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FMLA Regulations

Worth the Wait?

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On November 17, 2008, the United States Department of Labor ("DOL") issued the much anticipated revisions to the Family and Medical Leave Act ("FMLA") regulations. The new regulations become effective on January 16, 2009.

The process of revising the FMLA regulations is monumental for several reasons. First, for the first time since its passage in 1993, the FMLA was amended. In January 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008 ("NDAA") which provides for military leave entitlement as part of the FMLA job protection structure. The revised regulations address the Military Caregiver (a/k/a Covered Servicemember) Leave and also define and explain the "Qualifying Exigency" leave required but not defined by the NDAA.

Another reason for the revision to the regulations was the simple passage of time. As a DOL summary sheet on the final rules notes, the 15-year history of the Department in enforcing and administering the FMLA, as well as the body of case law that has developed and, in some cases, invalidated portions of the existing regulations, motivated several changes to the regulations.

The new regulations came after nearly 20,000 public comments were received by the DOL, including concerns raised by both employers subject to, and employees afforded job protection by, the FMLA. Many employers expressed concerns that the original intentions of the FMLA had been eroded and undermined as a result of abuses by employees. Employers also sought clarification of some of the questions and ambiguities raised by the existing regulations.

Here are some of the highlights from the new regulations:

Military Leave:

The new FMLA regulations address the two new military leave provisions of the NDAA. The first leave provision provides eligible employees who are family members of covered servicemembers with up to 26 workweeks of leave in a single 12-month period to provide care for a covered servicemember with a serious illness or injury incurred while on active duty. This leave provision extends the definition of "family members" to include "next of kin" for military leave only.

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The second leave provision relates to "Qualifying Exigency Leave." This new leave entitlement is intended to help families of members of the National Guard and Reserves manage their affairs while the member is on active duty. The regulations define "qualifying exigency" as including 8 broad categories for which employees may be eligible to use the normal 12 workweeks of FMLA job protected leave. The categories include:

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.

For all of the categories, the need for the leave is premised on activities related to the circumstances arising out of being on, or called to, active duty. Routine and regular matters do not qualify.

Serious Health Condition:

One of the changes made to the regulations was in the definition of "serious health condition." While the new regulations do not make any substantive changes to the definition of what constitutes a "serious health condition," they do include requirements relating to the frequency and timing of medical visits. Under the new regulations, incapacity and treatment can be established by an employee having 3 or more days of incapacity and treatment two or more times within 30 days, as long as the first treatment takes place within the first seven days of incapacity. The new regulations also establish the frequency of periodic treatment for chronic conditions, requiring at least two visits per year to a health care provider.

Unfortunately, the DOL declined to further define the precise conditions that do not qualify as serious health conditions. Nevertheless, the new regulations left in place the list of common ailments, such as cold and flu, which, under ordinary circumstances, would not satisfy the regulatory criteria required for serious health conditions. For employers, this means that the potential for employees to transform short-term, acute conditions into a qualifying serious health condition still exists.

Medical Certifications:

The regulations related to medical certifications were significantly revamped, although with limited substantive changes. In terms of timing, the regulations now provide employers with five, instead of two, business days to advise an employee of the need to provide a medical certification, and employees have 15 days to return it. If not returned, or if returned incomplete, employees have an additional 7 days' grace period.

After receipt of a complete and sufficient medical certification, an employer may contact the health care provider for purposes of clarification and authentication of the medical certification, provided the employee has been given the opportunity to cure the deficiencies. However, the new regulations provide that an employer's health care provider, human resources professional, leave administrator or management official may make the contact and only after obtaining written, HIPAA compliant consent from the employee. This is a change from the original regulation which only allowed an employer's healthcare provider to contact the employee's healthcare provider. Importantly, the new regulations specifically prohibit the employee's direct supervisor from contacting the healthcare provider under any circumstances.

Employee Obligations:

Employers have been critical of the disruption caused by employees failing to give adequate notice of unscheduled FMLA leave. In an effort to address this concern, the new regulations confirm that employees are required to adhere to the employer's usual and customary call in procedures for reporting absences, absent unusual circumstances.

Fitness for Duty Certifications:

The regulations continue to allow employers to seek fitness for duty certifications for employees returning from FMLA leave, as long as the certification is requested pursuant to a uniform policy that applies to all similarly situated employees. The new regulations also authorize employers to specifically require the fitness for duty certification to address the employee's ability to perform the essential functions of the job, provided that at the time the leave was designated as FMLA leave (in writing as required by the regulations) the employee is advised of this requirement and provided with a list of the essential functions of the job that must be performed. Any clarification or authentification of the fitness for duty certification is subject to the same limitations that apply to the medical certifications. As before, if fitness for duty certifications are part of a collective bargaining agreement, those provisions apply.

Reorganization of Regulations and Forms:

The DOL also made some changes to the manner in which the regulations are organized, including grouping all of the notice provisions of the regulations into one section which makes them easier to locate and ensure compliance. Additionally, the DOL restructured the regulations from a question and answer format into a statement and explanation format. While this change does not affect the substantive information of most of the regulations, for those who access the regulations on a consistent basis it will take some getting used to.

The DOL has also developed new notice and designation forms, as well as certification forms, including separate forms for the serious health condition of the employee and their family members, as well as certification forms relating to care of a service member and qualifying exigencies. You can also obtain a copy of the new, updated poster at http:/www.dol.gov.esa/whd/fmla/finalrule.htm.

Whether the new regulations adequately address (or alleviate, as the case may be) the concerns about the prior regulations which were raised by employers and employees alike remains to be seen. However, because of the regulatory changes employers should not assume that their policies and prior decisions on FMLA will continue to pass muster. Employers should review and update their

policies and consult the new regulations for guidance as FMLA leave requests are processed and administered.