

# Labor & Employment Law Alert

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your workplace*

## *Department of Labor Publishes Final FMLA Regulations*

Today the Department of Labor (DOL) published its final regulations implementing amendments to the Family and Medical Leave Act (FMLA). The final regulations become effective on January 16, 2009.

The final regulations make numerous revisions to the current regulations, enacted over a decade ago, on a variety of FMLA issues. They also implement the expansion of FMLA protection to military families by providing eligible family members with two types of leave: Military Caregiver Leave, and Qualifying Exigency Leave. A summary of some of the major revisions to the regulations is included below.

**“Notice of Eligibility” and “Designation Notice.”** An employer will have 5 business days to issue an “eligibility notice,” advising whether the employee is eligible for FMLA, how much FMLA leave is available to the employee, and the employee’s rights and responsibilities. If the employee is not eligible, the notice must state at least one reason why the employee is not eligible. If the employee is eligible, the notice will set forth the employee’s responsibilities (*i.e.*, get a medical certification). If an employee is given the eligibility notice and instructed to obtain a medical certification, the employee has 15 days to get the certification completed. When an employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason, the employer has 5 days to issue a “designation notice” designating the leave as FMLA-qualifying. If, however, the employer has enough information at the time the employee first requests the leave,

it may under the proposed regulations provide the employee with both eligibility and designation notice simultaneously.

**Medical Certification Process.** The regulations now recognize the limitations of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of HIPAA’s medical privacy rule to communications between employers and their employees’ health care providers. The new regulations now require that the employer’s representative who contacts an employee’s health care provider be a health care provider, human resource professional, leave administrator, or management official (but *not* the employee’s direct supervisor). Additionally, employers may *not* ask health care providers for additional information beyond that required by the certification form. Finally, if an employer determines that a medical certification is incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven (7) calendar days to cure the deficiency.

**Fitness-For-Duty Certifications.** The current regulations allow employers to enforce uniformly-applied policies that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. The final regulations broaden this practice in two ways. First, an employer may now require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job. Secondly, where reasonable job safety concerns exist, an employer may require a fitness-

for-duty certification before any employee may return to work when the employee takes intermittent leave.

**Serious Health Condition.** The final rule retains the six individual definitions of “serious health condition” in the current regulations, but clarifies that when an employee takes leave involving more than three (3) consecutive calendar days of incapacity plus two (2) visits to a health care provider, the two visits must occur within 30 days of the period of incapacity. The final rule also clarifies that, when an employee seeks to show he/she suffers from a serious health condition that involves more than three (3) consecutive, full calendar days of incapacity plus a regimen of continuing treatment, the first visit to the health care provider must take place within seven (7) days of the first day of incapacity. Finally, the final regulations define “periodic visits” for chronic serious health conditions as at least two (2) visits to a health care provider per year.

**Substitution of Paid Leave.** Employers may still require employees to take any accrued paid leave concurrently with FMLA leave. While the current regulations require different procedures depending upon whether the employee uses vacation or personal leave, or medical and sick leave, the final rule treats all forms of paid leave offered by the employer the same. Specifically, an employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave.

**Light Duty.** The final regulations state that time spent on “light duty” work does not count against an employee’s FMLA leave entitlement. An employee therefore retains his/her right to restoration during the period of time the employee performs light duty, or until the end of the applicable 12-month FMLA leave year. The regulations clarify that if an employee is voluntarily performing light duty work, he/she is not on FMLA leave.

**Perfect Attendance Awards.** Employers may now deny “perfect attendance” awards to employees who do not have perfect attendance because they took FMLA leave. The employer, however, must treat employees taking non-FMLA leave the same way.

**Waiver of Rights.** The regulations formally codify the DOL’s position that employees may voluntarily settle or release FMLA claims without court or DOL approval. Prospective waivers for FMLA rights, however, are still prohibited.

**Military Caregiver Leave.** Also known as Covered Servicemember Leave, this leave grants eligible employees who are family members of covered servicemembers the right to take up to 26 workweeks of leave in a “single 12-month period” to care for a covered servicemember with a serious illness or injury incurred in the line of duty while on active duty. The regulations provide employers with two new DOL certification forms to use for family military leave.

**Qualifying Exigency Leave for Families of National Guard and Reserves.** Qualifying Exigency Leave allows family members of National Guard and Reserve personnel on active duty to take FMLA job-protected leave to use for “any qualifying exigency” arising out of the fact that a covered military member in on active duty or called to active duty status in support of a contingency operation. The regulations define “qualifying exigencies” 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; (7) post-deployment activities; and (8) additional activities where the employer and employee agree to the leave.

In light of these changes, employers who have 50 or more employees should familiarize themselves with these new provisions and begin making preparations to amend their current FMLA policies prior to the January 16, 2009 implementation date.

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