2009 FMLA Regulations

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After a two-year process that involved the review of nearly 20,000 comments, the U.S. Department of Labor ("DOL") on Nov. 17, 2008, issued its first major overhaul of the Family and Medical Leave Act of 1993 ("FMLA"). These final regulations, which became effective Jan. 16, 2009, include provisions addressing military leave entitlements created in early 2008 by the National Defense Authorization Act ("NDAA"). The new regulations also update and clarify employer and employee rights and responsibilities under the FMLA. The following are the key changes and suggested steps employers should take to comply.

New Military Family Leave

The NDAA amended the FMLA to provide two new types of leave available to military servicemembers and their families.

Military Caregiver Leave

Under the first of these new military family leave entitlements, an eligible employee who is the spouse, child, parent or next of kin of a covered servicemember (*i.e.*, a current member of the Regular Armed Forces, the National Guard or Reserves) may take up to 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious illness or injury incurred in the line of duty on active duty. This special provision extends FMLA job-protected leave beyond the normal 12 weeks and extends FMLA protection to additional family members (*i.e.*, next of kin) beyond those who may take FMLA leave for other qualifying reasons. Unlike other forms of FMLA leave, an employer may not select the 12-month period used for computing available Military Caregiver Leave. Instead, the 12-month period begins on the first day the employee takes leave for this purpose and ends 12 months thereafter.

Qualifying Exigency Leave

The second new military leave entitlement 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. It allows eligible employees with a spouse, child or parent on active duty or called to active duty in the National Guard and Reserves (but not the Regular Armed Forces) to take up to the normal 12 weeks of FMLA job-protected leave because of a "Qualifying Exigency." Qualifying Exigencies are: 1) short-notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; 7) post-deployment activities; and 8) additional activities agreed to by the employer and employee.

Practice Tip

The DOL has also developed prototype forms for employers to use to facilitate the certification requirements for the new military family leave (Forms WH-384 and WH-385). Employers should utilize the new forms and update their FMLA policies to include military family leave entitlements. Employers may also need to develop systems for tracking the different 12-month leave period applicable to Military Caregiver Leave.

Serious Health Condition

The new regulations leave unchanged the six individual definitions of a "serious health condition," but set forth additional timelines within which an employee must visit his or her health care provider. Under the prior regulations, one definition of a serious health condition involved more than three consecutive days of incapacity, plus two visits to a health care provider. Under the new rule, the two visits must occur within 30 days of the beginning of the period of incapacity, and the first visit to the health care provider must take place within seven days of the first day of incapacity. A second definition of a serious health condition under the prior regulations involved more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The new rule clarifies that the first visit to the health care provider must take place within seven days of the first day of incapacity. The new regulations also define "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year. These rules provide greater specificity than the prior regulations which were more open-ended and, thus, subjected employees to the risk of more stringent timelines being imposed by their employers.

Practice Tip

Employers should review carefully medical certifications submitted by employees to ensure compliance with the new timelines. Employees seeking to take leave for their own serious health condition should be notified of the employer's designation within five days.

Employer Notice

The new regulations consolidate into one section (29 C.F.R. § 825.300) the various employer notice obligations under the FMLA and reconcile some conflicting provisions and time periods. Like the prior regulations, the new regulations require employers to post a general notice explaining the Act's provisions. The DOL has issued a revised poster for this purpose (WH Publication 1420). The regulations also require employers to include the general notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or to distribute it to new employees upon hiring. The DOL has also issued a revised Eligibility and Rights and Responsibilities Notice (Form WH-381) and a Designation Notice (Form WH-382). The new regulations expand the timeframe during which employers are required to provide the various notices — from two days to five days.

Practice Tip

Employers should utilize the DOL's new forms, and designate an individual or department that is familiar with the new FMLA procedures to respond to employee leave requests.

Employee Notice Requirements

In a significant change, the new regulations provide that absent unusual circumstances, FMLA leave may be delayed or denied if an employee fails to comply with the employer's normal policies for requesting leave or reporting absences, including the employer's call-in procedures. In such instances, employers may also take appropriate disciplinary action consistent with their internal rules.

Employees requesting leave for the first time must provide sufficient information for the employer to determine whether the leave may be for an FMLA-qualifying reason. As with the prior regulations, employees are not required specifically to mention the FMLA. However, the new regulations make clear that simply calling in "sick" is insufficient to trigger FMLA requirements.

