

Employers' First Resolution Of The New Year: Update FMLA Policies

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Authors: [Joseph N. Gross](#)

Department of Labor Issues Extensive Revisions to the FMLA Regulations

The Department of Labor (the "Department") has recently enacted significant revisions to the regulations implementing the Family Medical Leave Act of 1993 (the "FMLA"). These revisions include both changes to existing regulations and new regulations that provide guidance relative to military caregiver and qualifying exigency leave, which were incorporated into the FMLA in January 2008. The revisions and new regulations go into effect on January 16, 2009. Accordingly, covered employers, generally those with 50 or more employees in the current or preceding year, are advised to immediately review their existing policies to ensure that they comply with the revised regulations.

Military Caregiver Leave

Covered employers must provide leave for employees caring for family members with serious injuries or illness resulting from military service. This leave entitlement is in addition to FMLA leave. Eligible employees are entitled to 26 workweeks of leave, taken in a "single 12-month period." The 12-month period is measured forward from the date the employee begins military caregiver leave, regardless of the method used by the employer to measure the 12-month period for other FMLA-qualifying reasons, such as the birth of a child or a serious health condition.

Employers may require an employee seeking military caregiver leave to submit a certification form completed by a healthcare provider. While a covered employer is free to create a custom form, the Department has created a model form for this purpose and covered employers are prohibited from requiring additional information beyond what is specified in the regulations. Moreover, unlike certification forms for use with FMLA leave, covered employers are not allowed to request second and third medical opinions or TO require medical recertifications.

Qualifying Exigency Leave

Consistent with the January 2008 amendments to the FMLA, eligible employees may exercise FMLA leave for a "qualifying exigency" associated with the employee's spouse, son, daughter, or parent's active military duty or call to active duty status. The Department has defined eight "qualifying exigencies" related to military duty that must be taken as part of an eligible employee's 12-weeks of total FMLA entitlement. These exigencies include: (1) short-notice deployment (fewer than seven days' notice); (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 where the employer and employee agree to the leave.

Employers may require a copy of the service member's active duty orders or other documentation to support the exigency, but only once. Employers may also require their employees to complete a certification form, similar to the one developed by the Department.

Revisions and Amendments to Existing Regulations

The revisions to the FMLA regulations also attempt to provide consistency to several terms and definitions. Notably, there is no change in the requirement that reduced or intermittent leave may be taken in the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. While the final regulations issued by the Department are voluminous, the following highlight some of the most important amendments to the regulations.

Eligible Employee: While employees still must work 1,250 hours in the 12-months prior to the leave and meet the 12-month length of service requirement, the 12-month period may include breaks in service so long as an employee has worked 12-months in seven years (or longer in the event of certain military-related breaks in service). Employers, therefore, must now maintain records of service for at least seven years.

Serious Health Condition: The regulations clarify that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a health care provider, the two visits must occur within 30 days of the period of incapacity, and the first visit must occur within seven days of the start of the incapacity. Further, with regard to "chronic" serious health conditions, periodic visits to a health care provider must occur at least twice annually.

Certification: The revised regulations allow for employers to directly contact an employee's health care provider to authenticate or to obtain clarification of information required by a certification form. This contact, however, is limited to contact by the employer's health care provider, human resources professionals, leave administrators, and management officials. An employee's direct supervisor, however, may not contact the employee's health care provider. Employers are further required to first provide written notice to employees when the certification form contains missing or insufficient information to determine if the leave is related to a "serious health condition," identifying with particularity the missing information. Employers must be mindful of the implications of other laws, such as HIPAA, which require the employee's permission prior to contacting the employee's health care provider to obtain clarification of information.

Employer Notice Obligations: The "General Notice" which is required to be posted and incorporated in an employee handbook (or distributed separately if the employer does not utilize a handbook) has been revised. These revisions require that employers obtain new posters and revise their handbooks accordingly. Employers now have five business days, instead of three days, to provide employees who request FMLA leave with an "Eligibility Notice" of a leave request, along with a "Rights and Responsibilities Notice." Finally, within five business days after receiving sufficient information to determine that the leave qualifies under the FMLA, employers must provide employees with a

“Designation Notice” designating the leave as FMLA qualifying or notifying the employee that the leave does not qualify as FMLA leave. Also amended is the penalty for an employer failing to provide the required notices; whereas prior to the revisions there was a question as to whether the leave could be counted towards an employee’s total FMLA entitlement if the employer did not provide timely notice, under the revised regulations an employer is only liable to the extent that an employee is able to show that the employer’s failure to provide notice caused the employee “actual harm.”

Employee Notice: Instead of requiring employees to provide notice of leave up to two business days after an absence, the new regulations require employees to follow the employer’s normal and customary call-in procedures, absent unusual circumstances.

Paid Leave: The revised regulations provide that if an employee elects to substitute paid leave for non-paid FMLA leave, the employee must follow the requirements of the employer's paid leave policy. For example, if an employer’s policy directs that paid leave must be taken in whole-day increments, an employee may not substitute FMLA leave for a partial day’s absence, counted as paid leave.

Waiver of Rights: While an employee may settle an FMLA claim with an employer without approval from a court or the Department, prospective waivers continue to be prohibited. Employers should consider including an affirmative statement as part of any settlement or separation agreement acknowledging that the employee has received all of his or her rights under the FMLA.

Perfect Attendance Awards: Employers are free to deny employees who have taken FMLA leave awards for perfect attendance; provided, however, that the employer treats non-FMLA leave identically.

Employers should review their existing policies and forms to ensure that they comply with these new revisions effective January 16, 2009. If you have additional questions or would like to discuss the impact of the revisions to the FMLA on your specific operations and policies, please contact any of the following members of Benesch’s Labor & Employment Practice Group:

Maynard Buck at 216.363.4694 or e-mail: mbuck@beneschlaw.com

Joseph Gross at 216.363.4163 or e-mail: jgross@beneschlaw.com

Peter N. Kirsanow - 216-363-4481 or e-mail: pkirsanow@beneschlaw.com

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