Shipman & Goodwin LLP

Employer Alert

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EMPLOYERS MUST COMPLY WITH NEW FMLA REGULATIONS

On January 16, 2009, new Family Medical Leave Act (FMLA) regulations go into effect. These regulations not only cover FMLA but also the National Defense Authorization Act. There are detailed rules about what circumstances qualify for a leave for military families[1] as well as how much time they are eligible for.[2]

There is a renewed emphasis on improved communication[3] with an effort to make the administration of leaves more flexible, while also requiring more record keeping[4]. Employees must be advised of their rights and told what they need to do to have a leave approved and to preserve their reinstatement rights. The regulations also clarify how light duty affects a leave.[5]

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1 Relatives of those called to active duty in the National Guard and Reserves -- but not regular active-duty military members -- may take up to 12 weeks of leave for the following "exigencies": (1) short term deployment (up to 7 days of leave for each deployment); (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation (up to 5 days of leave for each occurrence of rest and recuperation); (7) post-deployment activities and (8) additional activities where the employer and employee agree to the leave.

2 Leaves for military families, family members caring for a service member with a serious injury or illness incurred in the line of duty on active duty, can take up to 26 workweeks of leave in a 12-month period. Note, for this specific type of leave the 12-month period begins on the day the employee commences such leave, regardless of how the employer normally administers the 12-month FMLA period for all other types of FMLA leave.

3 Disputes between employer and employee over whether leave qualifies as FMLA leave should be discussed and documented between employee and employer.

4 Employees must follow their employer's call-in policies when they are planning to miss work, "absent unusual circumstances." "Unusual circumstances" include: no one answered telephone; company voice mail box is full; employee is unable to use telephone because he or she is seeking emergency medical treatment. Previously, employees had up to two days after first absence to notify the company about their need for leave. Employers can continue to require employees to notify them in advance of taking leave that is foreseeable.

Employees must explain sufficiently the reasons for leave so as to allow employer to determine whether leave qualifies as FMLA leave. Calling in sick is not sufficient notice to trigger an employer's FMLA obligations. The call-in procedure should be included in the leave policy.

5 If an employee accepts light duty work after commencing FMLA leave, the time spent performing such work does not count against an employee's FMLA leave entitlement. At the end of the voluntary light duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave commenced, or the employee may use the remainder of his/her FMLA leave entitlement.

There are new notice requirements that must be posted and included in employee handbooks.[6]

When someone applies for leave, the Employer's response period regarding eligibility for leave has been increased to 5 business days from the date of the employee's request or from when the employer was aware that a leave may be a FMLA qualifying leave. There is a change in what information an employer can request.[7] The Eligibility Notice response requires specific information.[8]

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6 Every employer covered by the FMLA must post a general FMLA notice in all of its offices, even in offices where no employees are eligible for FMLA (employed for at least 12 months, for at least 1,250 hours during the 12 month period preceding commencement of the leave, at a worksite where 50 or more employees are employed within 75 miles of that worksite). (See DOL poster--available at DOL's "Final Rule" website: http://www.dol.gov/esa/whd/fmla/finalrule.htm)

If employer has no handbook or written policies regarding FMLA, an employer must provide FMLA notice to each employee when hired. Electronic posting is permitted where all employees and applicants have access to the electronic system.

Two notice requirements are mandatory when an employee requests leave: one to notify the employee of FMLA eligibility and his/her rights, and one to formally designate leave as FMLA leave. (See DOL forms)

- Eligibility Notice must be provided to an employee within five days following a leave request.
- Designation Notice must be provided within five business days after the employer receives an employee's medical certification(s) and any other required information.

Employers may provide retroactive notice so long as the delay does not cause any harm to the employee. Additionally, employees and employers can agree that leave be retroactively designated as FMLA leave.

7 Employers may request more detailed medical certification for an employee's own serious health condition under the new regulations, but information available regarding a family member's health condition is more limited. (See DOL forms) As a practical matter, consider using all of the new forms that DOL has available to support the new regulations. At least at the outset this will alleviate the need to produce new employer-specific forms, although employers can certainly create such forms at a later time if they wish (being sure never to exceed the limits that the regulations establish, e.g. permissible questions in a medical certification). It is also likely to reduce the potential for arguments with employees or their advisors, since the forms will be DOL produced.

