Labor and Employment Law Section

DOL Overhauls Family and Medical Leave Act Regulations: Important Changes You Should Know About

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The U.S. Department of Labor (DOL) published final regulations to the Family and Medical Leave Act[1] (FMLA) on Nov. 17, 2008. The new regulations, effective Jan. 16, 2009,[2] provide guidance on the Servicemember Leave Amendments enacted last year. Additionally, the new regulations make a number of significant changes to the original regulations dating back to 1995. This article highlights the additions and more notable changes to the regulations.

TIGHTENED DEFINITION OF SERIOUS HEALTH CONDITION INVOLVING 'CONTINUING TREATMENT'

The new regulations tighten the definition of a serious health condition that involves "continuing treatment" entitling an employee to FMLA leave. The "continuing treatment" test may be met when an employee's (or sick family member's) condition involves more than three consecutive calendar days of incapacity plus: (i) treatment two or more times by a health care provider; or (ii) one treatment by a health care provider that results in a "regimen of continuing treatment" (such as the use of a prescription drug).[3] The new rules clarify that the first visit to the health care provider in either case must occur within seven days of the first day of incapacity.[4] For leave involving two visits to a health care provider, the second visit must occur within 30 days of the first day of incapacity.[5] To qualify as a chronic serious health condition, the condition must require at least two visits to a health care provider per year.[6]

INCREASED EMPLOYER NOTICE OBLIGATIONS

The new regulations significantly increase the notice requirements for employers.[7] Employers must provide the required general notice of FMLA rights in an employee handbook.[8] If the employer does not have an employee handbook, the employer must give FMLA notice to each new employee upon hiring.[9] Notably, notice may be provided electronically.[10] The DOL has included a model general notice which may be used.[11]

In addition to the general notice requirements, the new regulations impose upon employers individual eligibility notice and designation notice requirements.[12] Under the new regulations, employers must notify an employee of his or her eligibility for FMLA within five business days after the employee's request for leave or the employer has acquired knowledge that the leave may be FMLA qualifying.[13] If the employee is not eligible, the notice must state the reason for ineligibility

(*e.g.* failure to meet the requirement for 12 months of service or 1,250 hours worked).[14] With each eligibility notice, employers must also provide a written rights and responsibilities notice detailing the specific expectations and obligations of the employee.[15] The notice must include certain provisions such as notice that the leave may be designated as FMLA, any requirement to furnish medical certification, any requirement for the employee to pay his or her share of the health benefits premium, and the consequences for failure to return after leave.[16] The DOL has provided a sample form that meets these new requirements that may be used by employers.[17]

Once an employer has enough information to make a designation determination (usually after receipt of the medical certification), the employer must provide the employee with a designation notice within five business days.[18] If an employer requires a fitness-for-duty certification to return to work, the employee must be so notified in the designation notice.[19] If the employer requires that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, a list of essential functions must be provided with the designation notice.[20] The DOL has also provided a sample designation form that employers may use.[21]

REMOVAL OF PENALTIES FOR FAILURE TO PROPERLY DESIGNATE

The new regulations reflect the current law following the U.S. Supreme Court decision in *Ragsdale v. Wolverine World Wide Inc.*,[22] which invalidated a penalty provision for failure to properly designate FMLA leave.[23] Under the facts of *Ragsdale*, the penalty provision would have required an employer to provide an additional 12 weeks of FMLA leave after the 30 weeks of leave the employee had already received because the employer failed to properly designate the leave as FMLA.[24] The Supreme Court held that the penalty provision was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement that the employee demonstrate individual harm.[25] The new regulations eliminate the "categorical" penalty provision, but clarify that an employer may still be liable where an employee suffers individualized harm because an employer fails to follow the notification rules.[26]

NEW EMPLOYEE NOTICE OBLIGATIONS

The new regulations modify the old rules which allowed employees to provide notice to an employer of the need for unforeseeable FMLA leave two business days *after* an absence, even if notice could have been provided earlier.[27] Under the new regulations, an employee needing FMLA leave must comply with the employer's usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances.[28] This provision is obviously meant to help curb the disruption caused by employees not reporting the need for leave until after returning from an absence.

