

Department of Labor Enacts Comprehensive Changes to Family and Medical Leave Act Regulations

November 25, 2008

As we previously reported, on November 17, 2008, the U.S. Department of Labor (DOL) published final regulations (final rule) under the Family and Medical Leave Act of 1993 (FMLA). We have now reviewed the final rule in detail, and provide a more in-depth analysis of the most significant provisions.¹

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¹ The full text of the rule—including full-text versions of DOL’s prototype notices and certification forms—is available through the DOL website at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

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OVERVIEW

The final rule adopted by the DOL does not differ significantly from its original proposal earlier this year. Nor does it significantly alter what constitutes a serious health condition or the ability of an employee to take unforeseeable intermittent leave—two of the major issues employers have struggled with over the years. The final rule does, however, alter the notice and certification requirements associated with FMLA leave, which should in turn foster better communications between employers and employees. The final rule also clarifies both employers’ and employees’ obligations under the Act in a number of other areas.

With regard to the recently enacted military leave legislation, which provided employers with little guidance, the final rule sets forth for the first time the requirements associated with employees’ rights to exigency leave when a family member is called to active military duty, as well as employees’ rights when an employee has a family member who becomes ill or injured as a result of active duty service.

Employers who are familiar with the current DOL regulations should note that the final rules modify the existing regulatory section numbers in part to incorporate the new military leave provisions. The final rule also contains prototype forms to comply with the new notice and certification requirements.

The final rule will take effect on January 16, 2009. Employers should evaluate the changes that will be necessary to their leave policies, procedures, and notices well in advance of the effective date to ensure a

smooth transition and ensure their compliance with the new legal requirements. Please join us for an interactive webcast presentation with our attorneys Corrie Fischel Conway, Carrie Gonell, and Michael Ossip on the new FMLA regulations, December 4 and December 9, 2:00 p.m. ET. Look for the registration link and additional information at the end of this LawFlash.

COVERAGE ISSUES

Definition of “Serious Health Condition”

29 C.F.R. §§ 825.113 and 825.115

Over the years, employers have felt that the FMLA’s definition of a “serious health condition” permits employees to take FMLA-protected leave for seemingly minor medical conditions such as the cold or flu. Although it recognized that an “overwhelming majority” of comments expressing “disappointment” at DOL’s failure to address in any substantive way the definition of “serious health condition” in its proposed regulatory changes earlier this year, DOL concluded in its final regulations that “no regulatory alternative . . . would address the concerns of the business community regarding the coverage of what some perceive to be minor ailments without excluding ailments that should be FMLA-protected.”

However, the final rule does adopt the following modest clarifications to the definition of a serious health condition:

- The current regulation requires an employee to establish a serious health condition by visiting a healthcare provider on two occasions and has more than three days of incapacity associated with the condition. The final rule provides that the two visits must occur within a 30-day period from the onset of the initial incapacity. The final rule also provides that the first visit must occur in person (i.e., not via phone call or other means) within seven days of the first day of incapacity.
- To address employer concerns that employees may schedule a second follow-up appointment simply to meet the second-visit requirement, DOL adds language in the final regulation that the healthcare provider, and not the employee or patient, must make the determination as to whether a second visit is needed during the 30-day period.
- DOL’s final regulation also includes DOL’s proposed clarification that “periodic” means visiting a physician twice or more per year for the same condition. (The current regulations define a chronic serious health condition as one that requires “periodic visits for treatment,” but fail to define what “periodic” means.)

Coverage to Care for a Family Member

29 C.F.R. §§ 825.122 and 825.124

The final rule provides several clarifications as to when an employee can take FMLA leave to care for a spouse, parent, or child with a serious health condition, and as to the documentation that an employer can require in connection with such leave requests:

- The DOL final rule establishes that the determination of whether an adult child has a disability should focus on the adult child’s condition at the time the parent’s leave commences, as opposed to after the request is made. This clarification was made in response to a district court decision, *Bryant v. Delbar*, 18 F. Supp. 2d 799 (M.D. Tenn. 1998), where the court conducted an analysis of whether an adult child had a disability for purposes of FMLA coverage based on facts and circumstances that occurred well after the leave commenced. The final rule does not change the fact that the federal Americans with Disabilities Act’s (ADA) definition of “disability” will be

operative in determining whether a disability exists. Given the recent amendments to the ADA, coverage for adult children may become more expansive.

