

Updated FMLA Regulations Require Changes to Employer Policies and Procedures

Making an already complex area of employment law compliance more challenging, the U.S. Department of Labor's updated regulations under the Family and Medical Leave Act ("FMLA") became effective in January. The updated regulations (which encompass 200 pages of the Federal Register) implement military family leave entitlements enacted last year under the National Defense Authorization Act, and also include revisions to pre-existing regulations under the 15-year old FMLA. The updated FMLA regulations require changes to employers' FMLA policies and procedures. This edition of the Employment Law Advisor reviews the highlights of the updated regulations.

Military Family Leave Entitlements

The updated FMLA regulations implement two types of military family leave: (1) Military Caregiver Leave; and (2) Qualifying Exigency Leave. Military Caregiver Leave permits a spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of leave in a single 12-month period to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is

The U.S. Department of Labor's updated regulations under the federal Family and Medical Leave Act recently became effective.

The updated FMLA regulations:

- implement and define Military Caregiver Leave and Qualified Exigency Leave for families of members of the Armed Forces / National Guard and Reserves; and
- revise prior regulations concerning traditional employee FMLA leave.

otherwise in outpatient status, or is otherwise on the temporary disability retired list, with a serious illness or injury incurred in the line of duty on active duty.

The purpose of the second type of military family leave, Qualified Exigency Leave, is to help 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. This leave permits eligible employees with a covered military member serving in the National Guard or Reserves to use the normal 12 workweeks of FMLA job-protected leave for "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty or is called to active duty status in the Armed Forces in support of a contingency opera-

tion. A "qualifying exigency," for which employees can use this type of FMLA leave, is defined in the updated regulations as: (a) short-notice deployment; (b) military events and related activities; (c) childcare and school activities; (d) financial and legal arrangements; (e) counseling; (f) rest and recuperation; (g) post-deployment activities; and (h) additional activities not encompassed in the other categories, but agreed to by the employer and employee.

The updated regulations include optional certification forms that employers may use for both types of military family leave. Copies of these forms (the Certification for

Serious Injury or Illness of Covered Servicemember, and the Certification of Qualifying Exigency) may be downloaded at: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>

Updates to the regulations for traditional employee FMLA leave include:

» Definition of Serious Health Condition

The updated regulations make three changes to the definition of serious health condition. One of the definitions of serious health condition under the prior FMLA regulations involves more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider.” The updated regulations clarify that 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. Another definition of serious health condition under the prior FMLA regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The updated regulations state that the first visit to the health care provider must take place within seven days of the first day of incapacity. The updated regulations also define “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year.

» Employers’ Notice Obligations

Employers are required to provide employees with a general notice

about the FMLA through a poster, and either an employee handbook or upon hire; an eligibility notice; a rights and responsibilities notice; and a designation notice. The updated regulations extend the time period for employers to provide various notices from two business days to five business days. A revised FMLA poster, which includes military family leave information, is available at: <http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>

An optional Notice of Eligibility and Rights and Responsibilities form and Designation Notice can be downloaded at: <http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>

» Employees’ Notice Obligations

To address the disruption to the employer’s business due to unscheduled absences, the updated regulations change the prior provision that has been interpreted to allow employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence – even if the employee could have provided the notice more quickly. The updated regulations provide that an employee needing FMLA leave generally must follow the employer’s usual and customary call-in procedures for reporting an absence.

» Certification Process

Under the regulations, employers may contact an employee’s health care provider for authentication or clarification of the medical certification. In response to privacy concerns raised by employees about their medical information, the updated

regulations add a requirement that the employer’s representative who contacts the employee’s health care provider for information must be a health care provider, human resources professional, a leave administrator, or a management official. The regulations expressly prohibit the employee’s direct supervisor from contacting the employee’s health care provider. Moreover, employers may not ask the employee’s health care provider for additional information beyond that required by the certification form. The Department of Labor has issued two optional certification forms – one form is for an employee’s serious health condition and the other is for the employee’s family member’s serious health condition. These forms are available at: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>

If an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking and also give the employee seven calendar days to correct the deficiency. Employers may request a new medical certification each leave year for medical conditions that last longer than one year and may request recertification on an ongoing condition every six months in conjunction with an absence.

» Fitness for Duty Certifications

The updated regulations make two revisions to the fitness for duty



certification process. First, employers may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns are present, an employer may require a fitness for duty certification before an employee may return to work when the employee takes intermittent leave.

» **Light Duty**

The updated regulations provide that time spent by an employee performing light duty work does not count against an employee's FMLA leave entitlement and that 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. The updated regulations clarify that if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

» **Substitution of Paid Leave**

The FMLA provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, that is provided by the employer, concurrently with any FMLA leave. The prior FMLA regulations applied different procedural requirements to the use of vacation or personal leave than to medical or sick leave. To simplify the sub-

stitution of paid leave, the updated regulations all forms of paid leave offered by the employer are treated the same, regardless of the type of leave substituted.

Massachusetts employers should note, however, that the Massachusetts Commission Against Discrimination's position is that employers cannot require an employee to use accrued paid leave concurrently with all or part of the employee's leave under the Massachusetts Maternity Leave Act (the "MMLA"), M.G.L. c. 149, § 105D. Our Employment Law Advisor concerning employer obligations under the MMLA is available at:

<http://www.mbbp.com>.

» **Perfect Attendance Awards**

The updated regulations allow employers to deny a perfect attendance award to an employee who does not have perfect attendance because of taking FMLA leave (as long as the employer treats taking non-FMLA leave in an identical way).

» **Retroactive Waivers of FMLA Rights**

The updated regulations make clear that employees may voluntarily settle or release their FMLA claims without DOL or Court approval. (This clarification was included in the updated regulations because of a decision of the federal Court of Appeals for the Fourth Circuit, which

interpreted the prior FMLA regulations as prohibiting employees from retroactively waiving their rights under the FMLA.) Only retroactive waivers (of past claims) are valid; prospective waivers of (future) FMLA claims or rights are unenforceable.

The updated regulations under the FMLA are detailed and lengthy. The foregoing summary addresses the most significant changes to the FMLA landscape. In reviewing their FMLA policies and procedure, employers should consult with counsel to ensure compliance with the updated regulations.

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