IMPLEMENTING THE FINAL FMLA REGULATIONS ISSUED BY THE DEPARTMENT OF LABOR

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Military FMLA Leave

As we advised in a prior client alert, President George W. Bush signed on January 28, 2008, legislation that includes provisions that amend the Family and Medical Leave Act (FMLA) to allow eligible employees to use leave in certain circumstances when their spouse, child, or parent is called for active duty in the military. The provisions were included in the National Defense Authorization Act for Fiscal Year 2008 (NDAA). The final regulations were published by the Wage and Hour Division of the Department of Labor (DOL) in the Federal Register on November 17, 2008. The final regulations will become effective on January 16, 2009.

The military caregiver provision implements the requirement to expand FMLA protections for family members caring for a covered service member with a serious injury or illness incurred in the line of duty on active duty. These family members may take up to 26 workweeks of leave in a 12-month period.

The rule also defines "qualified exigencies" for families of National Guard and Reserve personnel to take FMLA leave. Qualified exigencies are broadly defined as (1) short-notice deployment, (2) military events and related activities, (3) child care and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) deployment activities, and (8) additional activities where the employer and employee agree to the leave.

Other Changes Unrelated to the NDAA

The *Ragsdale* Decision

The regulations include a number of technical regulatory changes to reflect current law following the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, which invalidated a penalty provision of the regulations. *Ragsdale* ruled that the current regulation's "categorical" penalty for failure to appropriately designate FMLA leave, which in that case would have required the employer to provide an additional 12 weeks of FMLA-protected leave after the 30 weeks of leave the employee had already received, was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement

that an employee demonstrate individual harm. The regulations clarify that only where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.

Light Duty

Pursuant to the final Regulations, time spent performing "light-duty" work does not count against an employee's FMLA leave entitlement and that the employee's right to restoration is held in abeyance during the period of time the employee performs light duty (or until the end of the applicable 12-month FMLA leave year). If an employee is voluntarily performing a light-duty assignment, the employee is not on FMLA leave.

Waiver of Rights

The final regulations codify the DOL's longstanding position that employees may voluntarily settle or release their FMLA claims without court or department approval.

Serious Health Condition

The final regulations retain the six individual definitions of serious health condition while adding guidance on three regulatory matters: (1) The definitions of serious health condition involve more than three consecutive, full calendar days of incapacity plus "two visits to a health care provider." Under the final regulations, the two visits must occur within 30 days of the beginning of the period of incapacity, and the first visit to the health care provider must take place within seven days of the first day of incapacity. (2) With regard to the definition of serious health condition requiring a regimen of continuing treatment, the final regulations clarify that the first visit to the health care provider must take place within seven days of the first day of incapacity. (3) The final regulations define "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year since that provision is also open-ended in the current regulations and potentially subjects employees to more stringent requirements by employers.

Paid Leave

FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family, or medical or sick leave, as offered by their employer, concurrently with any FMLA leave. This is called the "substitution of paid leave." Under the final regulations, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic "paid time off").

Perfect Attendance Awards

The final regulations change the treatment of perfect attendance awards to permit employers to 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.

Employer Notice Obligations

The final regulations consolidate all employer notice requirements into a "one-stop" section of the regulations and reconcile some conflicting provisions and time periods under the current regulations. Further, the final regulations clarify and strengthen the employer-notice requirements in order to better inform employees and allow for a better exchange of information between employers and employees. Employers will be required to provide employees with a general notice about the FMLA (through a poster and either an employee handbook or upon hire), an eligibility notice, a rights and responsibilities notice, and a designation notice. In order to ensure employers are able to better inform employees under the

new notice provisions, the final regulations extend the time for employers to provide various notices from two business days to five business days.

Employee Notice
The final regulations modify the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if they could have provided notice more quickly. The regulations provide that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances.

Medical Certification Process
The final regulations recognize the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employees' health care providers. The DOL has added a requirement to the final regulations that specifies that the employer's representative contacting the health care provider must be a health care provider, human resource professional, leave administrator, or management official, but in no case may it be the employee's direct supervisor. Employers may not ask health care providers for additional information beyond that required by the certification form. The final regulations update the DOL's optional Form WH-380 to create separate forms for the employee and covered family members and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification. In addition, the final regulations specify that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking and give the employee seven calendar days to cure the deficiency.

Medical Certification Process (Timing)
The final regulations codify a 2005 DOL wage and hour opinion letter that stated employers may request a new medical certification each leave year for medical conditions that last longer than one year. The final regulations also clarify the applicable time period for recertification. In all cases, the final regulations allow an employer to request recertification of an ongoing condition every six months in conjunction with an absence.

Fitness-For-Duty Certifications
The final regulations make two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

Revised Posting

A revised FMLA poster reflecting the recently published final rule is now available for viewing and downloading. Every employer covered by the FMLA is required to post and keep posted on its premises in conspicuous locations a notice explaining the act's provisions. The poster and forms become effective January 16, 2009.

Recommendations

Employers should review and revise their FMLA policies to conform with the revisions to the FMLA based on these final regulations and should be prepared to implement an updated policy by January 16, 2009.