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Family Medical Leave Act (FMLA) Changes Effective January 16, 2009

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On November 17, 2008, the Department of Labor (DOL) issued new regulations amending the Family and Medical Leave Act of 1993 for the first time since it was enacted in 1993. The new regulations were promulgated after nearly four years of discussion among focus groups and after a substantial period of time for public comment. The new regulations include commentary, contributions, and recommendations from private and public employers. It appears that the DOL really took into consideration the comments of the public when drafting the new regulations in an attempt to make the regulations more “user friendly.”

The new regulations are an attempt to clean up and clarify the old FMLA regulations. However, the new FMLA regulations also interpret brand new legislation in the form of the Military Leave Act, passed into law as the National Defense Authorization Act (NDAA) for Fiscal Year 2008, Public Law 110-181, on January 28, 2008. Employers need to pay particular attention to the new Military Leave Act provisions, as well as the clarifications and new timelines set forth within the new regulations, particularly those changes to the notice and medical certification requirements.

Fortunately, the DOL has created model forms to be used by employers for FMLA leave notices, requests, certifications, etc. These forms are referenced below and are available on the DOL website. Although most of the forms are optional, using the standard DOL forms will help to provide clarity and completeness for employers, employees and health care providers. Employers are strongly recommended to update their leave forms and employee handbooks immediately to reflect the changes in the FMLA.

In this article, we highlight many of the significant changes to the FMLA that went into effect on January 16, 2009.

FMLA Overview

Eligible employees may take up to twelve (12) work weeks of unpaid leave during a 12 month period. Eligible employees must have worked for the employer a minimum of 1,250 hours during the 12 month period immediately before the date when the leave is requested to commence. FMLA leave allows an employee to take leave for the following reasons:

- For the birth and care of the employee’s newborn child;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; or

- To take medical leave when the employee is unable to work due to the employee's own serious health condition.

In most cases, an employee who takes FMLA leave will be permitted to return to the same position or an equivalent position with equal status, pay, and benefits. Key employees, those who are in the highest paid ten percent of employees working within 75 miles of the employer's worksite or facility, may not be entitled to job restoration, but must still be granted FMLA leave.

Definitions

Only employers employing 50 or more employees in a 75 mile radius of that office or worksite are required to comply with the federal FMLA.

Who is an eligible employee? Employees must have worked a minimum of 1,250 hours during the 12 month period immediately before the date when the leave is requested to commence. Eligible employees must have worked for the employer for at least 12 months, though the 12 months do not have to be consecutive. Also, breaks in service of more than seven (7) years are no longer required to be counted. The new regulations also clarify that an employee may become eligible for FMLA leave if the employee satisfies the 12 month employment requirement while out on non-FMLA leave.

The definition of "serious health condition" has been added to and clarified by the new regulations. A serious health condition is: an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Also, subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. The two visits must occur within thirty days of the beginning of the period of incapacity. A serious health condition exists where the first visit to the health care provider takes place within seven days of the first day of incapacity. The new regulations define "periodic visits" to a health care provider for chronic serious health conditions as a minimum of two visits to a health care provider per year.

Notice Requirements & Penalties

General information about the FMLA must be provided by poster and by handbook or other written materials, or may be posted electronically. Pursuant to the new regulations, employers should provide three different types of notices to employees:

- Notice to Employee of Rights under the FMLA (WH 1420) is a notice with general FMLA information. It should be conspicuously posted in a break room or other common area so it may be visible to both employees and applicants for employment. Employee handbooks must contain all of the substantive information found in the poster.
- Notice of Eligibility & Rights and Responsibilities (WH-381). Part A informs the employee whether he or she is generally eligible for FMLA leave. The employer must provide the employee with a completed part A within five (5) business days after the employee's first leave request in the leave year. Part B must be filled out if the employee is marked eligible for FMLA leave under part A. Part B informs the employee as to what additional information will be required from the employee prior to

qualifying the absence as FMLA leave. The employer must designate whether a certification form is required, whether documentation is requested to establish the relationship between the employee and the family member, responsibilities of the employee while on leave and rights of the employee while on FMLA leave such as maintenance of health benefits.

- Designation Notice (WH-382) is optional, and advises an employee as to whether the employee's request for FMLA leave has been granted. This form lays out the details of the FMLA leave for the requesting employee. If the employer requires a fitness-for-duty certification prior to allowing the employee to return to work, it is advisable for the employer to tell the employee of this requirement when designating the leave as FMLA.

