

## THE DOL ISSUES REVISED FMLA REGULATIONS: EMPLOYERS MUST COMPLY BY JANUARY 16, 2009

After many years of waiting, the Department of Labor finally has issued a new set of regulations interpreting the Family and Medical Leave Act (FMLA). As with the FMLA itself, the regulations impact all employers with at least 50 or more employees. The regulations are not simply minor refinements but are wholesale revisions, which address numerous issues that have plagued employers and employees alike since the initial regulations were published nearly fifteen years ago.

Overall, the regulations are a mixed bag for employers. Among other things, they address the categories of leave for military caregivers and certain qualified exigencies, they clarify what constitutes a serious health condition, they substantially modify employee and employer notice obligations, and they revamp the medical certification process. With these new regulations also comes an entirely new and/or revised set of notices and forms that employers will be required to use. Consequently, employers and HR professionals must act now to ready themselves, as the new regulations take effect January 16, 2009. Highlights and key provisions of the new regulations appear below.

### *Entitlement to Leave*

The new regulations impact various issues related to an employee's entitlement to leave under the FMLA. Among other things, employers must be ready to deal with a revised definition of "serious health condition" and two new categories of leave altogether.

- ❖ Leave Involving a Serious Health Condition. The new regulations clarify the definition of serious health condition in three key respects. First, when the health condition involves three consecutive days of incapacity plus two visits to a health care provider, the two visits both must occur within thirty days of the incapacity, and the first of these must occur within seven days. Second, when the health condition involves three consecutive days of incapacity plus a regimen on continuing care, the new regulations clarify that the first visit must occur within seven (7) days of the start of the incapacity. Third, when the health condition is a "chronic" condition requiring periodic medical visits, these periodic visits must involve at least two medical visits per year.
- ❖ The New Military Caregiver Leave. Earlier this year, Congress amended the FMLA to provide for 26 weeks of job-protected leave to employees who care for service members who incur a serious illness or injury in the line of duty. Under the new regulations, an employee is eligible for this type of leave if (1) he or she is the spouse, son, daughter, parent, or next of kin of a current (i.e. not retired) member of the Armed Forces, National Guard, or Reserves; and (2) the service member is undergoing medical treatment for an injury or illness incurred in the line of duty that renders him or her medically unfit to perform military service. The regulations clarify that employers can require a medical certification to substantiate the employee's need for leave. Unlike other types of FMLA leave, military caregiver leave provides job protection for up to 26 weeks in a single 12-month period.
- ❖ The New Qualified Exigency Leave. The regulations also discuss qualified exigency leave, another new type of leave added when Congress amended the FMLA earlier this year. Specifically, this type

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of leave is available for employees to handle certain non-medical exigencies due to the fact that they have a spouse, son, daughter, or parent on active duty or on call for active duty. The regulations set forth a list of eight (8) exigencies that qualify for this type of leave: (1) short-notice deployment; (2) military ceremonies, events, and similar activities related to the service member's call to duty or departure; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling from a chaplain, minister, military service organization, or other non-medical provider; (6) rest and recuperation while the service member is home on short-term leave; (7) post-deployment ceremonies and activities associated with the service member's return home; and (8) any other events or activities agreed to between the employee and employer. Like other types of FMLA leave, qualified exigency leave offers 12 weeks of job-protected leave.

## *Notice Requirements*

Going forward, both employers and employees have more rigorous and, in some cases, more onerous notice requirements under the FMLA.

