

DEPARTMENT OF LABOR ISSUES NEW FMLA REGULATIONS

Final regulations under the Family and Medical Leave Act (FMLA) may pose challenges to employers, who will need to update their FMLA policies and materials by the January 16, 2009 effective date for the new rules. Employee eligibility rules, the definition of a serious health condition, and many other existing FMLA rules are affected.

The new regulations, published by the Department of Labor (DOL) on November 17, 2008, also provide details on the two types of military family leave – caregiver leave and active duty leave – that were added to the FMLA by the National Defense Authorization Act (NDAA) in January 2008. For details on these FMLA military family leave amendments, see *Employee Benefits Alert, Issue 126, “FMLA Expanded to Provide Leave to Military Families.”*

The new regulations are lengthy and detailed, and employers may have difficulty updating their FMLA materials by the January effective date. This *Alert* highlights some of the key changes. The DOL has provided a [web page](#) that provides links to resources explaining the final rules in detail.

EMPLOYEE ELIGIBILITY

In order to qualify for FMLA leave, an employee must have worked for his or her employer for at least 1,250 hours in the 12-month period immediately preceding the leave. The employee must also have worked for the employer for at least 12 months. The 12 months need not be consecutive and, under the current rules, there are no restrictions regarding gaps between periods of employment. **The new regulations, however, provide that an employer need not count employment prior to a break in service of seven years or more when determining whether an employee has worked for the employer for at least 12 months.**

SERIOUS HEALTH CONDITION

An eligible employee may take FMLA-protected leave if the employee has a “serious health condition” or is needed to care for a family member with a “serious health condition.” The final regulations refine the circumstances that qualify as a serious health condition. The definition continues to include a condition resulting in more than three consecutive days of incapacity plus two visits to a health care provider. **The new regulations clarify that the first of these two visits must occur within seven days after the start of the incapacity, and the second generally must occur within 30 days after the incapacity begins.** The final regulations also continue to provide that a second visit is not required if a regimen of continuing treatment results from a visit that occurs within seven days after a period of more than three days of incapacity begins.

The new regulations also continue to treat certain chronic conditions as serious health conditions. One part of this definition requires “periodic” visits for treatment by a health care provider. **The final regulations clarify that there must be at least two visits to a health care provider per year for a chronic condition to qualify for FMLA coverage.**

SUBSTITUTION OF PAID LEAVE

The FMLA does not require employers to provide paid leave, but does provide that an employee may elect, or an employer may require, use of paid leave during FMLA leave. The final regulations permit an employer to require the employee to satisfy the same conditions for receiving paid leave benefits during FMLA leave as would apply under the paid leave program if FMLA were unavailable. Therefore, if an employer's paid vacation policy requires at least seven days' advance notice, an employee taking FMLA leave can be required to provide the seven-day notice to qualify for paid vacation during the FMLA absence. Failing to satisfy the conditions for paid leave benefits would make those benefits unavailable, but would not affect the availability of unpaid FMLA leave.

CHANGES IN NOTICE REQUIREMENTS

The final regulations uphold the requirement that employers post a general notice about the FMLA. Employers are also required to provide the general notice to employees by including it in an employee handbook or other similar written guidance. (Employers that do not have these items may distribute the general notice to employees upon hiring.) An appendix to the regulations provides the text for this general notice.

The final regulations require three employee-specific notices: an eligibility notice, a rights and responsibilities notice, and a designation notice. The first two must be provided within five business days after the employee requests FMLA leave or the employer learns that an employee's absence may be for an FMLA-qualifying reason. **The regulations replace the existing Form WH-381 (which employers generally have used to designate leave as FMLA-protected) with a new Form WH-381 that, when completed, combines the eligibility notice and the rights and responsibilities notice.** Although the regulations are not explicit on this point, it appears that the rights and responsibilities notice is not required if the eligibility notice informs the employee that he or she is not eligible for FMLA leave. The designation notice is required within five business days after the employer has enough information to determine whether leave is being taken for an FMLA-qualifying reason. An appendix to the regulations provides a form designation notice.

RETROACTIVE FMLA DESIGNATION

The final regulations follow the U.S. Supreme Court's holding in *Ragsdale v. Wolverine* that an employer may retroactively designate an employee's absence as FMLA leave, even if the employer did not provide a designation notice to the employee when required. Retroactive designation is permitted provided the employer's failure to make the timely designation does not cause the employee harm.

ACTIVE DUTY LEAVE

The FMLA's active duty leave provisions, which were signed into law as part of the NDAA, provide up to 12 weeks of unpaid FMLA leave to qualified employees. The leave is available for any "qualifying exigency" arising from the employee's spouse, son, daughter, or parent being on, or called to, active duty (or being notified of an impending call or order to active duty) in support of an action or operation against an opposing military force. Under the NDAA, employers were not required to provide active duty leaves until final regulations defined the term "qualifying exigency." **The new regulations provide the needed definition, specifying that qualifying exigent circumstances include short notice deployment, military events and related activities, school and child care activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities agreed to by the employer and the employee.**

CAREGIVER LEAVE

The NDAA amended the FMLA to provide up to 26 weeks of unpaid leave in a single 12-month period to an eligible employee who is needed to care for a family member who was injured or became ill while on active military duty.

The final regulations clarify that the 12-month period to be used for purposes of caregiver leave begins when the employee's leave commences. It should be noted that an employer may use other calculation methods for FMLA leave taken for reasons other than caregiver leave. **The final regulations further clarify that the 26-week caregiver leave entitlement applies for each service member and for each illness or injury incurred.**

CONCLUSION

Given the complexity and number of changes to the FMLA rules and the January 16, 2009 effective date, employers should act promptly to review and update their FMLA materials and practices.