

New FMLA Regulations Now in Effect

March 10, 2009

The Family and Medical Leave Act (FMLA) was amended on Jan. 28, 2008, when then President George W. Bush signed into law the National Defense Authorization Act (NDAA). Shortly thereafter, on Feb. 11, 2008, the Department of Labor (DOL) published a notice of proposed rule making in the Federal Register in order to update the FMLA regulations and provide guidance regarding the new amendments. The final updated rules and regulations were issued on Nov. 17, 2008, and they are now in effect.

The regulations issued by the DOL institute sweeping changes to the FMLA, covering a number of different areas of the Act. The areas that have been changed, modified or updated include notice, eligibility, intermittent leave, paid leave and medical certification among a host of other areas.

The DOL's final regulations are extremely long and complicated. Compliance with the FMLA and these new regulations will be a daunting task. The goal of this article is not to identify every change, but to highlight regulatory changes that most significantly impact employers and their administration of the FMLA. A review of these highlighted changes will place employers in a better position to start implementing the new FMLA regulations.

- **The Amendments to the Family and Medical Leave Act:** The actual amendments to the FMLA outline two primary changes, including the additions of “Military Caregiver Leave” and “Qualified Exigency Leave.”
 - **Military Caregiver Leave:** The FMLA now provides that a “spouse, son, daughter, parent or next of kin” may take up to 26 weeks of leave during a single 12-month period to care for a “covered service member” who suffers from a “serious injury or illness” incurred while on active duty. This type of leave is only available to family members who intend to care for a covered service member, and not for the care of former members of the armed forces or members of the permanent disability retired list.

The 12-month period, available to family members under this section, begins on the first day that an eligible employee takes the FMLA leave to care for a covered service member, regardless of how the employer calculates the 12-month period for entitlement to other forms of the FMLA leave. Moreover, an employee may take more than one period of Military Caregiver Leave for up to 26 weeks in a single 12-month period for different service members or for the same service member with a subsequent serious injury or illness.

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- **Qualified Exigency Leave:** The new provisions of the FMLA and its regulations also allow an employee to take up to 12 weeks of FMLA leave for a “qualified exigency” that arises when a “spouse, parent or child is on or has been called to active duty.” This type of leave is limited to 12 weeks during a 12-month period, to be calculated in the same fashion the employer uses in calculating other forms of the FMLA leave. Qualified exigency leave is not available to members of the *regular* armed forces who are called to active duty. Also, “qualified exigency” leave can be taken intermittently or on a reduced leave schedule.

The DOL was called upon to define “qualified exigency” and identified eight different reasons for a “qualified exigency” leave, including: (1) short notice deployment, (2) military events, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities and (8) additional activities. The final category entitled “additional activities” is intended to be a catch all for those qualified exigencies that were not enumerated by the DOL.

In order to initiate a “qualified exigency” leave, an employer may seek certification of the qualified exigency only when the employee first requests this type of leave. An employer can request a copy of the active duty orders issued by the military as certification for the leave. Alternatively, employers may have employees seeking “qualified exigency” leave fill out new Form WH-384, supporting the qualifying exigency leave.

- **Joint Employer Coverage:** The new regulations clarify whether a Professional Employer Organization (PEO) can be considered a “joint employer” for the purpose of the FMLA. Generally, PEOs work in association with employers performing administrative functions, such as payroll, benefits and policy enforcement. The regulations state that whether or not a PEO is considered a “joint employer” with a client will be based upon the “economic realities” of the facts and circumstances of the relationship. For instance, if a PEO is simply performing administrative functions, it will not be considered a “joint employer.” However, if the PEO has the right to hire, fire or has direct control over the client’s employees, the PEO may be considered a “joint employer” for FMLA purposes.
- **Employer Notice Requirements:** Along with the new regulations, the DOL has prepared a new notice to be posted by employers. The notice must be posted in conspicuous locations where it can be seen by employees and applicants. A copy of this notice can be found at the DOL web site, as WH Publication 1420. It can be posted electronically, if all of the employees are adequately linked and able to receive it electronically. Further, the information conveyed in the notice must be included in the employee handbook, if the employer utilizes a handbook or if not, it must be distributed to each employee at the time of hire.
- **Employer Notice of “Eligibility/Rights and Responsibilities:”** After an employee requests FMLA leave or the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employer must notify the employee of his/her eligibility to take the FMLA leave within five

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business days, absent extenuating circumstances. The notice of eligibility must state whether the employee is eligible for the FMLA leave or not. If the employee is not eligible, the employer must provide at least one reason why he/she is not eligible.