- ❖ Employer Notices. The new regulations will require employers to utilize an entirely new set of notices to advise employees of their rights and obligations under the FMLA. Specifically, four types of notice are required.
  - **A general notice.** Employers are still required to post a general notice explaining the FMLA's provisions. If employers use a handbook, the handbook again must include an FMLA policy.
  - **An eligibility notice.** This notice must be provided to employees within five (5) days of the employee's request for leave or the employer learning of the potential need for leave. The notice must be individually tailored to address the employee's eligibility for leave (i.e. whether he or she has met the hours and length of service requirements) but is not intended to address whether the reason for leave qualifies as a serious health condition. The Department of Labor has issued a sample eligibility notice that is appended to the new regulations, which is available on its website.
  - **A rights and responsibilities notice.** This notice is provided at the same time as the eligibility notice and provides employees general information as to their rights and obligations with respect to their FMLA leave request. The Department of Labor also has issued a sample rights and responsibilities notice appended to the new regulations.
  - **A designation notice.** This notice advises the employee whether or not the leave is FMLA-qualifying and whether a fitness-for-duty examination will be required upon expiration of the leave. The notice must be provided to employees within five (5) days after the employer receives sufficient information to make an assessment, up from the two days required under the current regulations. If the employer will require a fitness-for-duty examination that is tied to the essential functions of the employee's job, the designation notice must advise the employee of his or her essential job functions or attach a job description for the employee's position
- ❖ Employee Notice of the Need for Leave. The new regulations eliminate an employee's ability to advise his or her employer of the need for FMLA leave up to two days after the absence when notice could have been provided more quickly. Going forward, employees must follow their employers' customary call-in procedures for reporting absences.

## *The Medical Certification Process*

In what should be welcome relief for employers, the new regulations dramatically streamline the process for employers to assess whether a request for leave involves a serious health condition.

- ❖ The Certification Forms. The new regulations permit employers to use separate certification forms for employee serious health conditions as compared to family member serious health conditions such that additional information can be elicited in the case of employee serious health conditions.
- ❖ Timing of the Request for Certification. When an employer requests a medical certification, the certification form must be provided to the employee within five (5) business days of the employee's request for leave or the employer learning of the potential need for leave, up from the two business days required under the current regulations. Employees then must be given fifteen (15) days to provide the completed certification form.
- ❖ Questioning the Certification. If an employer deems the certification incomplete or insufficient, it must notify the employee in writing of the additional information needed and give the employee seven (7) calendar days to cure the deficiency. If the employer still has questions about the certification thereafter, the employer may contact the employee's health care provider directly to authenticate or clarify the certification. Only an HR professional, a health care official, a leave administrator, or a management official may initiate this contact – the employee's direct supervisor may not.

## *Other Issues Related to FMLA Leave*

The new regulations also discuss other issues related the administration of FMLA leave.

- ❖ Perfect Attendance Awards. The new regulations change the treatment of perfect attendance awards. Going forward, employers may deny perfect attendance awards to employees who do not have perfect attendance because of FMLA leave, so long as this is consistent with how employers treat employees on non-FMLA leave.
- ❖ Light Duty Work. To clarify disagreement by various courts, the new regulations state that time spent performing light duty work does not count against an employee's 12 weeks of leave entitlement. An employee's right to job restoration is essential on hold while he or she is performing light duty work.
- ❖ Waiver of Claims. The new regulations state that employees may voluntarily settle or release their FMLA claims without court or Department of Labor approval. This is a significant benefit for employers in North Carolina, South Carolina, Virginia, West Virginia, and Maryland. Previously, the Fourth Circuit (the federal appellate court governing these states) had held that court or department approval was required for such releases. As a result, employers may now include waivers of FMLA claims in any severance or settlement agreements.

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## ***What Employers Should Do . . . NOW!***

With the new regulations taking effect January 16, employers cannot afford to waste any time preparing for the upcoming changes. Specifically, we recommend a three-course plan of action:

- ☑ **First**, employers should update and revise their FMLA policies and procedures to ensure they comply with the new regulations. All employee handbooks will need to include a revised FMLA policy.
- ☑ **Second**, employers must ensure that their notices and certification forms comport with the new regulations. This applies to the aforementioned eligibility notice, rights and responsibilities notice, designation notice, and certification forms. The Department of Labor has attached sample notices and illustrative forms to the new regulations and made them available on its website.
- ☑ **Third**, employers must train all HR personnel, supervisors, and any other individuals with responsibility for administering FMLA leave regarding the new regulations to ensure that they are aware of their duties and legal obligations going forward.

If you have any questions concerning the new FMLA regulations or need assistance drafting or revising your FMLA policy, forms, and notices, please contact any one of our [Womble Carlyle Labor & Employment attorneys](#). Our labor and employment attorneys regularly advise clients on issues related to the FMLA and other types of employee leave under both state and federal law.

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