

Department of Labor Issues New FMLA Regulations

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The U.S. Department of Labor has issued new regulations under the Family and Medical Leave Act of 1993 – a complete re-write of the existing FMLA regulations. On December 1, 2006, the DOL requested public comment on experiences with the FMLA. After an outpouring of responses, the DOL has issued over 750 pages of new regulations and explanation of those changes. The new regulations impact a number of issues that developed in the 15 years since the original regulations were issued.

Three that are most significant to employers address: 1) employee call-in obligations, 2) medical certification, and 3) attendance bonuses. In addition, the DOL clarified certification requirements and the circumstances under which a covered employee may take leave under the new military leave provisions, which were added to the FMLA by the National Defense Authorization Act of 2008. The new regulations take effect on January 16, 2009.

Employee Call-In Obligations:

Regulation Section 825.302(a) retains the requirement that when the need for FMLA leave is foreseeable but 30 days notice is not practicable, the employee must provide notice “as soon as practicable.” Under the existing regulation, “as soon as practicable” is defined as “ordinarily... within one or two business days of when the need for leave becomes known to the employee.” In the new regulations, the DOL deleted the two-business day time frame in which an employee may provide notice. Under the new regulations, the employee must follow the employer’s

normal and customary call-in procedures, unless there are unusual circumstances.

Medical Certification Form:

The DOL currently provides an optional form (Form WH-380) that employers may use to obtain information related to the employee’s condition for FMLA certification purposes. The DOL has modified the form to alleviate confusion among employers, employees, and healthcare providers.

First, the DOL divided Form WH-380 into two separate forms so that one form is designated for the employee’s own serious health condition and one form is used for the serious health condition of a covered family member.

Second, the DOL deleted the checkboxes on the current WH-380 form for health care providers to indicate the type of serious health condition at issue in an effort to reduce employers’ receipt of certifications with multiple and contradictory checked boxes.

Finally, the new regulations make clear that employers no longer must list the essential functions of the job when it requires a medical certification.

Perfect Attendance Bonuses and Pay Increases:

The DOL adopted changes to Section 825.215(c) of the current regulations, which used to prohibit employers from excluding employees from perfect attendance bonuses due to FMLA leave. Under the new regulation, employers are permitted to deny perfect attendance awards to

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employees who do not have perfect attendance because they took FMLA leave, but only if the employer treats employees taking non-FMLA leave in an identical way.

Also, under the new regulations, employers may disqualify employees from bonuses or other payments based on achievement of a specified job-related performance goal when the employee has not met the goal due to FMLA leave so long as it is done in a nondiscriminatory manner. The same rule applies with respect to pay increases conditioned upon seniority, length of service or work performed.

Family Military Leave Issues:

The DOL clarified the recent additions to the FMLA allowing covered employees to take family military leave. The Military Caregiver Leave provision permits eligible employees who are family members of covered servicemembers 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 on active duty.

The Family Military Leave (or Qualifying Exigency Leave) provision permits eligible employees to take 12 weeks of FMLA leave

for a “qualifying exigency.” The regulations list seven categories of circumstances that are deemed to be a “qualifying exigency,” which are: (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 not encompassed by the other categories, but agreed to by the employer and employee. Additionally, the regulations provide a new optional form, WH-384, that employers may use to obtain certification from employees wishing to take FMLA leave for a “qualifying exigency.”

Other FMLA Issues Affected By The Regulations:

- Employer and employee notice requirements;
- Changes in the definition of “serious health condition”;
- Waiver of employee rights;
- Substitution of paid leave;
- Fitness-For-Duty Certification; and
- Recertification.

Proactive employers should revisit their FMLA policy and practices to ensure compliance with the new regulations.

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