Failure by an employer to provide the required notices may be considered interference with FMLA rights.

Designation

Employers are required to post the FMLA notice or face a \$110 fine (an increase of \$10 from the old FMLA regulations). Employers must post this notice in a prominent location; however, it may be permissible to post the notice electronically, provided it is posted prominently, in a conspicuous place where it can be seen by employees and applicants, with legible text that is easily read.

The employee must provide the employer with notice, which may include following the employer's usual and customary procedures for reporting an absence, absent unusual circumstances. Unusual circumstances include cases where no one answers the telephone, and when an employee is seeking emergency medical care.

Retroactive designation of leave is now permitted by the regulations. If an employer did not send a designation notice within five (5) business days, the employer may retroactively designate leave already taken as FMLA leave, provided that the employer's failure to designate the leave in a timely manner does not cause individual harm to the employee.

Substitution of Paid Leave

Different types of leave, such as accrued paid vacation, personal, or sick leave time, were not treated uniformly under the old regulations. Employers may now require employees to take all types of paid leave concurrently with any FMLA leave. Employees taking paid leave concurrently with FMLA leave are required to follow the same terms and conditions of the employer's normal leave policy. This may require the employee to call in every morning. The employer may request medical certification even when substituting paid leave for FMLA leave.

Employers may now count paid holidays falling within one full week of an employee's FMLA leave as an FMLA absence.

Perfect Attendance or Safety Awards

Under the new regulations, awards for "perfect attendance" or safety bonuses may now be denied to an employee who does not qualify because of having taken FMLA leave, provided the award or bonus is also denied to employees taking all other non-FMLA leave.

Light Duty

The old regulations allowed time spent working a light duty assignment to count towards FMLA leave entitlement. Now, under the new regulations, time spent performing light duty work no longer counts toward

an employee's FMLA leave allotment. An employee's right to restoration is held in abeyance during the light duty period, or until the end of the applicable twelve month year.

Waiver of FMLA Rights

The new regulations still prohibit prospective waivers of FMLA rights; however, the new regulations make clear that employees may continue to voluntarily settle their FMLA claims without court or Department approval.

Changes in the Certification Process

An employee requesting FMLA leave may be required to provide a certification form to their health care provider to be completed and returned to the employer within fifteen (15) days of the request or provide a reasonable explanation for the delay. If the need for leave is foreseeable, the employer must now request a medical certification within five (5) days (previously two days). If unforeseeable, the employer has up to five (5) days after the leave begins to request certification.

The certification form is designed to compile information needed by the employer to determine the type and duration of FMLA leave required. Should the employee fail to provide the requested certification to the employer, the employer may deny the employee's request for leave.

Under the new regulations, the Department of Labor has created two new medical certification forms—one for an employee's own serious health condition (WH-380-E) and one for the serious health condition of the employee's family member (WH-380-F).

Should additional information be needed to clarify or authenticate a medical certification, an employer representative may contact the employee's health care provider. The employer may still request additional information if the certification is incomplete or insufficient by specifying, in writing, what information is missing, but must now also allow the employee seven (7) calendar days to cure the deficiency. This is a change in the regulations; previously there was not a specific time within which the employer must allow the employee to cure the deficiency. Contact with an employee's health care provider (or the health care provider for the employee's family member) may be made by the employer's health care provider (old regulations), and now by additional individuals such as the employer's human resource professional, leave administrator, or a management official, but may still never be the employee's direct supervisor. Employers may not ask for information beyond what is contained on the certification form and must obtain the employee's permission for clarification of individually identifiable health information pursuant to HIPAA.

Additionally, the employer may now request and consider information obtained under the ADA, under a paid leave program or disability plan, or under a workers' compensation program, in conjunction with a FMLA absence.

Second and/or Third Opinions

Should the employer choose, they may request a second medical certification; however, the employer must pay for the certification from the employer-selected second doctor. If necessary to resolve a conflict between the first and second opinions, the employer or employee may request a third certification; however, the third opinion will be considered final. Pending the results of the second and/or third opinions, the employee will be entitled to provisional FMLA leave benefits.

Recertification

Should circumstances change significantly, or if an employer receives contradictory information regarding the reason given for the FMLA absence, or if the employee seeks a leave extension, the employer may request recertification but not more often than every thirty (30) days. An employer may now request recertification of an ongoing condition related to FMLA leave every six months.

