



What's New with the Family and Medical Leave Act

Many employers will be affected by the changes to the federal regulations interpreting the Family and Medical Leave Act ("FMLA"), which became effective on January 16, 2009. As a result of the changes, each employer covered by the FMLA will be required to post a new notice, prepare new forms, and train responsible personnel on how it should be implemented.

Highlights of the changes to the regulations involve the following topic areas:

Professional Employer Organizations

While the FMLA only effects employers with more than 50 employees, you may be subject to the FMLA requirements as a result of utilizing a Professional Employee Organization ("PEO"), for various administration and payroll tasks. Under the new regulations, PEOs that merely handle administrative functions, including payroll, benefits, regulatory paperwork and updating employment policies, are not joint employers with their clients. However, if, in contrast, a PEO has the right to hire, fire, assign, or direct and control the employees, or the PEO benefits from the work that the employees perform, then the PEO is a joint employer with the client.

Eligibility for benefits

The new regulations set out a new standard whereby an employer should include all periods of service toward the 12-month requirement unless the break is at least seven years long.

Military Leave

Military-caregiver leave was mandated by the National Defense Authorization Act (NDAA), which became law in 2007. Eligible employees are entitled to take up to 26 weeks of leave during a "single 12-month period" to care for a covered service member with a serious illness or injury incurred in the line of duty on active duty. The regulations make clear that the 26 weeks will be calculated on a per service member, per injury basis.

Active Duty Leave (Qualifying Exigency Leave)

The NDAA also created a new form of leave. This leave is called "active-duty leave" or "qualifying-exigency leave," which an employee may take to handle various non-medical exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or on call to active duty status. Active duty leave counts against the employee's 12-week per 12-month total allotment of FMLA leave. The regulations define seven categories of qualifying exigency: short-notice deployment; military events; child and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and a "catch-all" category of situations agreed to by the employer and employee.

Serious Injury or Illness

Although the new regulations retain six individual definitions of "serious health condition," the new regulations provide further guidance with respect to some of the definitions.

Notice

Employer Notice

The new regulations consolidate the employer notice requirements, requiring four mandatory notices that employers must issue. The regulations retain the prior requirement for a "General Notice" to be posted in every workplace and incorporated into any employee handbook. Employers must issue a personalized "Eligibility Notice" within five days of either a request for leave or after learning that a leave may be FMLA-qualifying. Employers must issue to an employee a written "Rights and Responsibilities Notice" at the same time as the Eligibility Notice. The employer must issue a written "Designation Notice" within five days after receiving sufficient information to determine whether the need for leave is FMLA-qualifying. The new regulations state that an employer may not count any leave against an employee's annual 12-week FMLA allotment until after it provides all required notices.

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Employee Notice

The new regulations retained the current requirement that an employee must give at least 30 days notice when the need for FMLA leave is foreseeable at least 30 days in advance, and the requirement that notice be provided "as soon as practicable" if leave is foreseeable but 30 days notice not practicable. However, the regulations added the requirement that when an employee gives less than 30 days advance notice, the employee must respond to a request from the employer to explain why it was not practicable to give 30 days notice. In addition, the new regulations require employees to give notice of unexpected FMLA leave according to their employer's normal and customary call-in procedures, absent unusual circumstances.

Medical Certification

The new regulations make the certification process more efficient. An employer may directly contact an employee's health care provider to authenticate or to obtain a clarification of information required by the certification form. An employee's "direct supervisor" is prohibited from making these inquiries, limiting this right to a "health care provider, a human resources professional, a leave administrator (including third-party administrators), or a management official." Further, employers may not ask health care providers for additional information beyond that required by the certification form.

Fitness for Duty

The new regulations expand the information that an employer may require in a fitness for duty certification. First, an employer may now require that the certification specifically address whether the employee can perform the essential functions of his or her job, so long as the employer has provided the employee with a list of the essential job functions no later than with the designation notice (the notice that confirms leave determinations). Second, if an employer has reasonable concerns about an employee's ability to safely perform a job, the employer can require an employee to provide a fitness for duty certification before the employee may return to work when the employee takes intermittent leave. An employer is permitted to require an employee to furnish a fitness-for-duty certificate up to once every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

Light Duty Not Considered FMLA Leave

The new regulations clarify "light duty" and state that time spent performing "light duty" work is not FMLA leave and does not count against an employee's entitlement to FMLA leave.

Substitution of Paid Leave

Under the new regulations, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic "paid time off"). An employee electing to use any type of paid leave concurrently with FMLA leave must therefore follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave.

Settlement

The new regulations make clear that an employee may voluntarily settle FMLA claims or waive FMLA rights without Department of Labor or court approval.

Perfect Attendance Awards

The new regulations change the treatment of perfect attendance awards to allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave as long as the employer treats employees taking non-FMLA leave in an identical way.

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