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**LABOR & EMPLOYMENT DEPARTMENT**

# ALERT

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## **DEPARTMENT OF LABOR ISSUES FINAL FAMILY AND MEDICAL LEAVE ACT REGULATIONS**

**By Catherine T. Barbieri**

The U.S. Department of Labor (DOL) issued final, revised regulations on November 17, 2008, concerning the Family and Medical Leave Act of 1993 (FMLA) and the amendments to the FMLA under the National Defense Authorization Act. The regulations make significant changes to the ways in which employers will need to administer leave under FMLA. The new regulations take effect on January 16, 2009.

The following is a summary of some of the more significant revisions to the former regulations, and the new revisions concerning military leave.

### **REVISIONS TO FMLA REGULATIONS**

#### ***IMPACT OF BREAKS IN SERVICE ON ELIGIBILITY FOR FMLA LEAVE***

In determining whether an employee meets the 12-month eligibility requirement for FMLA leave, employment periods preceding a break in service of more than seven years need not be counted, unless the employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation, or a written agreement, including a collective bargaining agreement, guarantees the employee's rehire following the break in service.

#### ***EMPLOYER NOTICE PROVISIONS***

Covered employers are required to provide employees with a general notice about the FMLA either in a handbook or some other written guidance or by providing a copy of the general notice to each new

employee upon hiring. In addition, when an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for FMLA-qualifying reasons, the employer also must provide an eligibility notice, a rights and responsibilities notice and a designation notice to the employee. Sample general, eligibility, rights and responsibilities, and designation notices are provided in the regulations. The final rule extends the time for employers to provide eligibility and designation notices from two business days to five business days.

The new designation notice requires that employers inform employees of a fitness for duty certification requirement and, if the employer wishes to obtain information about whether the employee can perform the essential functions of the job, to attach a statement of such functions. Also, the new designation form requires employers to notify the employee of the number of hours, days or weeks of leave that will be counted as FMLA leave, if known at the time the notice is issued.

#### ***EMPLOYEE NOTICE PROVISIONS***

The regulations also redefine employee notice obligations, depending on whether leave is foreseeable or unforeseeable. Employees still must provide 30 days' advance notice where the need for leave is foreseeable. However, if 30 days' notice is not practicable, then notice must be given as soon as practicable, which is now defined more narrowly to mean the same day or the next business day. In the case of unforeseeable leave,

generally notice must be given in the time frame prescribed by the employer's usual and customary notice requirements for leave.

### ***SERIOUS HEALTH CONDITIONS***

The new regulations limit the definitions of two common categories of serious health condition. For the "incapacity and treatment" category, the rules now mandate that the required two or more visits to a health care provider must occur within 30 days of the first day of incapacity, absent extenuating circumstances, and that the first visit must occur within seven days of the first day of incapacity. For the "chronic conditions" category, the employee must make periodic visits, now defined to mean treatment two or more times in a year, for treatment by a health care provider or a nurse under the direct supervision of a health care provider.

### ***MEDICAL CERTIFICATION REQUIREMENTS***

The new regulations include revised, separate medical certification forms for employees and their family members. The revised forms eliminate the six categories of serious health conditions and their definitions, and allow (but do not require) the health care provider to offer a more complete statement of the relevant medical facts, such as symptoms, diagnosis or any regimen of continuing treatment. The new rules also establish a mandatory notice and seven-day cure period for incomplete or insufficient certifications and adopt new rules for recertification intervals depending on the information provided in the initial medical certification.

The regulations now allow a representative of an employer to contact an employee's health care provider directly about a medical certification, but only to seek "authentication" or "clarification" of information on the form. The employer's representative must be a health care provider, human resources professional, leave administrator or management official, but the representative may not be the employee's direct supervisor. Further, employers may not ask health care providers for additional information beyond that required by the certification form.

### ***SUBSTITUTION OF PAID LEAVE FOR FMLA LEAVE***

Under the final rule, employers are permitted to apply their normal policies for taking paid leave when

an employee substitutes paid leave for unpaid FMLA leave.

### ***PERFECT ATTENDANCE AWARDS***

Previously, an individual who took advantage of FMLA leave could not be denied a perfect attendance award. Under the revised regulations, employers may deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way.

### ***FMLA WAIVERS***

The revised regulations codify the DOL's position that employees may voluntarily settle FMLA claims involving retrospective rights without court or DOL approval, but may not waive prospective claims.

### ***MILITARY LEAVE REGULATIONS***

The new regulations define what constitutes "qualifying exigency leave" and "military caregiver leave" for purposes of the military family leave amendments to the FMLA.

*Military Caregiver Leave.* Eligible employees are entitled to take up to 26 work-weeks of leave in a 12-month period to care for a spouse, child, parent or next of kin who is a covered service member with a serious injury or illness incurred in the line of duty on active duty. The regulations define key terms, such as "covered service member," "next of kin," "serious illness or injury" and "needed to care for." The regulations also create certification requirements for and include a model certification form specific to this type of leave.

*Qualifying Exigency Leave.* This leave is available for 12 work-weeks in a 12-month period to eligible employees with a covered military member serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The regulations define the term "qualifying exigency" to include eight specific activities: short-notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities where the employer and employee agree to the leave.

The regulations also contain definitions of other key terms, such as “covered military member” and “contingency operation,” and provide for certification requirements related to this type of leave.

### **FURTHER GUIDANCE TO ENSURE COMPLIANCE**

Employers need to be in full compliance with the new FMLA regulations by the January 16, 2009, effective date. To comply with the revised regulations, employers will need to revise their existing FMLA policies to incorporate the changes for nonmilitary and military FMLA leave; adopt the new certification forms

and general, eligibility, rights and responsibilities, and designation notices; and train their human resource professionals and supervisors concerning compliance with the new regulations. In addition, employers will need to ensure that other policies are consistent with the new FMLA regulations, and that their job descriptions accurately describe the essential functions of each position.

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