In addition to the eligibility notice, the employer must also provide written notice to the employee of his/her "rights and responsibilities." It is recommended that the notice of rights and responsibilities should be incorporated as part of the eligibility notice. Employers should utilize the new Form WH – 381 for providing notice of eligibility, as well as rights and responsibilities. The notice of rights and responsibilities requires specific information to be included, as outlined in new Form WH – 381. The required information includes the need for the employee to provide proper medical or exigency certification for his/her leave.

- **Employer "Designation" Notice:** Along with the eligibility notice, the employer must also provide the employee with notice that his/her leave will be designated as FMLA leave. The designation notice must be provided to the employee within five business days. The DOL has provided Form WH – 382 to assist employers in providing the designation notice. In the event that the employer fails to provide notice designating the leave as FMLA leave within the five business day time frame, the employer may retroactively designate the leave as FMLA leave, provided that the employer's failure to designate the leave does not cause harm or injury to the employee.
- **Eligibility Determinations:** The DOL has provided clarification in the new regulations regarding whether an employee's 12 months of employment must be consecutive to be eligible for leave. The regulations resolve a dispute in the case law concerning how long of a "break in service" was permissible when aggregating an employee's 12 months of service. The new regulation states that employment periods prior to a break in service of *seven* years or more need not be counted in determining whether an employee is eligible for the FMLA leave.

Additionally, in situations where an employee commences a non-FMLA leave before reaching the 12-month eligibility point, the regulations now allow the employee to have his/her leave converted to an FMLA leave after reaching his/her 12-month anniversary. The previous regulations did not allow this transition. Per the new regulations, in the event that an employee meets the eligibility requirements during a non-FMLA leave, any portion of the leave taken for an FMLA qualifying reason after the employee meets the eligibility requirement would be "FMLA leave."

- **Employee Notice:** The new regulations do not make any significant changes to the employee notice requirements when notice is *foreseeable*. The only slight change in this area arises where the employee becomes aware of foreseeable FMLA leave, less than 30 days in advance, as generally required. In these instances, the employee is required to provide notice of foreseeable leave "as soon as practicable." According to the new regulations, "as soon as practicable" means the employee should provide notice of the need for leave either the same day or the next business day. Under the previous regulations, the employee had two business days.

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The new regulations make more significant changes to employees providing notice of *unforeseeable* leave. In contrast to the two business days that employee's previously had to provide notice of unforeseeable leave, employees must now provide notice "as soon as practicable" under the facts and circumstances of the particular case. If the employee's notice is not "as soon as practicable," an employer may delay the FMLA coverage dependant upon the facts.

What's more, the new regulations alter an employee's duties regarding notice when he or she has previously been approved for the FMLA leave and misses work. In this instance, where the employee misses work for a reason covered by that previously approved FMLA leave, the employee must specifically reference either the qualifying reason for the leave or the need for the FMLA leave. However, it is suggested that employers make further inquiry to clarify whether the absence is covered under the FMLA. Also, when calling in sick, employees must provide a full explanation of their absence to trigger the FMLA coverage. Simply calling in sick is not sufficient notice of a potentially qualifying FMLA event.

- **Treatment of Holidays:** The issue of whether a holiday counts toward an employee's FMLA entitlement was clarified in the new regulations. If an employee is on FMLA leave for a full week in which a holiday falls, the full week, including the holiday, is counted toward the employee's FMLA entitlement. On the other hand, where an employee does not miss an entire week while on the FMLA leave, and a holiday occurs, the holiday is not counted toward the employee's FMLA entitlement, unless the employee was scheduled to work on the holiday.
- **Intermittent Leave or Reduced Scheduled Leaves:** The new regulations address the increments in which intermittent leave may be taken. Under the previous regulation on this issue, an employer was required to calculate leave increments based upon the shortest period of time that the employer's payroll system used to account for absences or use of leave, provided it was one hour or less. The regulations no longer reference the payroll system as a guide. The new regulations state that an employer must account for leave using an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. Also, employers can track the employee's leave in varying increments at different times of the day or shift.

Furthermore, there has been a change in the text of the regulations concerning an employee's intermittent leave for medical treatment. The former regulation indicated that when an employee requests intermittent or reduced schedule leaves for planned medical treatment, the employee "must attempt to schedule their leave so as not to disrupt the employer's operations." Currently, the employee "must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations." The essence of the change was that employees must attempt to schedule treatment in accordance with the employer's needs, but the DOL acknowledges that this is often not possible.

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What's more, if a healthcare provider deems that certain treatment must occur at a certain time, the healthcare provider's determination prevails over the employer's needs.

The new regulations also alter the manner in which employers calculate intermittent leave when an employee's work schedule changes from week to week. Under the previous regulation, when calculating the workweek for FMLA purposes, the employer used the average of the employee's schedule over the previous 12 weeks. The new regulations require the employer to use a weekly average over the previous 12 months.