Employers have 5 days (previously 2 days) following leave request to request medical certification.

Employees have 15 days to provide requested certification. Additional time may be granted if employee is using "diligent, good faith efforts to get the certification and lets the employer know of such efforts."

If an employee's medical certification is deficient, employer must notify employee of certification deficiencies in writing, and allow employee seven calendar days to provide additional information. If employee fails to submit a complete and sufficient certification afterwards, the employer can deny FMLA leave.

Employers may request certifications annually for conditions lasting longer than a year.

For conditions of relatively short duration, employer may request recertification every 30 days. If initial certification says absence will last longer than 30 days, recertification can be requested when the initial certification says the absence will end or six months, whichever is shorter, and in connection with an absence by the employee.

Employee must provide FMLA medical certification even when substituting paid leave for FMLA leave.

Employers can consider medical information received from employee pursuant to ADA or workers' compensation inquiries.

Direct supervisors are prohibited from obtaining an employee's medical information when an FMLA certification is needed.

8 In the Eligibility Notice, Employers must advise the employee whether leave is still available and if not, why not. An employee must be advised where he/she has not worked enough months or hours or has exhausted the amount leave for which he/she would otherwise be eligible. The Eligibility Notice also must explain whether and when medical certifications will be required, payment of insurance premiums for continuing coverage, job restoration rights, and the right to substitute and/or supplement unpaid leave with paid leave.

If a medical certificate is going to be needed before the employee can return to work, then at the time the Designation Notice is given, he/she must be notified of the requirement and given a functional job description so that his/her doctor can be aware of what the job entails.

Time spent in "light duty" work will not count against an employee's FMLA leave entitlement. Further, the employee's job restoration rights are held in abeyance during the period of light duty. If an employee is voluntarily doing light duty work, he or she is not on FMLA leave.

Employers may permit an employee to substitute accrued paid leave for unpaid FMLA leave and provided that the substitution occurs in accordance with employer's paid leave policies. If the employer requires advance notice of the use of vacation time, then the same time period must be complied with in order for the employee seeking FMLA or on FMLA leave to substitute unpaid time for paid time. Notice of this requirement must be included in the notice of rights and responsibilities that is included with the Eligibility Notice.

The changes provide new definitions of a serious health condition[9], continuing treatment[10] and chronic condition.[11] If an employer requires employee's to provide medical certification to establish eligibility for a FMLA leave, the employer has 5 business days to make the request and the employee then generally has 15 calendar days to provide the information. If the employee has a serious medical condition that extends beyond a single leave year, an annual medical certification may be required. The medical certification rules have also changed.[12] There are modifications to the rules regarding intermittent leaves.[13]

Once the employee provides the necessary information, the employer must inform the employee that leave has been approved and designated as FMLA leave via a Designation Notice. This notice must be provided within 5 business

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9 Serious health condition" - First visit to a doctor must occur within 7 days of start of incapacity and must be "in person." The new regulations also define "periodic visits to a health care provider" for chronic serious health conditions as at least two visits to a health care provider per year. These provisions should help employers to decide whether or not an employee has a qualifying serious health condition, and will also help employees establish such a condition through appropriate medical certification.

10 "Continuing treatment" - Must be a minimum of two visits within 30 days of the first day of incapacity. The health care provider, not the employee, must determine when the second or follow-up visit should occur.

11 "Chronic condition" - Employees must certify that they visited a doctor at least twice a year for the condition. 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.

12 The regulations recognize and require compliance with HIPAA as they now permit more detailed information about the employee's medical condition. Provided the employee signs the necessary authorization for the release of information, an employer may obtain a description of symptoms, diagnosis, hospitalizations, doctor visits, whether medication has been prescribed, referrals for evaluation or treatment or any other regimen of continuing treatment. As this information may be needed to determine whether the leave is properly designated as FMLA leave, the employee will understand the importance of provided the necessary permission. Without providing the information, the employee can lose his/her FMLA protections.

The certification must establish that the employee cannot perform the essential job functions and what the anticipated duration of the restriction will be. The certification must estimate the frequency and duration of episodes of incapacity related to intermittent unforeseen leave needs.

