



New FMLA Regulations Leave Employers Scrambling to Comply

Insights

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After years of waiting, the U.S. Labor Department (DOL) has just published new regulations interpreting the Family and Medical Leave Act (FMLA). These are the first significant changes since 1994, and will impact every employer subject to the law. The 762 pages of regulations not only address two new forms of military leave created earlier this year, but also make minor tweaks, major adjustments and wholesale changes to sections of the original FMLA regulations.

Not surprisingly, the result is a mixed bag for employers, who must come into compliance with the new regulations by January 16, 2009. The more significant topics are summarized below.

Military Caregiver Leave

The new regulations address Military Caregiver Leave, a form of leave that was created in January, 2008, and provides medical-oriented leave for those employees caring for family members with serious injuries or illnesses incurred in military duty. An eligible employee is entitled to 26 workweeks of leave to care for a covered service member in a "single 12-month period," regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. The employee is entitled in that period to no more than 12 weeks of leave for any of the other type of FMLA leaves (i.e. birth of a child, serious health condition, etc.).

Military Caregiver Leave is available to a wide range of family members – spouses, children, parents, and those "next of kin" of the covered service member. The term "next of kin" is new to FMLA, and the term does not apply to the other types of FMLA leave. It means the nearest blood relative of the service member, expanding the definition to include siblings, grandparents, aunts and uncles, and first cousins.

Employers may require an appropriate certification completed by a health care provider, and the DOL has developed an optional form which may be used for this purpose. While employers may use their own forms, they must not require information beyond what is specified in the regulations. Unlike other types of FMLA leave, you are not permitted to request second and third opinions nor to require recertifications.

Qualifying Exigency Leave

Qualifying Exigency Leave is a new type of FMLA leave (also created in January, 2008, but never implemented until now) 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. As with most other types of FMLA leave, it is subject to the usual maximum of 12-weeks of total FMLA leave in a year. The regulations list eight types of "qualifying exigencies" which may qualify for this type of FMLA leave:

- *Short-notice deployment*: leave to address any issue that arises from an impending call or order to active duty in support of a contingency operation seven days or less prior to the date of deployment;
- *Military events and related activities*: leave to attend any 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;
- *Childcare and school activities*: leave to arrange or provide for childcare or school-related activities;
- *Financial and legal arrangements*: leave to make or update various financial or legal arrangements;
- *Counseling*: leave to attend counseling (by someone other than a health care provider) when necessary as a result of the active duty or call to active duty status;
- *Rest and recuperation*: leave to spend time with a covered military member who is on short-term, temporary, rest-and-recuperation leave during the period of deployment (up to five days);
- *Post-deployment activities*: leave to attend arrival ceremonies (including funeral or memorial services), reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following active duty status; and
- *Additional activities*: leave to address other events arising from military duty agreed upon between employer and employee.

You may require a copy of the covered military member's active duty orders or other military documentation to support the qualifying exigency, but only once. You may also require the employee to complete an appropriate certification form setting forth various details of such leave, such as one developed by the DOL.

Other Medical Leave Issues

After a two-year process that involved roughly 20,000 comments from interested parties, the new regulations address many of the more cumbersome and confusing aspects of the law, some of which had resulted in different interpretations by different courts, and others that had even been held unlawful. Here are some of the more significant changes:

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. The new regulations set out a seven year standard (longer if the break was the result of certain military service), meaning that 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. 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 must occur within seven days of the start of the incapacity.

Certification

The new regulations make the certification 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. An employee's "direct supervisor" is prohibited 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. The new regulations also require the employer to notify the employee in writing if the medical certification is incomplete or insufficient to make a determination as to "serious health conditions," and to specifically identify the missing or insufficient (*i.e.* vague, ambiguous or non-responsive) information.

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 set 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 be distributed to each employee *upon hire*. Second, the new regulations 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. Third, you must also issue to an employee a written "Rights and Responsibilities Notice" at the same time as the Eligibility Notice

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Finally, the new rules require you to issue a written "Designation Notice" within five days after receiving sufficient information to determine whether the need for leave is FMLA-qualifying.

The penalty for failing to provide a required notice has also been overhauled. The current rule states that an employer may not count any leave against an employee's annual 12-week allotment until after it provides all required notices. The DOL's new regulation 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

Under the new regulations, you may restrict the right to use any form of paid leave consistent with your policies for similar, but non-FMLA qualifying, reasons, and 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.

Light-Duty Work

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 of the agreement 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 as part of a settlement or severance agreement.

What Should You Be Doing?

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. Employers need to

update their policies and procedures to reflect new or changed requirements, obligations and options under the new regulations.

And of course, this process must 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.

For years, many of our clients have relied on our "FMLA Kit" to ensure they were in full compliance with all the rules of this complex law. Naturally we are updating this FMLA Kit based on these new regulations. We'll be announcing on our website and in a future Legal Alert when those new compliance kits will be available.

In the meantime, if you need clarification or guidance, please contact your usual Fisher Phillips attorney.

This Legal Alert provides an overview of new complex regulations. It is not intended to be, and should not be construed as, legal advice for any specific factual situation.