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"Family and Medical Leave, Military Family Leave, and Updates to Regulations"

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On November 17, 2008, the Department of Labor (DOL) published its final rule implementing amendments to the Family and Medical Leave Act (FMLA), signed into law by President Bush in January 2008, which provide new military family leave entitlements and update the regulations under the 15-year-old FMLA. The final rule will improve communication between employees, employers and health care providers to make the law operate more smoothly and to provide needed clarity for both employees and employers about their responsibilities and rights under the FMLA.

**BRIEF OVERVIEW OF REGULATORY CHANGES**

**Military Family Leave:** Section 585(a) of the National Defense Authorization Act ("NDAA") amended the FMLA to provide two new leave entitlements:

- **Military Caregiver Leave:** Eligible employees who are family members of covered servicemembers will be able to take up to 26 workweeks 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 while on active duty. This 26 workweek entitlement is a special provision that (1) extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave and (2) extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.
- **Qualifying Exigency Leave:** The second new military leave entitlement helps families of members of the National Guard and Reserves manage their affairs during the time the member is on active duty supporting a contingency operation. The provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The DOL's final rule defines "qualifying exigency" in reference to a number of categories for which FMLA leave will be available: (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 not encompassed in the other categories, but agreed to by the employer and employee.
- **Certification Forms:** The final rule also includes two new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave. Click here to download a PDF of Form WH-384 or Form WH-385.
- **Decision/Penalties:** The final rule includes a number of technical regulatory changes to reflect current law. The current regulation's "categorical" penalty for failure to appropriately designate FMLA leave, which would have required the employer to provide an additional 12 weeks of FMLA-protected leave after the 30 weeks of leave the employee had already received, was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement that the employee demonstrate individual harm. The final rule removes these categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.
- **Light Duty:** Under the final rule time spent performing "light duty" work does not count against an employee's FMLA leave entitlement. 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). An employee who is voluntarily performing a light duty assignment is not on FMLA leave.
- **Waiver of Rights:** The final rule codifies that employees may voluntarily settle or release their FMLA claims without court or DOL approval. Prospective waivers of FMLA rights continue to be prohibited under the final rule.
- **Serious Health Condition:** The final rule retains the six separate definitions of serious health condition and adds guidance on three regulatory matters. Under the final rule, the two visits to a health care provider 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 way to satisfy the definition of serious health condition under the current regulations involves more than three consecutive full calendar days of incapacity plus a regimen of continuing treatment.

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And the final rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year since that provision is also open-ended in the current regulations and potentially subjects employees to more stringent requirements by employers.

- **Substitution of Paid Leave:** Although FMLA leave is unpaid, the statute provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family, or medical or sick leave offered by their employer concurrently with any FMLA leave, referred to as “substitution of paid leave.” The current regulations apply different procedural requirements to the use of vacation or personal leave than to medical or sick leave. Under the final rule, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic “paid time off”). An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he does not meet the employer’s conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.
- **Perfect Attendance Awards:** The final rule changes the treatment of perfect attendance awards to 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 it treats employees taking non-FMLA leave in an identical way.
- **Employer Notice Obligations:** The final rule consolidates all the employer notice requirements into one section of the regulations and reconciles some conflicting provisions and time periods under the current regulations. The final rule also clarifies and strengthens the employer notice requirements, thereby facilitating a better exchange of information between employers and employees. Employers will be 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. To ensure employers are able to better inform employees under the new notice provisions, the final rule extends the time for employers to provide various notices from two business days to five business days.
- **Employee Notice:** The final rule modifies the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if they could have provided notice more quickly. Lack of advance notice for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations. The final rule provides that an employee needing FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances. The final rule also highlights the existing consequences if an employee does not provide proper notice of the need for FMLA leave.
- **Medical Certification Process:** The final rule recognizes the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employees’ health care providers. In response to specific concerns raised by employees about medical privacy, the Department has included a requirement in the final rule specifying that the employer’s representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official. However, it may not be the employee’s direct supervisor. Although employers may not ask health care providers for additional information beyond that required by the certification form, the exchange of medical information is improved by updating the Department’s optional Form WH-380 to create separate forms for the employee and covered family members and by allowing health care providers to provide a diagnosis of the patient’s health condition as part of the certification. The final rule also specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking and give the employee seven calendar days to cure the deficiency. Such changes should improve FMLA communications, protect the privacy of workers, and help ensure that the employees who need leave will get it without being subjected to repeated requests for additional information and will not be denied FMLA leave on a technicality.
- **Medical Certification Process Timing:** The final rule codifies a 2005 DOL Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The final rule also clarifies the applicable time period for recertification. Under the current regulations, employers may generally request a recertification no more often than every 30 days and only in conjunction with an FMLA absence unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed. Because the current regulation has not been clear to all

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regarding the employer's ability to require recertification when the duration of a condition is described as "lifetime" or "unknown," the final rule allows an employer to request recertification of an ongoing condition every six months in conjunction with an FMLA absence.

- **Fitness-For-Duty Certifications:** The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. The final rule makes two changes: (1) an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job and (2) where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

**Download PDFs of both forms:**