- The final rule withdraws the DOL’s proposal to list among the examples of reasonable documentation to support a qualified family relationship a signed tax return as evidence of an in loco parentis relationship. Instead, and given the “absence of actual problems with the current rule,” the final rule retains the current regulation, allowing “a simple statement” from the employee to suffice as documentation of the relationship.
- The final rule also clarifies that an employee requesting leave to care for a family member need not be the only individual, or even the only family member, available to provide such care.

INTERMITTENT LEAVE ISSUES

Scheduling Intermittent Leave

29 C.F.R. § 825.202

The current regulations provide that when an employee uses intermittent or reduced-schedule leave, the employee must “attempt” to schedule the FMLA leave so as not to disrupt the employer’s operations. *See* 29 C.F.R. § 825.117. The final rule revises this requirement to mirror the FMLA statutory language that an employee must make a “reasonable effort” to avoid disruption. Notwithstanding that change, DOL makes clear that “if the healthcare provider determines that there is a medical necessity for a particular treatment time, the medical determination prevails.”

Increments of Intermittent Leave

29 C.F.R. §§ 825.20 and 825.205

Current regulations provide that employers must account for intermittent leave in the smallest increments of time used by their payroll system to account for absences or use of leave, so long as the increment is one hour or less. The final rule states that the employer must use

an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee’s FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

DOL’s explanation of the final rule also provides some important guidance to interpret this requirement moving forward:

- The final rule will not require that employers account for FMLA leave in small increments simply because their payroll systems are capable of doing so. As stated above, employers need only use the smallest increment of time used to account for other forms of leave, provided that increment is no more than one hour. For example, if an employer uses 30-minute intervals to account for sick leave and one-hour increments to account for vacation time, the employer must use the smaller of those increments (i.e., 30 minutes) for FMLA purposes.
- Under the final rule, employers may maintain policies that require leave to be taken in different increments at different times—e.g., all forms of leave may only be taken in one-hour increments during the first hour of a shift—provided that the increment is no more than one hour.

- Employers cannot deduct time during which the employee is working against an employee’s FMLA entitlement. For example, if an employee becomes ill 30 minutes before the end of a shift, the employer may not deduct one hour of leave even if the employer uses one hour as its smallest leave increment.

In addition, the final rule includes a narrow exception to the minimum increment rule for “physical impossibility”—situations in which an employee is physically unable to access the worksite after the start of a shift or depart from the worksite after the start of a shift (e.g., a flight attendant who will miss his or her flight if he or she takes leave at the start of a shift). When this exception applies, employers may designate the leave as FMLA leave and deduct the entire period that the employee is forced to be absent.

Calculating Intermittent Leave

29 C.F.R § 825.205(b)

The final rule changes the method of calculating an employee’s leave entitlement when an employee works a schedule that varies from week to week. Under the current regulations, an employer must determine the average number of hours worked using the 12-*week* period prior the employee’s commencement of leave. Under the final rule, employers will be required to use the 12-*month* average of hours worked prior the commencement of the employee’s FMLA leave.

Overtime and Intermittent Leave

29 C.F.R § 825.205(c)

The final rule contains a helpful clarification of the use of intermittent leave by modifying its interpretation as to when overtime hours taken as intermittent leave can be counted against the FMLA entitlement. Under the current regulations as they have been interpreted by DOL, it is unclear whether an employee who presents a note that he or she cannot work more than 40 hours a week (and therefore cannot work overtime) is taking “leave.” *See* preamble discussion to current 29 C.F.R. § 825.203. In the final rule, DOL clarifies that if the employee would have been required to work the overtime hours but cannot do so because of a FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked. Employers cannot, however, discriminate in the assignment of overtime hours in order to deplete FMLA leave-takers from their FMLA leave entitlement.

