



## New Revised Family Medical Leave Act Regulations Highlight Importance of Compliance

On November 17, 2008, the United States Department of Labor released final revised regulations implementing the Family and Medical Leave Act (FMLA). As of January 16, 2009, all FMLA-eligible employers in the U.S. must begin complying with the new regulations. Since 1993 the FMLA has required employers to provide eligible employees up to 12 weeks of unpaid job-protected leave for their own serious illnesses, for the birth or adoption of a child, or to care for family members with serious health conditions.

On January 28, 2008 President Bush signed legislation amending and expanding the FMLA to allow eligible employees to take two new types of FMLA leave: 1) Qualifying leave related to military service; and 2) Qualifying exigency leave and military caregiver leave. The legislation also granted the Department of Labor authority to issue regulations concerning those types of leave. One of the most significant changes to the Act is the guidance concerning the military leave provisions.

"Qualifying exigency leave" is only provided for family of service members in the reserve components of the military -- not for service members in the regular armed forces. The regulations identify eight distinct types of qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain finan-

cial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings. Employers must begin to provide leave due to a qualifying exigency no later than January 16, 2009, and should review carefully the extensive regulations concerning each of the new leave types.

The FMLA also grants leave to certain family members to care for a covered service member with a serious injury or illness for up to 26 workweeks under the "military caregiver leave." A serious injury or illness is defined as that "incurred by a covered service member in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating."

Unlike other forms of FMLA leave, military caregiver leave may be taken by an employee who is a service member's spouse, child, parent or next of kin. Unlike qualifying exigency leave, military caregiver leave may be taken by qualifying family members of service members in the reserves or in the regular armed forces.

In addition to new regulations concerning military-related leave, the revised FMLA now also addresses other, numerous issues in effect since August 1993. While the modifications are too numerous and extensive to detail here, some of the most important



# EMPLOYMENT & LABOR UPDATE



changes include:

- \* Clarification of the various categories of continuing treatment for purposes of determining whether an employee has a serious health condition.

- \* Modifications to the regulations concerning leave for pregnancy or childbirth to reflect that leave to care for the pregnant woman only is available to the woman and her spouse, not to her boyfriend or fiancé.

- \* Clarification that a health care provider, which now includes physicians' assistants, must identify any and all essential job functions the employee is unable to perform due to the employee's own serious health condition. The Act also permits (but does not require) employers to provide a list of an employee's essential job functions when requesting the medical certification.

- \* The new regulations allow employers to impose company-specific leave policies when employees wish to substitute paid leave for unpaid FMLA leave; therefore, when an employer requires a specified period of notice before use of personal leave or vacation time, an employee must provide sufficient notice of his or her intent to use such time.

- \* Employers may count paid disability leave against an employee's FMLA leave entitlement as long as it is taken for an FMLA qualifying reason, and also may use an employee's accrued paid time off to supplement the disability payments as long as the employer and employee agree to such an arrangement. The rule also applies to employees who are receiving workers' compensation where permitted under state law.

- \* The new regulations require employers to notify employees whether a leave of absence is being designated as FMLA leave within five business days (formerly two days).

- \* Numerous changes were made concerning the medical certification process, including the fact that an employer (i.e., a human resources representative, leave administrator or manager) now may contact an employee's medical professional directly to seek clarification of an employee's medical certification.

- \* Employers now may require a fitness-for-duty statement that details an employee's ability to perform his or her essential job duties before the employee returns to his or her position at the conclusion of FMLA leave.

The Department of Labor's new FMLA regulations also provide six sample forms and notices for employers. While employers are not required to use those forms or notices, compliance with the FMLA is much easier to demonstrate through the use of Department of Labor-provided model forms and notices.

It is important for employers to re-examine and revise their FMLA related policies and practices to ensure immediate compliance with the changes, especially concerning military leave provisions that likely are not even included in most employers' current FMLA policies.

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