

## New FMLA Regulations Take Effect January 16, 2009 – Is Your Workplace Ready?

On January 16, 2009, the new changes to the Federal Family Medical Leave Act (“FMLA”) will take effect. These changes reflect the Department of Labor’s (“DOL”) first attempt at an overhaul of the FMLA regulations since the Act took effect in 1993. The new changes reflect revisions, clarifications, and general reorganization of the former regulations. The new changes define the meaning of a “qualifying exigency” for purposes of the FMLA’s new injured servicemember leave. Finally, the changes include new employer notice, explanation of rights, designation, and medical certification forms and processes. Employers covered by FMLA should carefully review their FMLA policies to make sure that they comply with the new changes.

The FMLA applies to all private employers who have 50 or more employees for each working day of 20 or more full (not necessarily consecutive) calendar workweeks in the current or preceding calendar year. Public agencies are “employers” under FMLA without regard to the number of employees employed. The FMLA requires covered employers to allow eligible employees to take up to 12 weeks of unpaid leave for the birth or adoption of a child, to care for a child, parent, or spouse who suffers from a “serious health condition,” if the employee’s own serious health condition makes them unable to perform one or more essential functions of the job, or for certain qualifying exigencies.

The changes to the FMLA were extensive. This article will cover the main highlights that employers should consider as the deadline for implementation approaches.

### **New Notice and Designation Provisions**

The overriding goal of the DOL in revising the FMLA regulations was to require more communication between the employer and the employee regarding FMLA leave. Therefore, some of the most significant changes involve notice and designation provisions of the Act. The new regulations include the following notice provisions for employers and employees:

- **Employee Notice of FMLA Leave.** The current regulations allowed employees to provide notice of the need for leave up to two business days after an absence. The new regulations require that an employee follow the employer’s usual and customary call-in procedures for reporting an absence. An employee seeking additional FMLA leave for a previously certified condition must make reference to the prior leave in his or her new request for FMLA leave.
- **The FMLA Poster/General Notice** . Covered employers must post and distribute general notice of the FMLA provisions, even in locations that do not have 50 employees in a 75 mile radius. The posting requirement may be satisfied through an electronic posting so long as all employees have internet access. The distribution requirement may also be satisfied by including the notice in the employer’s employee handbook, or if the employer has no employee handbook, by distributing it to employees at the time of hire. If an employer distributes the notice in a handbook, it should contain all of the information in the DOL notice form.

- [The Notice of Eligibility and Rights and Responsibilities Form](#). After an employer receives notice from an employee of the need to take FMLA leave an employer must provide the employee with the Notice of Eligibility and Rights and Responsibilities form. In this notice provision, the employer communicates whether the employee meets the initial eligibility requirements for leave. If the employee is presumptively eligible, because he or she has worked enough hours and works in a location with at least 50 employees within a 75-mile radius, the employer should send this notice, along with the appropriate Medical Certification form, and provide the timelines in which the employee must return the Medical Certification form (usually seven days).
- [The Designation Notice](#). After the employer has sufficient information to determine whether an employee's leave is FMLA qualifying (usually after the employee returns the Medical Certification Form), the employer has five business days to provide the employee with the new Designation Notice, specifying the amount of leave that the employee may take, or informing the employee what additional information is required to determine whether leave is FMLA qualifying. In the Designation Notice, employers must inform the employee whether the employer will require that the employee use accrued paid leave. Additionally, an employer must tell their employees whether they will require a fitness for duty examination prior to reinstatement from leave, along with a list of the employee's essential job functions, which the employer will provide to the medical provider who completes the fitness for duty examination.

If there is a dispute between the employer and the employee regarding whether the leave is FMLA qualifying, the parties should resolve this through face to face meetings, or oral conversations, which the employer must fully document.

### **Medical Certification Process**

The DOL made significant changes to the medical certification process to give the employer more information in which to determine whether the employee's condition qualifies as a "serious health condition," including:

- The DOL replaced the former medical certification form with two new forms: One form is specifically for the [employee's own serious health condition](#); the second form is specifically for [leave to care for a family member](#).
- Employers may now request more specific medical information, including: the employee, or family member's specific diagnosis; A statement that intermittent or reduced leave is medically necessary; A statement pertaining to which essential job functions an employee cannot perform; and Detailed information regarding the frequency and duration of intermittent and reduced leave schedules.
- If an employee submits an incomplete (i.e., vague, ambiguous, or nonresponsive) medical certification, the employer must advise the employee in writing what additional information it requires, and provide seven calendar days (or longer) to complete and return the form.

