



# U.S. Department of Labor Issues Final FMLA Regulations

## Client Advisories

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After a long wait, the United States Department of Labor (“DOL”) has released final regulations revising the existing Family and Medical Leave Act (“FMLA”) regulations as well as implementing new rules pertaining to statutory changes to the FMLA enacted by Congress earlier this year. The new regulations will become effective on January 16, 2009.

With the holiday season upon us, the January 16 effective date leaves employers with little time to become conversant in the revised regulations and to make necessary changes to their policies and practices. The revised regulations, which make significant changes and additions to the existing rules, will require employers to act now in order to ensure timely compliance.

While the revised regulations do not solve many of the existing difficulties frequently encountered by employers in administering the FMLA, the changes offer some assistance in addition to also adding new obligations. Employers must act now to take advantage of the favorable changes, as well as to comply with the additional administrative requirements and new leave entitlements.

The following are some of the key changes in the revised regulations:

### **New Regulations Implementing Military Family Leave Amendments**

The revised regulations give significant guidance regarding the implementation of the military family leave amendments to the FMLA, which were enacted as part of the National Defense Authorization Act (“NDAA”), signed into law on January 28, 2008. In those statutory amendments, Congress specifically directed the DOL to provide definitions and clarifications pertaining to the newly enacted forms of military family leave - military caregiver leave and qualifying exigency leave.

**Military Caregiver Leave:** Eligible employees who are family members of covered service members will be able to take up to 26 workweeks of leave in a “single 12-month period” to care for a covered service member with a serious illness or injury incurred in the line of duty. While this form of leave has been in effect since the adoption

of the NDAA, the revised FMLA regulations clarify that this leave is different from nonmilitary leave in several respects, including the fact that it is available on a per-service member, per-injury basis, and that the 12-month period may not equate to the employer's FMLA leave year, but begins on the first day the employee takes leave for this purpose. The regulations define key terms, such as "covered service members," "next of kin," "serious illness or injury," and the term "needed to care for." The regulations also address how military caregiver leave will interact with nonmilitary FMLA leave and qualifying exigency leave.

Qualifying Exigency Leave: Qualifying exigency leave is intended to help families of members of the National Guard and Reserves manage their affairs and address "qualifying exigencies" when the service member is called to or serving on active duty in support of a contingency operation. The new regulations broadly 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. The definition of "qualifying exigencies" encompasses a wide spectrum of life activities and now gives family members of a qualifying service member a great deal of leeway taking FMLA leave, such as leave for child care, attending parent-teacher conferences or other school meetings, meetings with attorneys to update wills or trusts, and many other activities which relate to the covered service member's absence. Employers will be required to begin granting qualifying exigency leaves to eligible employees on January 16, 2009.

### **Revised Regulatory Provisions**

**Employers' Notice Obligations Enhanced:** The final regulations include a complete overhaul of the notice provisions of the FMLA, including new forms for employers. The rules outline four separate areas of required notice: a general notice of the FMLA; an eligibility notice; a rights and responsibilities notice; and a designation notice.

As a result of the enhanced notice provisions, the new regulations extend the time for employers to respond to requests for leave from the existing (but unrealistic) two business days to a slightly more realistic five business days. Also, the new regulations permit retroactive designation of leave if the delay does not cause the employee harm or injury. Importantly, the final regulations clarify that failure to provide the required written notice can be considered "interference" with an employee's FMLA rights.

New and Additional Forms Issued: In addition to adding several new forms addressing the new types of military service related leaves, the DOL has updated and expanded upon many of the existing optional FMLA forms. For example, present form WH-380 (Certification of Health Care Provider) has now been split into two forms, one for family serious health conditions, WH-380F, and one for the employee's own serious health condition, WH-380E. Present WH-381 (Employer Response to Employee Request for Family or Medical Leave) has also been modified. A separate form, WH-382, has been promulgated which, while optional, will allow employers to meet their mandatory obligation to inform employees in writing whether requested FMLA leave has been approved. These prototype forms, and others, are available at [www.dol.gov](http://www.dol.gov).