Also, a physical impossibility exception has been established with respect to intermittent leave. Intermittent leave will not be given for certain types of employment. Specifically, if the nature of the employment makes it physically impossible for an employee to start midshift (i.e., airline stewardess, railroad employee, etc...) the employer may designate the entire shift as the FMLA leave, if taken. This exception is geared toward individuals who work in rooms or areas that must be sealed.

- **Substitution of Paid Leave:** The new regulations make clear that employers' paid leave policies will determine whether an employee can substitute paid leave for the FMLA leave. Additionally, when an employee is receiving disability or workers' compensation payments, and those payments only cover a portion of the employee's salary, the employer and employee may mutually agree to supplement the partial wage payment with paid leave.
- **Need for Care of Family Members:** Generally, under the FMLA, an employee is "needed to care for" a family member where the family member has a serious health condition and is unable to care for his or her own basic needs. The new regulations clarify that the employee taking the FMLA leave to care for a family member need not be the only individual or family member available to care for the family member.
- **Medical Certification:** The new regulations provide a more concrete timetable for requesting medical certification. Specifically, a request for medical certification should be made within five business days after the request for leave has been made in the case of a foreseeable leave. In the case of an unforeseeable leave, the request for certification should be made within five business days after the leave commences. Furthermore, if the employer does not make its request for certification within the time allotted, the employer can later request the certification, "If the employer later has reason to question the appropriateness of the leave or its duration."

Employees still have 15 calendar days to provide the medical certification, unless it is not practicable under the circumstances. If an employee fails to provide certification for a foreseeable leave within the allotted timeframe, and without any reason for the delay, the employer may deny the FMLA leave until a sufficient certification is submitted by the employee. The employer may also deny leave where the employee fails to provide certification within the time allotted for an unforeseeable leave until sufficient certification is provided.

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The medical certification forms provided by the DOL have been modified. The DOL has created two new certification forms to be used for medical certification. These two new certification forms are titled Form WH – 380-E “Certification of Health Care Provider for Employee’s with Serious Health Condition,” and Form WH – 380 F “Certification of Health Care Provider for Family Member’s Serious Health Condition.” Employers must notify employees in writing of deficiencies in the medical certification and allow employees time to remedy the deficiency before denying the FMLA leave.

An employer may now contact healthcare providers directly for the purpose of authenticating or clarifying a certification and may do so without the permission of the employee. The contact can be initiated by a number of different employer representatives, but cannot be made by the employee’s direct supervisor. The employer can authenticate the certification to verify that the certification was authorized by the healthcare provider or the employer can ask the healthcare provider to clarify the information included in the certification. The employer cannot request additional information.

Where an employee’s serious medical condition extends beyond one year, employers may request recertification every new leave year.

- **Equivalent Position/Payment of Bonuses:** The new regulations do not recognize the distinction between performance-based bonuses and absence of occurrence-based bonuses, contrary to the previous regulations. Per the new regulations, if “a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee fails to meet the goal as a result of the FMLA leave, the bonus may be denied. The bonus may be denied, only if it is not done in a discriminatory manner.”
- **Fitness for Duty Certifications:** Employers may demand more information under the new regulations regarding an employee’s ability to return to work. The employer is permitted to require that a healthcare provider specifically address the employee’s ability to perform the essential functions of the employee’s job.

Additionally, employers may also seek fitness for duty certifications for intermittent leave, if the employer has reasonable safety concerns regarding the employee’s ability to perform his or her duties, based upon the serious health condition for which the employee took leave. The certification of fitness for duty for intermittent leave can be required once every 30 days, as long as the employer informed the employee of this requirement in the “designation” notice.

- **Waiver of FMLA Rights:** The new regulations clarify a split in the U.S. Circuit Courts as to whether FMLA claims can be waived. Employees cannot waive or be induced by employers to waive “their *prospective* rights under the FMLA.” However, an employee may waive his or her FMLA rights regarding a settlement or release of claims based upon past employer conduct. Moreover, a settlement or release of this type does not require approval by the DOL or a court.

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- **Remedies:** Remedies are available under the new regulations where an employer interferes with an employee's rights under the FMLA. Interference with an employee's FMLA rights would include the failure to provide the employee with FMLA eligibility notice, among other interferences. Pursuant to the new regulations, an employer may be liable "for compensation and benefits lost by reason of the violation or other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotions or any other relief tailored to the harm suffered."

Compliance with the new FMLA regulations will be a complex and exhaustive process for employers and Human Resource professionals. It is recommended that you consult with a labor and employment attorney to ensure compliance and proper administration. If you would like a copy of the DOL's new FMLA regulations and sample forms to assist in this process, they can be found on the DOL's web site at www.dol.gov.