seven days of the start of the incapacity.

The same is true for a serious health condition occasioned by three consecutive days of absence plus a regimen of continuing treatment. Again, the first visit to a health care provider must occur within seven days of the start of the incapacity.

With respect to a qualifying "chronic" serious health condition, the regulations define the requirement of "periodic visits to a health care provider" as at least two visits to a health care provider per year. Employers may not require more visits to deem the condition as chronic.

*Certification*One troubling task for employers has been determining whether the reason for a particular absence constitutes a qualifying "serious health condition." While the law has always allowed an employer to require an employee to provide a medical certification from a health care provider, the current regulations prohibit an employer from following up directly with the employee's physician, instead requiring a time-consuming, needlessly expensive, roundabout process. The new regulations make this process more efficient.

Once they take effect, an employer may directly contact an employee's health care provider to authenticate or to obtain a clarification of information required by a certification form. Because of privacy concerns the new rule prohibits an employee's "direct supervisor" from making these inquiries, limiting this right to a "health care provider, a human resources professional, a leave administrator (including third-party administrators), or a management official." The regulations do not define these positions, and while a "direct supervisor" may be easy to distinguish from a "management official" in larger companies, smaller employers must be careful not to run afoul of this rule.

If an employer believes that a medical certification is incomplete or insufficient to make a "serious health condition" determination, the new regulations require the employer to notify the employee in writing, and to specifically identify the missing or insufficient (*i.e.* vague, ambiguous or non-

responsive) information. You must then allow the employee seven calendar days to cure such deficiencies.

*Employer Notice Obligations*One of the DOL's objectives in developing the new regulations was to encourage further notice of FMLA rights and obligations. The new rules' notice requirements reflect that goal, setting out no fewer than four mandatory notices employers must issue.

First, the regulations retain the prior requirement for a "General Notice" to be posted in every workplace and incorporated into any employee handbook. If a company does not maintain a handbook, the notice must to be distributed to each employee *upon hire*. This latter requirement is a change from the prior regulation which only required distribution upon a request for leave if an employer lacked a handbook.

Second, the new regulations also require employers to issue a personalized "Eligibility Notice" within five days of either a request for leave or after learning that a leave may be FMLA-qualifying. This notice addresses an employee's general eligibility in terms of months and hours worked, and size of worksite, not whether the reason for the leave constitutes a qualifying "serious health condition."

At the same time an employer issues an Eligibility Notice to an employee, it must also issue a written "Rights and Responsibilities Notice," which must include a host of information, including medical certification obligations, rights to use paid leave, rights to maintain health care benefits, potential liability for repayment of health insurance premiums, and may also include employer-specific rules, such as periodic return to work reports.

Finally, the new rules require employers to issue a written "Designation Notice" within five days after receiving sufficient information to determine whether the need for leave is FMLA-qualifying. This extends an employer's time to designate leave from two days under the current regulations to five days. If the leave is qualifying, the Designation Notice must also address the amount of leave that will be counted against an employee's annual allotment, and whether the company will require a fitness-for-duty certification prior to an employee's return to work. And if the fitness-for-duty certification is based on the "essential functions" of an employee's job, those functions must be outlined in the Designation Notice. Notably, only a single Designation Notice is required each year for the same FMLA-qualifying condition, regardless of whether the leave is taken in multiple blocks or intermittently.

The DOL has also overhauled the penalty for failing to provide a required notice. The current rule states than an employer may not count any leave against an employee's annual 12-week allotment until after it provides all required notices. For example, in *Ragsdale v. Wolverine World Wide Inc.*, a trial court held that an employee who had already taken 30 weeks of leave was allowed an additional 12 weeks because her employer failed to provide her with a required written notice regarding the first 30 weeks. The U.S. Supreme Court struck down the DOL's current regulation, finding that it violated FMLA by allowing more than 12 weeks of leave. The DOL's new regulation acknowledges

violated FMLA by allowing more than 12 weeks of leave. The DOL's new regulation acknowledges *Ragsdale*, removes this penalty altogether, and clarifies that an employer is liable for failing to provide notice only to the extent an employee suffers actual harm, such as lost compensation and benefits, other monetary losses, or loss of employment or a promotion.

*Employee Notice*The new regulations modify a current regulation that allowed some employees to notify their employers of the need for FMLA-qualifying leave up to two business days *after* an absence, even where the need for leave was known in advance. Under the new regulations, employees must follow their employer's normal and customary call-in procedures, unless there are unusual circumstances.

*Paid Leave*The DOL's new regulations provide needed clarification with respect to the substitution of paid leave for unpaid FMLA leave. The current regulations prohibit employers from imposing any limits on the substitution of paid vacation or personal leave, but allow employers to restrict the substitution of paid sick or medical leave under the FMLA to situations in which they would otherwise provide such paid leave. These distinctions among different forms of paid leave have been removed.

Under the new regulations, an employer may 1) restrict the right to use any form of paid leave consistent with its policies for similar, but non-FMLA qualifying, reasons; and 2) apply its normal procedural rules subject to which paid leave was accrued. For example, if your paid sick-leave policy prohibits the use of sick leave in less than full-day increments, an employee would have no right to use less than a full day of paid sick leave regardless of whether the sick leave was being substituted for unpaid FMLA leave.

Similarly, if your paid-PTO policy requires two days' notice for the use of PTO leave, an employee seeking to substitute such paid leave for unpaid FMLA leave would need to provide two days' notice. Rules such as this should be addressed in the Rights and Responsibilities Notice.

*Light-Duty Work Does Not Count Against Twelve Weeks*One area of recent confusion in the courts has been whether light-duty work may be counted against an employee's annual allotment of FMLA leave. The new regulations clarify that time spent performing light duty work does *not* count against the annual 12-week allotment of FMLA leave, and the employee's right to job restoration is held in abeyance during the light duty period.

*Waiver of Rights*Federal courts have split on whether employees are allowed to waive their FMLA rights as part of settlement or severance *without* approval by a court or the DOL. The new regulations make clear that employees may voluntarily settle FMLA claims or waive FMLA rights without such approval, provided they are not doing so prospectively. In other words, like most other statutory rights, an employee may not waive FMLA rights in advance, but may do so after the fact, commonly as part of a settlement or severance agreement.

What Should Your Business Do To Prepare?

The changes addressed above are a small sampling of the detailed new regulations all covered employers must understand by early 2009. Within the next 60 days, employers need to update their policies and procedures to reflect new or changed requirements, obligations and options under the new regulations. This process must, of course, take into account any relevant state leave laws with rules that differ from the new FMLA regulations.

Likewise, every employer must ensure that its leave designation and certification forms comply with the new regulations, which may well require the creation of new forms to both comply with and take advantage of employer-friendly options made available under the new rules.

Finally, we recommend training front-line supervisors and management, who are often the first to learn about a potential serious health condition, about their general duties under FMLA. FMLA remains a rule-driven law, and while complicated at times, supervisors need to be able to spot FMLA red flags in order to ensure compliance and minimize the risk of legal liability.