SUBSTITUTION OF PAID LEAVE

Enforcing Terms and Conditions of an Employer’s Paid Leave Policy

29 C.F.R § 825.207

One of the more notable changes that DOL adopts is to make clear that the terms and conditions of an employer’s paid leave policies apply and must be followed by the employee in order to substitute for FMLA leave any form of accrued paid leave, including paid vacation, personal leave, family leave, sick leave, and paid time off. Under the current regulations, employers cannot impose such terms and conditions except in a limited manner in connection with the use of paid leave. *See* 29 C.F.R. § 825.207(c) and WH Admin. Op. FMLA 20043A (Oct. 4, 2004). Under the final rule, if an employer’s policy requires vacation leave to be taken in full-day increments, an employee substituting vacation for FMLA leave would have no right to use less than a full day of vacation leave. Or, for example, if an employer requires a two-day notice before taking personal leave, an employee seeking to substitute personal leave for FMLA leave would need to meet the two-day notice requirement.

Employers will be required to make employees aware in writing of any such restrictions associated with paid leave use, and will also have to inform an employee that he or she remains entitled to unpaid FMLA leave even if he or she chooses not to meet the terms and conditions of the paid leave policy.

Interplay of Paid Leave with Disability Benefits

29 C.F.R § 825.207(d)

Under the final rule, it remains the case that the FMLA substitution provisions are not applicable when an employee receives disability benefits while taking FMLA leave. The final rule provides, however, that the employer and employee may agree to have paid leave run concurrently with FMLA leave to supplement disability benefits (e.g., where an employee only receives two-thirds of his or her salary from the disability plan), as long as such an agreement is permitted under applicable state law.

Interplay of Information Required for Disability Plans or Workers' Compensation Benefits

29 C.F.R. §§ 825.207 and 825.306

The final rule makes clear that if an employer has a disability benefit plan that would require the employee to provide more or different medical information than that permitted under the FMLA's medical certification requirements, an employer can require an employee to provide such information as long as the employer makes clear that the failure to provide this additional information only jeopardizes receipt of disability benefits, not the entitlement to unpaid FMLA leave. This same rule applies in the case of workers' compensation benefits. The final rule clarifies that an employer may use this additional information to determine whether the need for leave qualifies under the FMLA.

JOINT EMPLOYER COVERAGE

Coverage of Professional Employer Organizations

29 C.F.R § 825.106

The final rule provides that a Professional Employer Organization (PEO) will *not* be considered a joint employer for FMLA purposes when it only performs administrative functions for an employer, such as providing payroll services. However, in certain cases it could be covered, for example, if it has authority to hire or fire. A case-by-case analysis will be required to determine if joint employment status exists.

ELIGIBILITY REQUIREMENTS

Consecutive Employment

29 C.F.R § 825.110(b)(1)

The current regulations require that, in order to be eligible for leave, an employee must have been employed by the employer for at least 12 months, must have provided at least 1,250 hours of service during the 12 months preceding the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the primary worksite. 29 C.F.R. § 825.110(a). The existing regulations also provide that the 12-month eligibility period need not be continuous, 29 C.F.R. § 825.110(b), which has left open for debate how an employer would combine nonconsecutive periods of employment, including periods separated by years.

Based in part on *Rucker v. Lee Holding*, 471 F.3d 6 (1st Cir. 2006), wherein the U.S. Court of Appeals for the First Circuit held that an employer was required to consider for FMLA eligibility purposes a five-year separation of service, the DOL proposed a clarification earlier this year that employers would not be required to aggregate service when there is a break of five years or longer except for breaks in service of any length resulting from either:

- The employee's fulfillment of military obligations; or
- A written agreement or collective bargaining agreement already in existence that expresses the intent to rehire the employee.

The final rule adopts the proposal with one important change: the DOL *extends the permissible gap in service from five years to seven years*. That is, employers are required to look at prior service for up to seven years before the leave is taken in order to determine employee eligibility.

Because the FMLA's recordkeeping requirements extend only three years, the rules put the burden on the employee, not the employer, to establish that he or she is an eligible employee where the employee relies on a period of employment that predates the employer's records.