Practice Tip

Employers should ensure that employees are aware of their procedures for reporting absences by including them in an employee handbook or other written policy which is distributed regularly.

Medical Certification

The DOL has created new medical certification forms for use when an employee requests leave for his or her own serious health condition (Form WH-380E) or to care for a family member with a serious health condition (Form Page 2 of 42009 FMLA Regulations WH-380F). More significantly, the new regulations permit employers to contact health care providers directly for purposes of authenticating or clarifying information in a medical certification form, after first giving the employee an opportunity to cure any deficiencies. The employer representative contacting the health care provider must be a health care provider, a human resources professional, a leave administrator or management official. The employee's direct supervisor is specifically prohibited from contacting the employee's health care provider.

The new regulations also clarify the permissible timing of employer requests for medical certifications. The rules codify a 2005 DOL opinion letter which stated that employers may request a new medical certification each leave year for medical conditions lasting longer than one year. They also restructure and clarify the requirements for recertification. In all cases, employers may request recertification of an ongoing medical condition every six months in conjunction with an absence.

Practice Tip

Employers should consistently enforce practices and procedures for obtaining and reviewing medical certifications, and for directing contacting employees' health care providers. They should also verify that their processes for obtaining medical information are consistent with state privacy laws.

Perfect Attendance Awards

Under the new regulations, employers are permitted to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave, so long as they treat employees taking non-FMLA leave in an identical way. For example, if an employee who takes a paid vacation during the bonus period is not disqualified from receiving a perfect attendance bonus, an employee who takes FMLA leave during the bonus period also may not be disqualified.

Practice Tip

Employers are still prohibited from using the taking of FMLA leave as a negative factor in employment actions or from counting FMLA leave under "no fault" attendance policies.

The *Ragsdale* Fix

The new regulations contain a change to reflect current law following the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which invalidated a DOL regulation that had applied a penalty when an employer failed to designate FMLA leave appropriately. The so-called "categorical" penalty provided the employee with 12 more weeks of FMLA leave, even after he or she had used the initial 12 weeks of leave. The Court held that the penalty was inconsistent with the statutory entitlement to only 12 weeks and contrary to the FMLA's remedial requirement that an employee demonstrate individual harm. The new regulations remove all references to "categorical" penalties and clarify that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.

Practice Tip

Employers should implement procedures for tracking all types of employee leave, regardless of whether designated as FMLA-qualifying. While the best practice is to ascertain whether an employee's leave request is FMLA-qualifying at the outset, if the employer later learns that the leave was FMLA-qualifying, it can retroactively designate it as FMLA leave and count it against the employee's 12-week entitlement.

Other Changes *Light Duty*

At least two courts have held that an employee continues to use his or her 12-week FMLA leave entitlement while on a "light duty" assignment following FMLA leave. The new regulations clarify that time spent performing "light-duty" work does not count against an employee's FMLA leave entitlement and that the employee's job restoration rights are retained while he or she is assigned to light duty (until the end of the applicable 12-month FMLA leave year). If, however, an employee is voluntarily performing a light-duty assignment, the employee is not on FMLA leave.

Substitution of Paid Leave

The prior regulations applied different procedural requirements to the use of vacation or personal leave than to medical or sick leave. Complicating matters even further, family leave was treated differently from vacation and personal leave. Under the new regulations, all forms of paid leave offered by an employer are treated the same. An employer may require that employees electing to substitute paid leave for unpaid FMLA leave comply with the employer's normal conditions and policies for the use of paid leave. The employee is still entitled to unpaid FMLA leave if he or she does not meet these conditions, and the employer may, but is not required to, waive such conditions, even in the absence of an employee request to do so.

Fitness-for-Duty

The new regulations expand the circumstances under which employers may require "fitness-for-duty" certifications before an employee is permitted to return to work. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of his or her job, so long as the employer timely notifies the employee of this requirement and specifies what the essential job functions are. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return from intermittent leave.

Waiver of Rights

The new regulations codify the DOL's long-standing position that employees may voluntarily settle or release their FMLA claims without court or DOL approval. Although this is not a change in the law, the clarification was needed because a recent Fourth Circuit decision interpreted the DOL's regulations as prohibiting employees from either prospectively or retroactively waiving their FMLA rights. The regulations clarify that only prospective waivers of FMLA rights are prohibited.