



Employment Law Alert

Legal developments affecting human resource management

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New FMLA rules require significant changes to FMLA policies and procedures

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The U.S. Department of Labor (DOL) has now issued the final rule that provides for significant updates of the existing regulations concerning the Family and Medical Leave Act of 1993. These changes go into effect on January 16, 2009, and will require employers to make numerous changes to their FMLA policies and practices. The entire text of the revised regulations and the new prototype notices and forms referred to herein are available on the DOL website at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>. Some of the most important changes required by the new rule follow.

Military Family Leave

Two new types of FMLA Military Family Leave are required by the new rule. These new types of leave must be incorporated into all employer FMLA policies (and forms, if the new DOL model forms are not used). We recommend that employers tell managers that FMLA leave is now available for these reasons.

First, Qualifying Exigency Leave helps the family of a National Guard and Reserves member manage its affairs while the member is on active duty in support of a contingency operation. Twelve weeks of leave is available to eligible employees with a covered military member serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. Qualifying exigency is very broadly defined to include categories of reasons, including short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities agreed to by the employee and employer.

The second type of Military Family Leave added to the FMLA is Military Caregiver Leave, which provides that eligible employees who are family members of a covered service member will be able to take leave to care for a covered service member with a serious illness or injury incurred in the line of duty on active duty. Unlike other types of FMLA leave, Military Caregiver Leave entitles eligible employees to up to 26 workweeks of leave in a “single 12-month period,” and the “single 12-month period” must be measured from the time the employee first takes Military Caregiver Leave, regardless of how the employer otherwise tracks FMLA leave entitlement. Employees may take a combination of Military Caregiver Leave and other FMLA leave in the 26-workweek period (but may not take

more than 26 workweeks of leave regardless of the types of leave taken). These new requirements will make administration and tracking of FMLA leave significantly more complicated where Military Caregiver Leave is part of the leave taken.

Changes to notice requirements and FMLA procedures

Changes to the way employers and employees must communicate during the FMLA request and designation procedure must be put in place by all employers. This change is likely to cause some confusion on the part of employees and may well meet with resistance from managers who are already burdened with the existing labyrinth of FMLA requirements. Some of the required changes follow:

- General notice about the FMLA must still be provided by poster, and by handbook or written materials. In lieu of posting, electronic notice may be given under certain circumstances. A new poster has been drafted by the DOL for this purpose (see WH-1420). Critically, an employer must now include in its handbook all the substantive information in the poster, which will require revision of employer handbook policies.
- Within five business days (a change from the previous two-day requirement) of when an employee requests FMLA leave, the employer must give the employee the new “Eligibility and Rights and Responsibilities” notice. This notice (mandatory DOL Form WH-381) must include a host of information, including whether employees must provide medical certification, the policy and conditions regarding substitution of paid leave, and if an employee is not eligible for FMLA leave, at least one reason why the employee is not eligible. Additional guidance has also been provided on how an employee must request FMLA leave and what an employer can do to get more information.
- The old “Certification of Health Provider” form has been replaced by two new medical certification forms, which differ depending on whether the serious health condition is that of the employee or a family member. If required, a medical certification form should go to the employee with the Eligibility and Rights and Responsibilities notice.
- Optional certification forms for Military Family Leave (WH-384, WH-385) have also been provided by the DOL.
- Employers must give employees a “Designation Notice” informing the employee of whether the leave is designated as FMLA leave. The employer must provide this notice to the employee within five business days after the employer is able to determine whether the leave is being requested for an FMLA-qualifying reason (for example, within five business days after the employer receives the completed medical certification back from the employee and is, therefore, able to determine whether the leave is requested for an FMLA-qualifying reason). DOL has provided a model Designation Notice (WH-382).
- The general rule for when employees must provide notice of the need for unforeseeable leave has changed. Previously, employees could wait up to two days after an absence to give notice of the need for FMLA leave. Now, employees must give notice as soon as is practicable and must follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances. This practice provides an opportunity for better management of FMLA absences if an employer has an established call-in procedure (or puts one into place).

- Retroactive designation of leave as FMLA leave is now specifically permitted by the regulations if an employer does not designate leave as required by the regulations (sending a designation notice within five business days of when the employer has sufficient knowledge to determine that the leave is FMLA qualifying). The employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, provided that the employer's failure to designate leave timely does not cause harm or injury to the employee.

Serious health condition and certification issues

The new rules provide more information concerning the definition of "serious health condition," which may help employers in determining whether a particular condition qualifies for FMLA leave.

The changes also provide some relief in connection with management of the medical certification process. An employer representative (it could be a health care provider, an HR professional, a leave administrator, or a management official, but not the employee's direct supervisor) may now directly contact the employee's health care provider to obtain information required by the medical certification form. Further, if a medical certification is incomplete or insufficient, the employer must notify the employee in writing, specify what information is lacking, and give the employee seven calendar days (unless not practicable under the particular circumstances) to provide the additional information. If the employee does not provide a complete certification after this process, the employer may deny FMLA leave.

Employers may request a new medical certification each leave year for medical conditions that last longer than one year. Also, the regulatory requirements for recertification have been clarified, and in all cases, an employer can request recertification of an ongoing condition every six months in conjunction with an absence.

The new rules also address the fitness-for-duty certification procedure, and although the opportunity now exists for an employer to obtain more detailed information from health care providers in this regard, the employer must also jump through more hoops to get it. An employer is permitted to require a fitness-for-duty certification from an employee on FMLA leave for medical reasons before he or she may return to work, if this certification is a requirement of all employees on leave for medical reasons. For employees on intermittent leave, the new rules provide that an employer may require an employee to provide a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist, provided the employer includes that requirement in its designation notice. For employees on a single stretch of leave, employers can now request more than the "simple statement" previously allowed under the rules: when an employer (1) provides the employee with a list of the employee's essential job duties no later than the designation notice and (2) advises the employee in the designation notice that the certification must address the employee's ability to perform the essential functions of the job, the employer may require the employee's health care provider to certify that the employee can perform those duties.

Conclusion

As noted above, employers will need to make significant changes to their FMLA policies, employee handbooks, and FMLA request processing practices in order to comply with the revised FMLA regulations. Although this Employment Law Alert provides highlights of the necessary changes, the revised regulations address a great number of detailed circumstances that are beyond the scope of this Alert. Additionally, along with the revised regulations, the DOL has also published more than 100 pages of background information and comments addressing the changes, some of which may prove helpful to employers when a particular problem arises.

If you have any questions about the revised regulations, or would like assistance revising your FMLA policy or implementing the new notice procedures and related forms and practices, please contact your Nixon Peabody attorney or:

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