Counting Leave as “FMLA Leave” When Eligibility Commences “Midstream”

29 C.F.R § 825.110

The final rule also clarifies when an employer must designate leave as FMLA-protected leave if an employee has not met the FMLA eligibility requirements at the commencement of a leave. If the employee is not eligible for FMLA leave at the commencement of a leave because the employee has not met the 12-month length-of-service requirement, the employee may meet this requirement while on FMLA leave, because leave time counts toward length of service. Under the current regulations, it was not clear whether, in such circumstances, the employer should start designating the leave as FMLA-protected at the point when an employee met the 12-month threshold, because the determination of whether an employee is eligible for FMLA leave is to be made at the time “leave” is to commence. The final rule confirms that in such circumstances, the leave should be designated as FMLA-protected at the point the employee becomes eligible. Therefore, the leave time taken after the employee becomes eligible will be FMLA-protected, and the leave time taken before the employee becomes eligible will not be FMLA-protected.

Definition of “Worksite”

29 C.F.R § 825.111

In response to the Court of Appeals' decision in *Harbert v. Healthcare Service Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), DOL proposed earlier this year the modification of existing regulations with respect to defining the “worksite” of individuals working for joint employers. Current regulations provide that an employee's worksite is the primary employer's office from which the employee is assigned or to which he or she reports. 29 C.F.R. § 825.111. In *Harbert*, the court held that the existing regulation was “arbitrary and capricious” because, among other reasons, it wholly failed to incorporate the common understanding of “worksite” as the site where an employee actually works. Accordingly, the DOL proposal modified existing regulations to state that after an employee, who is jointly employed, is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of the employee's eligibility is the actual physical place where the employee works. The final rule adopts the proposal without change.

The final rule also contains important clarification with respect to telecommuting arrangements. DOL makes clear that “employees who work out of their home do not have their personal residence as their worksite.” Instead, “virtual” or “remote” employees are considered to work in the office to which they report and from which assignments are made.

COUNTING FMLA LEAVE

Treatment of Holidays

29 C.F.R § 825.200(h)

The final rule reaffirms DOL's interpretation of the current regulations that when a holiday occurs during an employee's scheduled workweek and an employee is taking a full week of leave, the holiday counts against the employee's 12-week leave entitlement. The final rule also provides that when the employee is

taking FMLA leave in increments of less than a week, the time counts against the FMLA entitlement only if the employee was required to work on the holiday. For example, if an employee who regularly works Mondays through Fridays requires only Wednesday, Thursday, and Friday for leave, that employee would use only two-fifths of a week if that Friday was a holiday. If that same employee needed Monday through Friday for leave, the employer may deduct a full week of leave despite the Friday holiday.

Light Duty

29 C.F.R. § 825.220(d)

Current regulation 29 C.F.R. § 825.220(d) states that when an employee accepts a light-duty assignment, “the employee’s right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of light duty.” Some courts have interpreted this provision to mean that an employee uses up his or her 12-week FMLA leave entitlement while performing work in a light-duty assignment. The final rule makes clear the following:

- The time an employee works in a voluntary light-duty position does not count against the employee’s FMLA entitlement.
- The right to restoration is held in abeyance during the period of time the employee performs a light-duty assignment. For example, if an employee takes four weeks of FMLA leave and voluntarily accepts a light-duty assignment for 10 weeks, the employee has the right to restoration at the conclusion of that 10-week period (or, if the employee is unable to return to the position, may take the remainder of his or her FMLA entitlement). However, when an employee uses his or her full 12-week FMLA allotment, and voluntarily returns to a light-duty position because the employee is unable to resume working in his or her original position, that employee no longer has a right under the FMLA to restoration.

EMPLOYER NOTICE REQUIREMENTS

DOL’s final rule incorporates a revised framework for employer notice requirements. The proposed notice provisions are grouped into four main categories—general notice, eligibility notice, rights and responsibilities notice, and designation notice—and they will create new obligations that employers must incorporate into the FMLA administrative process.

General Notice Requirement

29 C.F.R. § 825.300(a)

Under the current regulations, employers must provide a “general” notice of the FMLA provisions by posting a notice in a location available to both employees and applicants. Employers also must contain a general explanation of the FMLA in an employee handbook if an employee has one that addresses leave and attendance policies (general “distribution” notice). If an employer does not have such policy guidance, the employer must provide a “general notice” of the FMLA provisions when an employee requests FMLA leave. *See* 29 C.F.R. §§ 825.300 and 825.301. The final rule modifies these “general” notice requirements in several ways.

