

New FMLA Regulations - Analysis

Service

Labor & Employment

As we noted in our publication on November 17, 2008, the U.S. Department of Labor has published its new FMLA regulations, which will take effect on January 16, 2009. This is the first substantial update since the FMLA was enacted in 1993. The basic rights have not changed: an eligible employee is entitled to 12 workweeks of leave in a 12-month period for birth and newborn care, adoption or foster care placement, to care for an immediate family member with a serious health condition, and for one's own serious health condition. As previously noted, however, Congress amended the FMLA to provide certain leave rights relating to military family leave. The new regulations set forth guidelines for these new military family leave rights, and they update and modify certain other FMLA regulations. What follows are the key items in the new regulations.

Serious Injury or Illness of Covered Service Member

The recent statutory changes authorize up to 26 weeks of leave for certain family members to care for seriously ill or injured military personnel. The new regulations contain numerous provisions implementing this new leave right.

This FMLA provision is not limited to immediate family members. Instead, an employee eligible for this leave includes "next of kin," as well as the immediate family members (spouse, son, daughter, or parent). Next of kin is defined generally to mean the nearest blood relative other than the immediate family member, and the regulations set forth a priority for next of kin. When the military service member has not designated his or her nearest blood relative for purposes of this FMLA leave, all of the identified individuals qualify for FMLA leave for this purpose.

The serious injury or illness is not coextensive with the FMLA's serious health condition. Instead, a serious injury or illness is one that "may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating."

Other requirements for FMLA leave under this provision are that the service member be an active service member, and must have incurred the illness or injury in the line of duty. Further, the service member must either (1) be undergoing medical treatment, recuperation, or therapy; (2) be in outpatient status; or (3) be on the temporary disability retired list.

Most complicated for employers may be the requirement that the 26 weeks of leave be taken in a "fixed" 12-month period, which starts at the time the first FMLA leave is taken to care for the service member. Thus, unlike current FMLA rules, which allow the employer to select the type of 12-month period it wants to use for FMLA calculation purposes, such as a calendar year or a rolling year (the most common), care for a service member with a serious injury or illness has a defined 12-month period. And, perhaps in recognition of potential abuse, the Department of Labor has made clear the employee may not combine the standard 12 weeks of FMLA leave with the 26 weeks of service member FMLA leave, for a total of 38 weeks of leave. Instead, the regulations specifically state that FMLA leave for any qualifying reason is limited to a total of 26 weeks in a fixed 12-month period (with a maximum of 12 weeks for non-seriously ill/injured military family leave).

Qualifying Exigency for Military Personnel

The statutory changes include up to 12 weeks of leave in a 12-month period due to a "qualifying exigency" relating to an employee's immediate family member being on active duty, or having been notified of an impending call to active duty, in support of a contingency operation. Qualifying exigency leave does not apply when the service member is a member of the regular armed forces. It applies only to members of the reserves, or the retired forces.

A "qualifying exigency" includes (1) any issue that arises from receiving short notice of deployment (seven or less calendar days notice of deployment), where leave can be used during the seven calendar days; (2) attendance at official ceremonies, programs, family support programs, or informational briefings; (3) arrangement of childcare or attendance at certain school activities; (4) to make or update legal or financial arrangements; (5) to attend counseling; (6) to spend time with a military service member on short-term rest and recuperation (limited to five days of leave for each instance); (7) post-deployment official programs, or issues relating to death; or (8) any other activities that both the employer and the employee agree are exigencies (and the employer and the employee both agree on the duration and timing of the leave). The need for leave for one or more of the foregoing reasons must be related to the service member's active duty or call to active duty.

Twelve Months of Employment

One of the requirements for employee eligibility under the FMLA is the employee must have worked for the employer for a total of 12 months. Under current rules, it was clear the 12 months did not need to be consecutive, but it was unclear how breaks in service affected the calculation. The new

regulations clarify that, with a few exceptions, a break in service of seven years means the employer need not count employment prior to the break in service in determining whether the employee meets the 12- month requirement.

Continuing Treatment and the Serious Health Condition

Under the existing regulations, a serious health condition may be established by a three-day period of incapacity followed by "subsequent treatment". Under the new regulations, however, the "subsequent treatment" must occur within defined time frames. Specifically, if the "subsequent treatment" consists of two or more treatments, the treatment must generally occur within 30 days of the first day of incapacity absent extenuating circumstances. If the "subsequent treatment" consists of one visit followed by treatment, the visit, which must be in-person, must take place within seven days of the first day of incapacity.

Certification/Fitness for Duty

A number of items have changed concerning the employer's right to request certification under the FMLA, including an express ability of the employer to request additional certifications at certain intervals. These changes include detailed requirements relating to what can and cannot be required for certifications relating to the military family leave provisions. Perhaps most importantly, however, the new regulations contain rules regarding essential functions and serious health conditions. Specifically, the new regulations allow the employer to include information in the certification form directed to the employee's essential functions and the ability of the employee to perform those functions. This is important because a "serious health condition" is defined to include a three-day period of incapacity, which may include an inability to work. Under the current regulations, there is no way to assess a health care provider's blanket assertion of incapacity. With the new regulations, there will now be an ability to seek specific information relating to the alleged incapacity, by way of an assessment of the employee's ability to perform the essential functions of his/her job. The fitness for duty form, which under the existing regulations was quite simple, can now also seek information about the employee's ability to perform the essential functions of his or her job. This new regulatory ability to focus specifically on a job's essential functions reinforces that employers should have updated job descriptions, with essential job functions, in place.

Reporting Absences

Under the existing regulations, an employee may invoke the protections of the FMLA for an unforeseeable leave up to two business days after the absence. The new regulations, however, allow an employer to require compliance with its usual reporting procedures, unless unusual circumstances prevent compliance.

Contacting the Doctor

One impediment employers have had to gathering necessary information was the prohibition on anyone other than an employer's medical professional contacting the employee's health care provider. The new regulations change this. Now, other individuals are also authorized to contact the employee's health care provider for authentication and clarification, including a human resources professional, or a leave administrator. Even a management representative may contact the employee's health care provider, although this representative may not be the employee's direct supervisor.

Waiver

Historically, it has been unclear whether an employee may waive his or her rights under the FMLA. The new regulations make clear that, while an employee may not waive future FMLA rights, an employee may waive his or her FMLA rights based on past conduct, such as in a separation agreement or other document.

New Forms

In conjunction with the publication of its new regulations, the Department of Labor has issued several new forms that, while not required to be used, are fully compliant with the new regulations. The new forms include: (1) Certification of Health Care Provider for Employee's Serious Health Condition; (2) Certification of Health Care Provider for Family Member's Serious Health Condition; (3) Notice to Employees of Rights under FMLA; (4) Notice of Eligibility and Rights & Responsibilities; (5) Designation Notice; (6) Certification of Qualifying Exigency for Military Family Leave; and (7) Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave. These forms will be available at www.wagehour.dol.gov.

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