Fitness for Duty

The employer may require certification to specifically address the employee's ability to perform the essential functions of the job. Additionally, when the employer has reasonable safety concerns, the employer may now require a fitness-for-duty certification before the employee is allowed to return to work. The employer must first inform the employee of this requirement and provide a list of essential job functions with the designation notice (WH-382).

New Military Caregiver Leave—Leave to Care for a Covered Servicemember

The new FMLA regulations lay out a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period.

A covered servicemember is: a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Employees eligible to take time off to care for the covered servicemember include: the spouse, parent, son or daughter, or next of kin; however, this does not include parents "in-law," but does include those persons in loco parentis—those who have/had day-to-day responsibilities to care for and financially support a child; a biological or legal relationship is not necessary.

According to the new regulations, a covered servicemember's next of kin is defined as: the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple members with the same level of relationship, all family members shall be considered the next of kin and may take FMLA leave to provide care either consecutively or simultaneously.

The eligible employee is permitted to take up to 26 weeks of leave in a single 12 month period to care for a covered servicemember. Employees may take a combination of Military Caregiver Leave and other types of FMLA leave, but may not take more than 26 total weeks of all types of FMLA leave in a calendar year, measured from the time the employee first takes Military Caregiver Leave, regardless of how the employer otherwise tracks FMLA leave. Employers may require medical certification from employees requesting FMLA leave to care for a covered servicemember; however, second and third opinions may not be requested, nor is recertification required (WH-385, optional).

Qualifying Exigencies

The other new type of leave is leave to address certain “qualifying exigencies.” Qualifying exigencies are not medical conditions, but leave to take care of qualifying exigencies is still categorized as FMLA leave. Eligible employees with a spouse, son, daughter, or parent on active duty or called to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies include: attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, attending post-deployment reintegration briefings, and additional activities agreed to by the employee and employer.

Qualifying exigency leave may begin as soon as the individual receives the call-up notice. Employers may require certification of qualifying exigency for employees requesting military family leave (WH-384, optional).

Spouse Employees

If a husband and wife are both employed by the same employer, each employee may take time off under the FMLA provisions. However, both employees combined may not take more than twelve (12) weeks of leave in the preceding 12 month period if the leave is taken for the birth of a child, placement of a child for adoption or foster care, or to care for a parent (but not a parent-in-law) with a serious health condition. If a husband and wife both wish to take leave to care for a covered servicemember, they may only take a combined total of 26 weeks of leave.

Penalties for Interference with FMLA Leave

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the FMLA or to discharge or discriminate against an employee for opposing any practice made unlawful under the FMLA.

The new regulations state that penalties for interference with FMLA leave may be assessed only if the employee suffers individual harm. If the employee fails to show the employer’s interference in their FMLA rights caused the employee to suffer individualized harm, the employee may not prevail on their claim. An employer may be liable for: compensation and benefits, other actual monetary losses sustained as a direct result of the violation and for appropriate equitable or other relief, including reinstatement, promotion or any other relief. The regulations also changed the penalty in that the employer is no longer subject to a “categorical penalty” whereby the employer would be required to provide an additional twelve weeks of leave in addition to that leave already taken by the employee. This was clarified in the new regulations in keeping with the Supreme Court’s decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002). In *Ragsdale*, the Court ruled that the “categorical” penalty (requiring an employer to provide 12 additional weeks of FMLA leave after the employee had already taken 30 weeks of leave) was inconsistent with the statutory limit of 12 weeks of FMLA leave and contrary to the law’s requirement that an employee show individual harm.

Employees may choose to file a complaint with the Department of Labor or may proceed with suing the employer directly. However, the new regulations have clarified that there is no longer a “categorical penalty” for the employer and the employee must show individual harm in order to recover. Should the employee prevail, they may recover compensation and lost benefits, other actual monetary losses resulting from the violation, and equitable relief such as reinstatement and promotion.

Tips to Help Employers with Compliance:

- 1) Post the new FMLA poster in a prominent place.
- 2) Revise the employee handbook to reflect the new changes.
- 3) Develop a job description for each position that can be provided to the employee's health care provider with the certification forms; this will also allow a complete fitness-for-duty certification to be performed, if necessary.
- 4) Place time and duration limits on light duty assignments—as light duty is no longer FMLA leave, it must be limited in time.
- 5) Remember, contact with an employee's health care provider (or the health care provider for the employee's family member) may be made by the human resources professional and others, but never by the employee's direct supervisor.
- 6) Adopt and begin using the new DOL model notice forms (WH Publication 1420, WH-380-E, WH-380-F, WH-381, WH-382, WH-384, and WH-385).

Links:

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