If the employer finds that the information provided is insufficient or incomplete, it can deny the leave, but it must advise the employee in writing what additional information is needed and give the employee at least 7 calendar days (depending on how practical it is for the employee to be able to get the response for the doctor) to provide the needed information or clarification.

If an employee has a serious health condition which may be a disability under the ADA, the employer can follow the ADA's guidelines for requesting information and to determine what, if any, accommodation is appropriate.

In order to provide the employee some protection, there are limitations on who may contact the employee's health care provider(s). It can never be the employee's supervisor! The contacts with the employee's health care provider can only come after the period to cure deficiencies in the medical documentation response. The people authorized by the regulations to make the contact are a human resources professional, a leave administrator, a management official or the employer's health care provider. Whoever makes the contact must be aware that they are obtaining sensitive personal information and must safeguard it as they would with any HIPAA protected information.

The regulations clarify that the employee is required to provide a release for medical information so that the second or third provider can obtain and review the information. The employer must provide the employee with a copy of the second and third opinions within 5 business days of a request for such information.

13 An employer must account for intermittent or reduced schedule leave using an increment no greater than the shortest period of time that employer uses to account for use of other forms of leave provided it's not greater than one hour. In other words, employers may require employees to take FMLA leave in minimum increments equal to those used for other forms of leave (e.g. if employers account for sick leave in 30-minute increments, they can require employees to use 30 minutes of FMLA time for intermittent or reduced schedule leave), provided it is one hour or less. Previously, employers were required to account for FMLA leave in increments used by the employer's payroll system.

Leave entitlement for employees working a schedule that varies from week to week will now use a weekly average over the 12 months preceding the leave period (rather than just prior 12 weeks under current rule).

Employers may require fitness-for-duty tests for employees returning from intermittent FMLA leave if doing the job raises a significant risk of harm to themselves or others.

days after the employer has sufficient information to decide on whether the employee is eligible.[14]

Employers may now deny so-called "perfect attendance awards" for any employee who does not have perfect attendance because he or she took FMLA leave. However, employers may do this only if they treat employees taking non-FMLA leave in an identical way.[15]

While many of the changes in the new regulations are aimed at employer practices, employers should amend their policies to account for the new regulations. In particular the military leave provisions, including the list of eight "qualifying exigencies," and provisions regarding substitution of paid leave should be reviewed and amended as necessary.

QUESTIONS OR ASSISTANCE?

This alert is intended to highlight the new regulations and cannot address all the changes and nuances that may go into effect on January 16. If you have specific questions, please contact Gary Starr at (860) 251-5501, Henry Zaccardi at (860) 251-5737 or Eric Lubochinski at (203) 324-8154.

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14 The Designation Notice must advise the employee of how much leave time she/he is eligible for. If a fitness for duty certification is required before an employee can return to work, that requirement must be spelled out in advance and the company must provide a list of essential job duties so that the treating doctor will know what the job entails.

Employers can require a fitness for duty certificate prior to the employee's return. The employee is required to cooperate in this process. The new regulations allow the employer to seek certification regarding the employee's ability to perform the essential job functions, provided the employer first gives the employee a list of essential job functions when it provides the employee with the Designation Notice and notice that the certification must address the ability to perform requirements.

This Designation Notice regarding the amount of time available for leave may need to be updated every 30 days if the length of the leave is either unknown when it began or is to continue for an extended period. If there is adequate information, the Eligibility Notice and Designation Notice may be combined and provided within 5 business days.

Also, the new regulations remove a prior prohibition on the use of accrued paid leave when an employee is out under FMLA due to a Workers' Compensation injury. Previously, even the use of a limited amount of accrued paid sick time in such cases, simply to permit the employee to make up the difference between Workers' Compensation benefits and the full paycheck he/she normally received, meant that the employer could not count that period of absence as FMLA leave time. Many employers failed to understand this nuance in the old regulation's substitution of paid leave rules. Fortunately the DOL will now allow such supplemental use of increments of accrued paid leave during a Workers' Compensation absence, so long as the employer and the employee mutually agree to this arrangement. If they do agree, then FMLA and Workers' Compensation can continue to run concurrently and the employer can apply this form of substitution of paid leave without concern.

15 Employers may disqualify employees from bonuses or other payments based on achievement of a specified job-related performance goal (such as attendance) where the employee has not met the goal due to FMLA leave.

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