

Legislative Update

Employee Benefits



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Family and Medical Leave Act: Department of Labor's Final Rules

Purpose

In the flurry of legislative activity we have been reacting to since the presidential election, other important legislation affecting you and your company may have taken a back seat. As such, we are providing this Legislative Update to remind you about the final rule on Family and Medical Leave Act (FMLA) recently released by the Department of Labor (DOL).

In November 2008, the DOL published its final rule to implement the first-ever amendments to the 15-year-old FMLA. The final rule is intended to improve communication between employers, employees and health care providers, to make the law operate more smoothly, and to provide needed clarity for both workers and employers about their responsibilities and rights under FMLA.

Military Family Leave

Military Caregiver Leave

Under the first of two new military family leave entitlements, eligible employees who are family members of covered military service members are able to take up to 26 workweeks of leave in a single 12-month period to care for a covered military service member with a serious illness or injury that was incurred in the line of duty while on active duty. Other than extending FMLA job-protected leave beyond the normal 12 weeks of FMLA leave, this new rule also extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.

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Qualifying Exigency Leave

The second entitlement, "Qualifying Exigency Leave," helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. (A contingency operation may exist when there is a call-up to or retention on active duty of members of the uniformed services during war or national emergency.)

This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees who have 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 a number of broad categories for which employees can use FMLA leave, including:

- short-notice deployment
- military events and related activities
- childcare and school activities
- financial and legal arrangements
- counseling
- rest and recuperation
- post-deployment activities
- additional activities not encompassed in the other categories but agreed to between the employer and employee

The final rule also includes two new DOL certification forms that may be used by

employees and employers to facilitate the certification requirements for the use of military family leave.

Notification Rule

The final rule removes categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.

Light Duty

Under the final rule, time spent performing "light duty" work does not count against an employee's FMLA leave entitlement, and 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 considered to be on FMLA leave.

Waiver of Rights

Employees may voluntarily settle or release their FMLA claims without court or DOL approval. This is not a change in the law, but rather a clarification. Prospective waivers of FMLA rights continue to be prohibited under the final rule.

Serious Health Condition

The final rule reiterates and retains the six individual definitions of serious health condition but adds guidance on three regulatory matters:

- One of the definitions of serious health condition calls for more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider.” The prior rule was open-ended as to when those two visits must occur. The new rule requires that the two visits to a health care provider occur within the more-than-three-days period of incapacity. What’s more, the two visits must occur within 30 days of the beginning of the period of incapacity, and the first visit to a health care provider must take place within seven days of the first day of incapacity.
- A second way to satisfy the definition of serious health condition involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The final rule also clarifies in this case that the first visit to the health care provider must take place within seven days of the first day of incapacity.
- Thirdly, the final rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year, eliminating the open-ended nature of the provision in the prior regulations.

Substitution of Paid Leave

Under the final rule, all forms of paid leave offered by an employer must be treated the same, regardless of the type of leave substituted (including generic “paid time off”). An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he/she does not meet the employer’s conditions for taking paid leave, and the employer may waive any procedural requirements for the taking of any type of paid leave.

Perfect Attendance Awards

The final rule changes the treatment of perfect attendance awards to allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance as a result of taking

FMLA leave, as long as employees taking non-FMLA leave are treated in the same way.

Employer Notice Obligations

Employers are now required to provide employees with the following:

- a general notice about the FMLA (through a poster, and either upon hire or in an employee handbook)
- an eligibility notice
- a rights and responsibilities notice
- a designation notice

In order to ensure employers are able to better inform employees under the new notice provisions, the final rule extends the time for employers to provide various notices to new hires from two business days to five business days.

Employee Notice

The final rule provides that an employee requiring FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, except under unusual circumstances, rather than allowing the employee to be absent for up to two full business days before being required to provide notice of the absence. The final rule also highlights (but does not change) the existing consequences if an employee does not provide proper notice of his/her need for FMLA leave.

Medical Certification Process

Content and Clarification

The final rule recognizes 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. In addition, the DOL has specified that any employer’s representative contacting a health care provider in regard to an employee’s FMLA leave must be another health care provider, a human resource professional, a leave administrator, or a management official, but *in no case* may he/she be the employee’s direct supervisor. Further, employers *may not* ask health care providers for additional information beyond

that required by the certification form.

The final rule also updates the DOL’s optional Form WH-380 to create separate forms for the employee and covered family members, and to allow—but not require—health care providers to include a diagnosis of the patient’s health condition as part of the certification.

If an employer deems that a medical certification is incomplete or insufficient, the rule requires that the employer specify in writing the information that is lacking, and must give the employee seven calendar days to cure the deficiency.

Timing

The final rule restructures and clarifies the regulatory requirements for recertification. In all cases, the final rule allows an employer to request recertification of an ongoing condition every six months in conjunction with an absence.

Fitness-for-Duty Certification

The final rule makes two changes to the fitness-for-duty certification process:

- First, an employer may require that certification specifically address the employee’s ability to perform the essential functions of the 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 taking intermittent leave.

This newsletter contains highlights of the regulatory changes to the FMLA. For the complete rule, visit:

<http://www.dol.gov/esa/whd/fmla/finalrule.htm>

Source: U.S. Department of Labor

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This article is intended as an overview and should not be viewed as legal advice. Please consult your attorney if you have questions.