STREAMLINED MEDICAL CERTIFICATION PROCESS

The new regulations include several provisions designed to streamline the medical certification process and improve communication. First, if a medical certification is incomplete or insufficient, the employer must notify the employee of the specific deficiency, in *writing*, and allow the employee seven calendar days to cure the deficiency.[29]

Additionally, the new regulations allow, under certain conditions, direct contact between the employer and the health care provider for either authentication of a medical certification or for clarification of information on a medical certification form.[30] However, the employer must first obtain the employee's consent to contact the health care provider.[31] Under no circumstances may the employee's direct supervisor contact the health care provider.[32] Further, employers may not ask for additional information beyond that required by the certification form.[33] If an employee refuses to consent to employer contact with the health care provider and fails to cure any deficiencies in the medical certification, leave may be denied.[34]

Finally, the new regulations simplify recertification. Specifically, the regulations adopt a prior DOL opinion letter allowing an employer to request a *new* certification annually in conjunction with a condition lasting beyond a single leave year.[35] Further, the regulations clarify that an employer may request recertification at least every six months if the request is in conjunction with an absence.[36] This is so even if a specific duration is specified on the medical certification.[37] The DOL included two new medical certification forms that employers may use — one for an employee's own serious

health condition and one for a family member's serious health condition.[39]

CHANGES TO THE FITNESS-FOR-DUTY CERTIFICATION PROCESS

The regulations make two changes to the fitness-for-duty certification process. First, an employer can require more than a "simple statement" of the ability to return to work.[40] Employers may now require certification specifically addressing whether an employee can perform the essential functions of the job.[41] Second, while the current regulations prohibit requiring a fitness-for-duty certification to return to work from intermittent leave, the new regulations allow an employer to request a fitness-for-duty certification every 30 days, but only if reasonable safety concerns exist.[42]

CLARIFICATION FOR LIGHT DUTY

The regulations clarify that the time employees spend performing "light duty" work does not count against an employee's leave entitlement.[43] Instead, the employee's right to reinstatement is tolled during time spent on a light duty assignment.[44] This could result in providing an employee job protection for longer than 12 weeks. For example, an employee may take six weeks of FMLA leave, return and work six weeks of light duty, and then take the remaining six weeks of FMLA leave – all without affecting the employee's right to reinstatement. An employee's right to reinstatement, however, ceases at the end of the applicable 12-month FMLA year.[45]

NO OBLIGATION TO EXTEND PERFECT ATTENDANCE AWARDS

Under the new rules, employers are now allowed to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave.[46] An employer may only do so as long as it treats employees taking non-FMLA leave the same as those taking FMLA leave.[47] For example, if an employee taking paid vacation would be eligible for the bonus, an employee taking FMLA leave and substituting paid vacation would also be eligible.

SUBSTITUTION OF PAID LEAVE

The old and new regulations provide that an employee may take, or employers may require the employee to take, any accrued paid vacation, personal leave or family leave offered by their employer concurrently with any FMLA leave.[48] Under the new regulations, an employee who elects to use any type of paid leave concurrently with FMLA leave must follow the employer's policy that applies to other employees taking that type of paid leave.[49] However, an employee is entitled to the *unpaid* FMLA leave even if he or she does not meet the employer's policy conditions for taking paid leave.[50]

CLARIFICATION REGARDING SETTLEMENT OF PAST FMLA CLAIMS

The regulations clarify that employees can voluntarily settle or release past FMLA claims without court or DOL approval.[51] However, prospective waiver of FMLA claims continues to be prohibited under the regulations.[52]

IMPLEMENTATION OF MILITARY FAMILY LEAVE

The new regulations implement the recent statutory amendments entitling eligible employees to FMLA leave because of a "qualified exigency" arising from the employee's spouse, son, daughter, or parent being called to active duty in support of a contingency operation.[53] The regulations provide examples of broad categories of what could constitute a "qualified exigency," such as 1) short notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; and 7) post-deployment activities.[54] Additionally, the regulations provide a "catch-all" provision for activities not encompassed in the other categories, but agreed to by the employer and employee.[55]

The new regulations additionally provide guidance on the new provision allowing an employee up to 26 workweeks of leave in a single 12-month period to care for an injured servicemember (including a member of the national guard or reserves) with a serious injury or illness incurred in the line of duty if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.[56] The "next of kin" concept is new to the FMLA and includes the nearest blood relative to the injured servicemember who is not the servicemember's spouse, parent, son or daughter.[57] The DOL included two new certification forms which can be used by employees and employers to facilitate the certification requirements for military family leave.[58]

CONCLUSION

The new regulations provide employers more latitude to obtain information from employees and health care providers and provide new tools for preventing employee abuse of FMLA leave. Employers, however, assume more demanding obligations to inform employees of their FMLA rights and responsibilities. Employers should be advised to update existing FMLA policies, procedures, and forms to comply with the new regulations and to take advantage of the new tools provided.

1. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,073 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825). The text of the final rule is at www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763.
2. *Id.* at 67,934.
3. 29 C.F.R. §825.114(a)(2) and (b); *see also* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,079 (to be codified at 29 C.F.R. §825.115(a)(1)).
4. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,079 (to be codified at 29 C.F.R. §825.115(a)(3)).
5. *Id.* at 68,079 (to be codified at 29 C.F.R. §825.115(a)(1)).
6. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,080 (to be codified at 29 C.F.R. §825.115(c)(1)).
7. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300).
8. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.300(a)(3)).
9. *Id.*
10. *Id.*
11. WH Publication 1420, *id.* at 68,123 (to be codified at 29 C.F.R. pt. 825 (appendix D)).
12. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300(b)-(d)).
13. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.300(b)(1)).
14. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.300(b)(2)).
15. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300(c)(1)).
16. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300(c)(1)(i)-(vii)).
17. Form WH-381, *id.* at 68,124-25 (to be codified at 29 C.F.R. pt. 825 (appendix D)).
18. *Id.* at 68,097 (to be codified at 29 C.F.R. §825.300(d)(1)).
19. *Id.* at 68,097 (to be codified at 29 C.F.R. §825.300(d)(3)).
20. *Id.*
21. Form WH-382, *id.* at 68,126 (to be codified at 29 C.F.R. pt. 825 (appendix E)).
22. 535 U.S. 81, 122 S.Ct. 1155 (2002).
23. *Id.* at 96.
24. *Id.* at 94.
25. *Id.* at 90-91.
26. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,097 (Nov. 17, 2008) (to be codified at 29 C.F.R. §825.300(e)).
27. 29 C.F.R. § 825.303(a) (1995); *see also* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,099-100 (Nov. 17, 2008) (to be codified at 29 C.F.R. §825.303(a) and (c)).
28. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,099-100 (Nov. 17, 2008) (to be codified at 29 C.F.R. §825.303(a) and (c)).
29. *Id.* at 68,100-01 (to be codified at 29 C.F.R. §825.305(c)).
30. *Id.* at 68,102 (to be codified at 29 C.F.R. §825.307(a)).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 68,101 (to be codified at 29 C.F.R. §825.305(e)); *see also* Wage and Hour Opinion Letter, FMLA2005-2-A (September 14, 2005).
36. *Id.* at 68,103 (to be codified at 29 C.F.R. §825.308(b)).
37. *Id.*
38. Form WH-380-E, *id.* at 68,115-18 (to be codified at 29 C.F.R. pt. 825 (appendix B)).
39. Form WH-380-F, *id.* at 68,119-22 (to be codified at 29 C.F.R. pt. 825 (appendix B)).
40. *Id.* at 68,105 (to be codified at 29 C.F.R. §825.312(b)).
41. *Id.*
42. *Id.* at 68,106 (to be codified at 29 C.F.R. §825.312(f)).
43. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.220(d)); *see also* Wage and Hour Opinion Letter FMLA–55 (March 10, 1995).
44. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.220(d)).
45. *Id.*
46. *Id.* at 68,093 (to be codified at 29 C.F.R. §825.215(c)(2)).
47. *Id.*
48. 29 C.F.R. §825.207(a); The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,089 (to be codified at 29 C.F.R. pt. 825.207(a)).
49. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,089 (to be codified at 29 C.F.R. pt. 825.207(a)).
50. *Id.*
51. *Id.* at 68,095-96 (to be codified at 29 C.F.R. §825.220(d)).
52. *Id.*
53. *Id.* at 68,083 (to be codified at 29 C.F.R. §825.126(a)).
54. *Id.* at 68,083-84 (to be codified at 29 C.F.R. §825.126(a)(1)-(7)).
55. *Id.* at 68,084 (to be codified at 29 C.F.R. §825.126(a)(8)).
56. *Id.* at 68,084-85 (to be codified at 29 C.F.R. §825.127(a)).
57. *Id.* at 68,085 (to be codified at 29 C.F.R. §825.127(b)(3)).
58. Form WH-384 (Certification of Qualifying Exigency for Military Family Leave), *id.* at 68,127-129 (to be codified at 29 C.F.R. pt. 825 (appendix G)) and Form WH-385 (Certification for Serious Injury or Illness of Covered Servicemember), *id.* at 68,130-33 (to be codified at 29 C.F.R. pt. 825 (appendix H)).

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