Waiver of Rights: Employers will welcome the fact that the revised regulations settle a running dispute in the federal appeals courts by implementing as part of the regulations the DOL's longstanding informal view that employees may voluntarily settle their FMLA claims without court or DOL approval, but may not waive claims based on prospective conduct. This change will allow employees and employers to more easily settle fully and finally FMLA claims by way of settlement and severance agreements.

Serious Health Condition: The new regulations do not provide substantial relief to employers, who had been hoping for significant changes to the very broad definition of serious health conditions. The revisions retain the six individual definitions of serious health condition, but add interpretive guidance in three areas. First, with respect to the definition of serious health condition which requires that the individual be incapacitated for more than three consecutive calendar days and also seek treatment from a health care provider at least twice, the revised regulations clarify that these two visits to the health care provider must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity. Second, under the existing regulations, as an alternative to seeking treatment twice, an employee may seek treatment only once, as long as the employee is given a regimen of continuing treatment, for example a course of antibiotics. The revised regulations clarify that this treatment must first be sought within seven days of the first day of incapacity. Third, the new regulations define "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year.

Medical Certification Requirements: The new regulations make significant changes to the medical certification form and procedures for obtaining a medical certification. The DOL has adopted a revised medical certification form which provides the health care provider with greater freedom to offer a more complete statement of the medical facts, such as symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, and referrals for evaluation and treatment, or any other regimen of continuing treatment. In addition, the new regulations specify that if an employer deems a medical certification to be deficient, the employer must specify in writing what information is lacking and give the employee seven calendar days to remedy the issue. The revised regulations adopt new rules regarding recertification which will depend on the information provided in the initial medical certification.

In addition, an employer is now specifically allowed to contact an employee's health care provider directly (as opposed to the prior requirement to engage a health care provider to make the inquiry) in order to obtain information required for certification. The provision restricts who may make such contact; for example, prohibiting the contact to be made by the employee's direct supervisor.

Bonus and Incentive Awards: The new regulations modify the rules for perfect attendance awards to allow employers to disqualify employees from bonuses or other payments based on achievement of a specified job-related performance goal (such as attendance) where the employee has not met the goal due to FMLA leave, so long as this is done in a nondiscriminatory manner.

Substitution of Paid Leave: The FMLA only requires unpaid leave. However, the statute provides that employees may elect to, or employers may require that, accrued paid vacation and personal leave, and, where the reason for leave qualifies under the employer's policies, sick leave, be used concurrently with any FMLA leave. In addition



to several other changes regarding substitution of paid leave, under the new regulations, 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 paid leave. However, an eligible employee remains entitled to unpaid FMLA leave even if he or she does not meet the employer's conditions for taking paid leave.

Employee Notice: The new regulations modify the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if they could have provided notice more quickly. Under the new regulations, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances.

Fitness for Duty Certifications: Employers may now demand more than a "simple statement" of the ability to return to work. Under the new regulations, if the employer complies with certain up-front notice obligations, the employer may require that the fitness for duty certification specifically address the employee's ability to perform the essential functions of the employee's job. Also, employers may now ask for fitness for duty certifications for intermittent leave if reasonable safety concerns exist.

### **Moving Forward**

As a result of the voluminous nature of the new regulations, this alert highlights only some of the changes. However, the overall theme of the new regulations is to require more employee and employer communication. While this communication may provide more clarity, the additional requirements will ensure that, going forward, the FMLA will continue to be a major compliance obligation. As a result, it is important for employers to work diligently and quickly to ensure that they are prepared for the new regulations when they take effect shortly after the holidays.

At a minimum, employers should act now to: (1) update their policies and forms regarding FMLA; (2) update job descriptions to ensure that they reflect the essential functions of the respective positions; (3) train HR staff with respect to compliance with the revised regulations; and (4) conduct FMLA training for management and supervisory staff highlighting their significant responsibilities with respect to ensuring compliance.

**Archer's Labor and Employment Department stands ready to assist you with all of your FMLA and other employment related responsibilities, from compliance assistance and employee training to defending against legal claims should they arise. If you have any questions about the new FMLA regulations, or how they may impact your business, please contact a member of Archer's Labor and Employment Department, at 856-795-2121.**

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