- Recognizing the overlap between the FMLA, the ADA and workers' compensation statutes, an employer may now follow the procedures under those statutes for requesting medical information without violating FMLA. This is a significant change from the prior regulation that included only limited medical inquiries. This means that an employer (a health care provider, Human Resources professional, leave administrator, or management official – but not a direct supervisor) may now directly contact an employee's medical provider to authenticate information on a medical certification form without obtaining the employee's permission.
- The employer representatives listed above may also contact a medical provider with the employee's permission to request clarification of the medical certificate. Prior to directly contacting the medical provider, however, the employer should ask the employee to clarify this information with his or her medical provider. If the employee refuses permission or does not otherwise clarify the information, the employer may deny FMLA leave on the grounds that the certification is unclear.

### **Recertification**

For employees requesting intermittent or reduced leave for periods in excess of six months, employers may request recertification every six months in conjunction with an absence. An employer may provide an employee's health care provider with a record of the employee's absence pattern and ask the health care provider if the employee's serious health condition and need for leave is consistent with the pattern of absences.

### **Regulations Regarding Military Family Leave Amendments**

The DOL enacted the new Military Family Leave provisions earlier this year, but many of those provisions were less than clear. The new regulations now clarify those amendments.

**“Qualifying Exigency.”** This leave entitles an employee to take up to 12 weeks of leave due to a “qualifying exigency” arising out of the fact that the employee's spouse, child or parent has been called to active duty. It does not apply to family members of military members who are in the regular armed forces. Under the new regulations, a “qualifying exigency” includes:

- Short notice deployment, defined as a call/order to active duty seven days prior to the date of deployment (limited to seven calendar days of leave beginning on the date the military member is notified of deployment);
- Military and activities related to call to active duty;
- Childcare and school activities, such as arranging for alternative childcare, providing childcare on urgent or immediate need basis, enrolling children in new schools or day care, and attending meetings with school or day care staff;
- Making or updating financial and legal arrangements;
- Counseling;
- Rest and recuperation (limited to five days per leave, up to 12 weeks in a 12-month period, to spend with military member on short-term leave);
- Post-deployment activities, defined as up to 90 days following termination of active duty status; and

- Any additional activities involving a relationship between the need for leave and the active duty that the employer and employee agree to.

The DOL did not promulgate any specific notice requirements for a qualifying exigency leave. Where leave is foreseeable, however, eligible employees must provide notice that is reasonable and practicable. DOL has provided a separate certification form for the [“qualified exigency” leave](#). To certify the leave, an employer may ask for copies of the military servicemember’s orders.

**Military Caregiver Leave.** Under the Military Caregiver leave, an eligible employee may take up to 26 workweeks of leave in a single 12-month period to care for an injured servicemember who is the employee’s spouse, parent, child or relative for whom the employee is next of kin. The new regulations that clarify the military caregiver leave as follows:

- **Separate Certification Form.** DOL has created a separate certification form for the [“Serious Injury or Illness of a Covered Servicemember for Military Family Leave”](#). Employers may request details about the servicemember’s medical condition, how it occurred, when it occurred, and its probable duration.
- **“Single 12-month period”:** The single 12-month period begins with the first day the employee takes leave.
- **Next of Kin.** The regulations prioritize the nearest blood relatives who are not listed above who may be considered “next of kin.” A servicemember may specifically designate in writing another blood relative as his or her nearest blood relative for purposes of military care giver leave. An employee may be required to provide confirmation of his or her relationship to the injured or ill servicemember. This can be in form of a birth certificate or court document.
- **Number of leaves.** The regulations clarify that an eligible employee may take more than one leave to care for different covered servicemembers, or for the same servicemember with a different serious illness or injury as long as the leaves do not exceed 26 workweeks in any single 12-month period.

**Other significant changes that take effect on January 16, 2009 include:**

**Serious Health Condition.** The final rules retained the six definitions of a serious health condition. The new regulations provide more clarification on three of these definitions:

- 1) A serious health condition involving more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider”: Both visits to the health care provider must now occur within 30 days of the original incapacity, and the first visit must occur within seven days of the original incapacity.
- 2) A serious health condition involving more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment: the first visit to the

health care provider must take place within seven days of the first day of incapacity.

- 3) Chronic conditions: the new regulations specify that employees must now certify that they visited a doctor at least twice a year for the condition in order for it to be considered chronic.

