

Employment Law Bulletin

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New FMLA regulations necessitate review of FMLA policies and procedures.

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The U.S. Department of Labor (DOL) recently issued a final rule which revises and updates the existing regulations concerning the Family and Medical Leave Act of 1993 (“FMLA”). These revised regulations require employers to make numerous changes to their FMLA policies and procedures, as well as the notices they provide to employees taking leave protected by the FMLA. Some of the most significant changes are discussed below.

Background

The FMLA covers employers who had 50 or more employees in 20 workweeks in the prior or current year. Covered employers must provide “eligible employees” with up to 12 weeks of unpaid leave in a 12 month period, when that leave was necessitated by their own or a relative’s serious health condition or because of the birth or adoption of a child. For purposes of the FMLA an eligible employee is one who has been employed by the employer for at least 12 months, and has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave

Military Family Leave

The final rule addresses two new types of FMLA Military Family Leave, namely Military Caregiver Leave and Qualifying Exigency Leave, which were created by the passage of the National Defense Authorization Act for FY 2008.

The first of these new leave entitlements, Military Caregiver Leave, entitles family members of covered service members to take up to 26 weeks of leave in a single 12 month period (which must be calculated from the time the employee first takes Military Caregiver Leave) to care for a service member with a serious injury or illness incurred in the line of duty. Employees may take a combination of regular FMLA leave and Military Caregiver Leave. However, the total amount of leave taken in the 12 month period may not exceed 26 weeks.

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The second type of leave, Qualifying Exigency Leave, was intended by Congress to help families of members of the National Guard and Reserves manage their affairs when the service member is on active duty in support of a “contingency operation.” A contingency operation is a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States, or results in the call to active duty of members of the uniformed services under certain sections of the US Code.

Employees may now avail themselves of their normal 12 workweeks of FMLA leave for any “qualifying exigency” arising out of the fact that a covered service member is on activity duty or has been called to activity duty in support of a “contingency operation.” The final rule defines “qualifying exigency” expansively by referring to a number of broad categories of reasons for which employees can use leave including: short notice deployment, military events, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation and post deployment activities.

Light Duty

Some courts had held that employees who returned from FMLA to a light duty position, used up FMLA leave while on that light duty assignment. Pursuant to the new regulations, time spent performing light duty work does not count against an employee’s FMLA leave entitlement. Moreover, the employee’s right to restoration is held in abeyance while the employee performs the light duty assignment.

Medical Certification

If an employer receives a medical certification form back from an employee which is incomplete or insufficient, the employer must now specify in writing what is lacking and give the employee 7 calendar days to cure the shortcoming. If the employee fails to cure the deficiency, the employer may then contact the employee’s health care provider as discussed below.

One of the most significant changes to the DOL’s FMLA regulations allows employers to contact the employee’s health care provider to authenticate a certification form or clarify information contained thereon. Under the old rules only a health care provider representing the employer could contact the employee’s health care provider. Under the new rules, a healthcare provider, a human resource professional, a leave administrator or another management official may contact the employee’s health care provider to obtain clarification. Likewise the new rules now define clarification to include “contacting the health care provider to... understand the meaning of a response.” However, there are two important limitations on this new right. First, the person contacting the health care provider may not be the employee’s direct supervisor. Second, the information sought must be limited to that covered by the Medical Certification Form.

Fitness for Duty Certification

Employers have been permitted to require an employee who is absent due to his or her own serious health condition to obtain a fitness for duty certification prior to his or her return to work, provided that the employer imposes this requirement on all similarly situated employees (i.e. same occupation, same serious health condition) on leave for medical reasons.

The new rules allow the employer to get substantially more information from a healthcare provider. Under the old rule an employer could only require a “simple statement on an employee’s ability to return to work.” The new rule allows an employer to require that “the certification specifically address the employee’s ability to perform the essential functions of his or her job.” In order to make use of this tool, when the employer provides the employee with the Designation Notice (discussed below), the employer must also provide the employee with a list of the job’s essential functions and advise the employee that the fitness for duty certification must address his or her ability to perform those essential functions. Employers may also contact the physician to authenticate or clarify information contained on the fitness for duty certification. However, employers remain barred from delaying an employee’s reinstatement during this process or requiring that the employee obtain a second opinion from another provider.

Notice Requirements

The DOL has substantially changed the procedure by which employees advise employers of the need for leave and by which employers designate that leave as FMLA or non-FMLA leave. The most significant changes are as follows:

Employer notice requirements

- Eligibility: Within five business days (as opposed to within two business days under the old rule) of when an employee requests leave the employer must advise the employee whether or not he or she is eligible for FMLA leave (i.e. whether he or she meets the FMLA’s definition of an “eligible employee”.) This eligibility notice may be oral or in writing. If the employee is not eligible, the notice must state at least one reason why that is the case.
- Rights and Responsibilities: Within the same five day time frame the employer must provide the employee with a new “Rights and Responsibilities Notice.” This notice must be in writing and include a plethora of information, including whether the employee must provide a medical certification and the policy and procedures related to substituting paid leave. The DOL has created a combined “Eligibility and Rights and Responsibilities” form of notice which employers may use.

- **Certification:** The old “Certification of Health Provider” form has been replaced by two new forms depending on whether the absence is due to the employee or a family member’s health condition. This certification form should accompany the Eligibility and Rights and Responsibilities Notice.
- **Designation Notice:** Within five business days after the employer is able to determine whether the leave is FMLA qualified an employer must provide the employee with the “Designation Notice.” In the case of leave due to a medical condition, this notice requirement would normally be triggered by the employer’s receipt of a completed Certification form. As discussed above, if the employer wants to require the more detailed fitness for duty certification allowed by the rules, then a statement of the job’s essential functions should accompany this notice.

Employee Notice Requirements

- The most substantial change to employee notice requirements relates to the employee’s obligation to provide notice of unforeseeable leave. Previously, employees could wait up to two days to provide notice of the need for leave. Under the new rule, an employee must give notice “as soon as practicable under the facts and circumstances of the particular case.” More importantly, provided the employee is physically capable of doing so, he or she must comply with the employer’s usual and customary notice requirements for requesting leave (i.e. a call-in procedure). The new regulations specifically provide that “if an employee does not comply with the usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.”

Conclusion

Employers covered by the FMLA need to revise their employee handbooks, FMLA policies and processes to comply with the revised regulations promulgated by the DOL. This Bulletin highlights the most significant changes. However, there are many more detailed changes to the regulations which may affect the proper response to any given request for leave, and are necessarily beyond the scope of this Bulletin.

If you have any questions about the revised regulations or are considering revising your employee handbook or FMLA policies please contact your RCF&P attorney or:

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