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Changes to the Family and Medical Leave Act: What Every Employer Needs to Know

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On November 17, 2008, the Department of Labor published a new set of Family and Medical Leave Act (FMLA) regulations, the first significant changes since the current regulations were issued in 1995. These regulations took effect on January 16, 2009, and they implement new forms of military FMLA leave and many other significant changes. As a result, employers must be aware of these changes and adjust their policies and employee handbooks accordingly.

The Basics of the Family and Medical Leave Act

The FMLA requires employers with 50 or more employees within a 75-mile radius to provide eligible employees up to 12 weeks of unpaid leave in a 12-month period. An employee is eligible for leave under the FMLA if he or she has been employed for at least 12 months and has worked 1,250 hours for the employer within the previous 12 months.

Before the amendments, an eligible employee was entitled to FMLA leave upon the occurrence of one or more of the following events: (1) for the birth of a child and care for the newborn; (2) for the placement of a child for adoption or foster care; (3) to care for the employee's spouse, child, or parent with a "serious health condition;" or (4) because of a "serious health condition" that makes the employee unable to perform the functions of his/her job.

A "serious health condition" is one that involves inpatient care in a hospital, hospice, or residential medical facility and includes any period of incapacity. It also includes continuing treatment by a health care provider, which may involve:

- Any period of incapacity that involves absence from work, school, or other daily activities for more than three calendar days and any subsequent treatment period of incapacity relating to the same condition.
- Pregnancy or prenatal care.
- Chronic or long-term health conditions requiring periodic visits for treatment over an extended period of time.
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's disease, severe stroke, or terminal stages of a disease).
- Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider either for restorative surgery after an accident or other injury, or for a condition that is so serious that it would likely result in incapacity for three or more calendar days in the absence of medical intervention or treatment (e.g., cancer, severe arthritis, or kidney disease).

Revisions to the FMLA Regulations

1. *"Serious Health Condition"*

The final regulations from the Department of Labor retained the above six definitions of "serious health condition," but modified the tests of "incapacity and treatment." For continuing treatment involving two or more doctor visits, those visits now must occur within 30 days of the start of the incapacity. In addition, the first visit with a health care provider must occur within seven days of the start of the incapacity.

A second way to satisfy the definition of a "serious health condition" under the regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The first visit to the health care provider must take place within seven days of the first day of incapacity.

Finally, chronic serious health conditions require periodic visits of at least twice a year for treatment of the incapacity.

2. *"Light Duty"*

Under the final regulations, 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. If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

3. *"Waiver of Rights"*

The regulations codify the Department of Labor's longstanding position that employees may voluntarily settle or release their FMLA claims without approval from the Department or the courts. Prospective waivers of FMLA rights, however, continue to be prohibited under the final rule.

4. *"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, concurrently with any FMLA leave. This is called the "substitution of paid leave." Under the final regulations, 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").

Employers may require compliance with the procedural requirements of paid leave benefits when substituting paid leave for unpaid FMLA leave. An employee electing to use any type of paid leave concurrently with FMLA leave must follow the employer's policies that apply to other employees for the use of such leave. The employee may use unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave.

5. *"Notice Requirements"*

The regulations place more demanding notice requirements on employers. Employers are 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. An employer now has five business days to provide these notices (instead of two).

Absent unusual circumstances, employees who require FMLA leave must comply with the employer's usual and customary call-in procedures for reporting an absence.

6. *"Perfect Attendance Awards"*

Employers may deny a "perfect attendance" award or a bonus for perfect attendance to an employee whose imperfect attendance is due to FMLA leave, so long as the employer treats employees taking non-FMLA leave in an identical way.

7. *"Medical Certification"*

Under the new regulations, an employer's representative who contacts a health care provider must be a health care provider, a human resource professional, a leave administrator, or a management official. The employee's direct supervisor is prohibited from being the representative who contacts the employee's health care provider. Employers may not ask health care providers for additional information beyond that required by the certification form.

If a certification is incomplete or insufficient, the regulations provide that the employer give the employee written notice of the additional information needed and allow the employee seven days to cure the deficiency.

8. *"Fitness for Duty Certification"*

The regulations make two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second,

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.

9. *"Military Caregiver Leave"*

Employees may take up to 26 weeks of leave during 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.

10. *"Qualifying Exigency Leave"*

The second new military leave entitlement indentifies eight circumstances that constitute a "qualifying exigency" for which an eligible employee is entitled to FMLA leave while that employee's parent, spouse, son, or daughter is on active duty or called to active duty status. These "qualifying exigencies" are: (1) short-notice deployment (seven days or less); (2) military events; (3) childcare and school activities; (4) financial and legal arrangements; (5) non-medical counseling for self, servicemember, or servicemember's child; (6) rest and recuperation leaves; (7) post-deployment activities; and (8) additional activities not encompassed in the other categories, but agreed to by the employer and employee.

Employers may obtain copy of the final regulations from the Department of Labor's website: http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763.

Practical Advice and To Do List for Employers

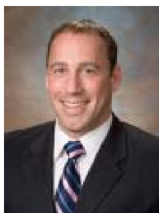
Employers must understand their legal obligations and requirements with respect to the new regulations. Employee handbooks and other written policies must be updated to include the new military leave provisions and comply with the new regulations. New notice and medical certification forms must be prepared to comply with the Department of Labor's regulations.

Employers should adopt policies requiring use of paid leave concurrent with FMLA leave and consider changing rules regarding the use of paid leave to take advantage of the new flexibility.

Most importantly, employers must ensure that all human resources personnel, as well as supervisors and managers, have been trained regarding the new regulations and that an adequate tracking system for FMLA leave exists. ◆

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning the Family and Medical Leave Act. Please feel free to contact Barry H. Uhrman [(602) 263-7328, buhrman@jshfirm.com] with any questions you may have regarding this important development in employment law.

About The Author



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Mr. Uhrman joined Jones, Skelton & Hochuli in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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