

### **Recent Changes to the FMLA Amendments**

**May 2009**

Eight years after the U.S. Supreme Court held that regulations issued by the Department of Labor (DOL) were invalid, the DOL has revised its FMLA regulations. In addition to addressing the concerns raised by the Supreme Court, the DOL clarified previous regulations, made changes where practical problems were identified, and attempted to make handling FMLA requests more routine.

Employers should be aware of these most significant changes.

#### **Definition of Serious Health Condition**

Employers had hoped that the DOL would significantly narrow the definition of "serious health condition." The DOL acknowledged that many of the problems employers are facing are legitimate but concluded that it could not make material changes without taking away protections for clearly covered conditions. Therefore, the DOL only tweaked the regulations:

- "Treatment" by a health care provider requires an in-person visit within seven days of the first day of incapacity.
- "Health care provider" can include a physician assistant who is licensed and performing within the scope of his or her practice as defined by state law.
- Where an employee seeks to be covered under the definition of "incapacity for more than three days," which requires "continuing treatment by a health care provider," the two treatments must be within 30 days absent extenuating circumstances outside the employee's control.
- Where an employee seeks to be covered under the definition of "chronic serious health condition," which requires periodic visits for treatment by a health care provider, the employee must have treatment at least two times a year.

#### **The Amount of Time Charged Against An Employee's FMLA Leave**

The new regulations, like the old, state that generally an employer cannot charge an employee for more FMLA than is taken. In other words, if an employee only needs three hours of FMLA leave, he or she cannot be required to take a whole day. However, the new regulations have modified this requirement in several ways:

- Under the old regulations, an employer had to track FMLA time in the smallest increments used for time-keeping, or at least in increments as small as one hour. This meant that many employers had to keep track of FMLA leave in increments as small as 6 minutes. Under the new regulations, one hour is still the maximum, but the minimum is set by the employer's other time-off policies, such as vacation time or sick leave.

- Where return to work is physically impossible, such as where a flight attendant needs to attend a doctor's appointment in the middle of a scheduled flight, the employer can require the employee to take off the entire time of physical impossibility, not just the time needed for the appointment. However, the DOL has cautioned that this provision is very limited and will not apply to employees who need time off in the middle of a manufacturing shift.
- Where an employer's paid leave policies require larger increments of time, such as a half-day or full day, the employer must choose between accepting the pay and using up the larger amount of FMLA time or taking the leave unpaid and only being charged for the smaller increment.

### **Substitution of Compensatory Time**

The new regulations allow a public employer to coordinate compensatory time off provided to employees like firefighters and police officers with FMLA leave.

### **Attendance and Production Incentives**

The original regulations did not allow an employer to deny an attendance or production bonus where an employee had earned that bonus up until the time leave was taken. The new regulations allow an employer to deny a bonus where the specified goal (such as hours worked, products sold, or perfect attendance) is not met, *so long as the bonus is also denied to other employees on an equivalent leave status*. In addition to requiring that the bonus be paid if employees on other unpaid leave are covered, this means that if the employee is coordinating paid time off, the employee must be treated like others receiving the same pay, such as vacation pay.

### **Forms and Notices**

The FMLA process is now highly regulated, with strict time tables and extensive forms. The following summarizes the new procedure. Employers should review the new DOL forms and consult with counsel where appropriate:

- An employee first gives notice of the need for leave.
- Employer policies should clearly state what notice is required, when it must be given, and how it should be given. The new FMLA regulations allow an employer to enforce these procedures.
- Within 5 business days, the employer must provide the employee with a Notice of Eligibility and Employee Rights & Responsibilities, and include any certification form necessary. The DOL now has four different certification forms, depending on the reason for the leave.
- The employee must return the certification form within 15 days.
- Within 5 business days, the employer must provide the employee with a Designation Notice stating that the leave has been granted, denied, or that additional information is necessary. This may include stating that the certification form is incomplete. Where no certification is required, the Designation Notice must be provided at the same time as the Notice of Eligibility. The new regulations clarify the ways in which the employer can seek authentication or clarification during these 5 business days.

### **Leave for the Serious Injury or Illness of a Covered Service Member**

This new form of FMLA leave allows an employee to take time off to care for a family member who has been injured during military service. It differs from traditional FMLA leave in the following ways:

- FMLA extends not only to a parent, spouse, or child, but also to next of kin.
- The “child” may be an adult without meeting the definition of “incapable of self-care and ‘disabled’ as defined by the ADA.”
- Leave is for “serious injury or illness,” which is defined differently than “serious health condition.”
- An employee may take leave for up to 26 weeks within a 12 month period beginning on the first day of the leave. The employee only gets this leave once unless there is a new injury or a new service member.

### **Leave for “Qualified Exigencies”**

This is a new form of FMLA leave for the family members of an individual called to active military service from the National Guard, the Reserves, or military requirement. Unlike leave for “serious illness or injury,” this leave follows the normal 12 weeks per year FMLA model and applies only to the employee’s parent, spouse, or child. Like leave for “serious illness or injury,” the “child” may be an adult. “Qualified exigencies” include:

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- “Additional activities” which arise out of the call to active duty

The circumstances under which each of these leaves can be taken, and the amount allowed for each, are set forth in the regulations.

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