

LABOR & EMPLOYMENT MINUTE

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New FMLA Regulations and Their Affect on Employers

On November 17, 2008 the U.S. Department of Labor (“DOL”) issued new Final Regulations interpreting numerous aspects of the Family and Medical Leave Act (“FMLA”). The new set of regulations is set to take effect on **January 16, 2009**. In total, the new regulations span hundreds of pages and may be downloaded through the Department of Labor’s website at www.dol.gov. Highlights of some of the more significant changes are below.

1. Family Members in the Military

Military Caregiver Leave

Under the new regulations, an eligible employee caring for a family member who has suffered a serious injury or illness incurred in military duty is entitled to 26 workweeks of leave during a single 12-month period. The Military Caregiver Leave applies to a wide range of family members including parents, spouses, children and “next of kin”.


Employers may require that a health care provider give appropriate certification for the leave. A sample form has been developed by the DOL. Although employers are welcome to use their own forms, they can not require information beyond what is specified in the regulations and cannot request second and third opinions from health care providers.

Qualifying Exigency Leave: Defined

The National Defense Authorization Act, enacted earlier in 2008, allowed eligible employees with family members on active military duty, or who are being called to active military duty, to use FMLA leave for a “qualifying exigency”. Until now, however, the term “qualifying exigency” remained undefined. The new FMLA regulations specify that eligible employees can use the FMLA for leave associated with: military events and related activities; child care and school activities; short-notice deployment; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities (including memorial services); and any additional activities agreed to by the employer and employee.

2. “Serious Health Condition”: Clarified

Despite hopes to the contrary, the new FMLA regulations retain the same broad definition of “Serious Health Condition” as before. However, they clarify that an employee taking leave based upon a “chronic” serious health condition must visit a health care provider at least twice per year. Further, the requirement of three (3) days incapacitation plus two visits to a health care provider has been clarified to specify that the first visit must occur within seven (7) days of the first day of incapacity and both visits must occur within thirty (30) days of the start of incapacity.

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3. Employer Contact with Health Care Provider

The new regulations expand the ability of an employer to contact an employee's healthcare provider. However, in no event should the employee's direct supervisor have such contact. The group of persons who may make contact with the health care provider are a human resources professional, a leave coordinator or a management official. There are specific restrictions which may, or may not, apply to a specific individual or employer. Before initiating contact with a health care provider, an employer should examine the restrictions and may wish to seek guidance from counsel.

4. Production and Attendance Awards

Previously, employers were not permitted to disqualify an employee from receiving a perfect attendance award based upon that employee's use of FMLA leave. The new regulations provide that bonuses, awards or payments predicated on perfect attendance may be denied if the employee has not met the requirement due to FMLA leave. The employer must, however, treat employees on non-FMLA leave in the same manner.

5. Release of FMLA Claims

The new regulations expressly allow an employee to settle or release actual, past or potential FMLA claims without the approval of a court or the DOL. This provision resolves a split of authorities which has been brewing in the federal court system. If you had removed reference to FMLA claims in your release form, you may now reinsert it.

There are numerous other modifications, clarifications and definitions presented in the new FMLA regulations which cannot be fully covered in this newsletter. If you have questions, or if we can assist you in any way, please do not hesitate to contact us.

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- Development of Employment Procedures and Policies

If we may be of assistance, please contact Christopher E. Parker at 404.256.0700 or cparker@mflaw.com.