**Leave for Pregnancy or Birth, Adoption or Foster Care.** The new regulations clarify that an expectant mother may take FMLA leave before the birth of her child for prenatal care or if her condition makes her unable to work. A spouse, but not a boyfriend or fiancé, may take leave to care for his spouse if she is incapacitated (including providing psychological comfort and reassurance). Further, both a mother and a father may take up to 12 weeks of leave to care for a newborn child with a serious health condition even if both are employed by the same employer. Leave may also be taken for adoption or foster care, but must be completed within a year of the placement. Intermittent or reduced schedule leave after placement of a healthy child for adoption or foster care may only be taken with the employer's agreement, and the employer may temporarily transfer the employee to another position to accommodate the leave. However, if the leave is needed to care for a serious health condition of the child, no employer agreement is necessary.

**Retroactive Designation.** The new rules remove the "categorical penalty" provision that occurred when an employer did not appropriately designate FMLA leave. Under the old rules, the employer had to provide the employee with an additional 12 weeks of leave and could not retroactively designate leave. The new rules clarify that an employer should still properly designate leave in a timely manner, but clarifies that employer liability will ensue only when the employee can establish that he or she suffered individualized harm because the employer failed to follow the notification rules.

**Substituting Paid Leave.** The regulations make it clear that employees may now substitute all forms of paid leave offered by an employer regardless of the type of leave. An employee must follow the employer's policies regarding the use of such leave. The regulations also clarify the interaction between FMLA leave and paid disability leave and workers' compensation time loss. The rules pertaining to substitution of paid leave do not apply when an employee is on paid disability leave, but an employee and an employer may agree to supplement paid leave benefits that only partially replace an employee's income.

**Light Duty Assignments.** An employee with a serious health condition who cannot perform one of the essential functions of the job is entitled to FMLA leave and cannot be required to accept a light duty assignment. The new regulations clarify that the time that an employee spends doing light duty work does not count against an employee's FMLA leave entitlement. An employee's right to job restoration is held in abeyance while he or she is performing light duty work.

**Waiver of Rights.** The new regulations clarify that employees may voluntarily settle or release their past FMLA claims without court or DOL approval. Prospective waivers, however, are prohibited.

**Perfect Attendance Awards/Production Bonus.** Employer's may now disqualify an employee who did not meet a production goal or achieve perfect attendance because of FMLA leave as long as the employer treats other leaves off work in the same manner. For example, an employee who gets a production bonus based on making 1800 widgets would not be entitled to the bonus if they took FMLA leave and failed to meet their widget requirement as long as the employer treated all employees in a similar manner. As another example, if an employer gave a perfect attendance award to employees, but allowed two weeks of vacation as a carve out. If an employee on FMLA leave substituted vacation leave for FMLA leave, then the employee would be entitled to the attendance award just like others who took vacation. However, if that same employee took all of their vacation, and then took unpaid FMLA leave, the employee would not be entitled to the perfect attendance award.

**Fitness-For-Duty ("FFD") Certifications.** Under the current FFD rules, employers can enforce uniformly-applied policies or practices that require all similarly situated employees who take leave to provide a fitness for duty certificate that they are able to return to work. The final rule makes two changes. First, an employer may request that the medical provider specifically state whether an employee can perform the essential functions of the employee's job. Second, for an employee on intermittent leave, an employer may ask for an FFD certification where reasonable job safety concerns exist.

### **What Employers Should Do Now to Implement These Changes:**

Employers who have not already implemented workplace changes should review their policies and be prepared to apply the new regulations. At a minimum, employers should do the following:

- 1) Revise your FMLA policy to include all of the new changes.
- 2) Post the General Notice on your workplace bulletin boards, or on the Internet.
- 3) Review your employee call-in procedures and consider revisions that would require employees to provide advance notice of absences.
- 4) Download all forms for ease of access.
- 5) Review all your job descriptions, or prepare job descriptions for all of your positions that include the essential job functions. This activity will be beneficial for purposes of the ADA and the FMLA. After you have created job descriptions, review them with your employees at their annual performance review and have them sign a certificate that they agree that the essential job functions are accurate. Make sure to include job functions such as:
  - regular work attendance;
  - the ability to get maintain a calm demeanor in a stressful environment;
  - the ability to interact with coworkers in a variety of situations;
  - the ability to clearly communicate, verbally and in writing; and
  - the ability to provide calm and polite customer service.

- 6) Train your managers regarding the new FMLA requirements.
- 7) Program your favorite advice lawyer's number into your speed dial because, as with any new major legislative change, there will be lots of questions about the new procedures.

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