Posting Notice

Under the final rule, employers can satisfy the posting requirement through an electronic posting of notice, provided that (1) the electronic posting is in a conspicuous place on the employer’s website, (2) it is accessible to all applicants and current employees (not just on an internal intranet site), and (3) all employees have access to company computers that post the information in a conspicuous manner.

Distribution of General Notice

If an employer has an employee handbook that contains guidance to employees concerning employee benefits or leave rights, employers should include the general notice in the handbook. For employers who do not maintain employee handbooks or otherwise distribute FMLA policies to their employees, employers will need to distribute a copy of the general notice either in paper or electronic form to each employee at the time of the employee's hire. (This is a change from the original proposal, which required employers to distribute general notice at least once per year.) It will no longer be sufficient to distribute this general notice only in connection with a specific FMLA leave request. DOL has developed a new prototype notice, and expects to make the notice available to employers in multiple languages. The final rule makes clear that this general notice must include information concerning the procedures for filing complaints of violations of the FMLA with the Wage and Hour Division. The current regulations do not require that notification of procedures for filing a complaint be included in the handbook information. Employers need to review their policies to ensure this information is included.

Notice Requirements Associated with Specific Leave Requests

29 C.F.R. § 825.300

Under the current regulations, when an employee specifically requests FMLA leave, an employer must inform the employee within two business days of the leave request whether the employee is eligible for FMLA leave, and also provide the employee with a specific notice of his or her rights and responsibilities associated with FMLA leave, including whether the leave is designated as FMLA-protected and whether the employee needs to provide a medical certification ("specific notice"). See 29 C.F.R. §§ 825.301, 825.110, and 825.208. DOL observed that this process was confusing to both employers and employees. As such, the final rule modifies the timing and content of the specific notice requirement in several ways, as discussed below.

Eligibility Notice Requirement

29 C.F.R. § 825.300(b)

The final rule requires an employer to provide an employee with a specific "eligibility notice." This notice informs the employee as to whether the employee meets the statutory eligibility criteria—employment with the employer for 12 months, at least 1,250 hours of service in the 12 months prior to the leave request, and employment at a worksite where 50 or more individuals are employed within 75 miles of the primary worksite.

The final rule also addresses the content and timing of this notice as follows:

- It must be provided within five business days of the start of a FMLA leave "absent extenuating circumstances" (compared to the two-day turnaround required by the current regulations).
- In the event that an employee is not eligible for leave, the notice must state at least one reason why the employee is not eligible. For example, if an employee is not eligible for leave because he or she has not worked for an employer for 12 months, the eligibility notice should clearly state such.
- If an employee needs FMLA leave for a different FMLA-qualifying reason in the same leave year that an employer has already provided to the employee eligibility notice due to a different FMLA-qualifying reason, the employer must provide the employee a new eligibility notice within five business days of the second leave request only if the employee's eligibility status has changed. If the employee's eligibility status has not changed, however, no further notice must be provided in the leave year.

The final rule contains a prototype eligibility notice that reflects the changes in the regulations.

Rights and Responsibilities Notice Requirement

29 C.F.R § 825.300(c)

The final regulation also requires employers to provide a “Rights and Responsibilities” notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice is similar to the specific notice required by the current regulations. The notice must be provided each time the eligibility notice is provided to an employee (typically, within five business days of the start of leave). The notice must include notice of the following:

- That the leave may be designated and counted against the employee’s annual FMLA entitlement
- Any requirement for the employee to furnish certification supporting the need for leave
- That the employee may substitute paid leave, or whether the employer will require the employee to substitute paid leave, and any conditions related to that substitution, as well as the employee’s right to take unpaid leave if the employee does not qualify for substitute paid leave under the employer’s policies
- Any requirement for the employee to make premium payments to maintain health benefits and the conditions related thereto
- That the employee is a “key employee” under the FMLA, and the consequences related thereto
- That the employee has a right to maintain benefits during the leave and a right to restoration upon return
- That the employee may be liable for unpaid portions of insurance premiums should the employee fail to return after the end of the leave entitlement

Any required certification may be provided with the Rights and Responsibilities notice. The employer may also include other information pursuant to the employer’s specific policies and procedures related to leave, e.g., that the employer requires periodic status reports.

DOL also includes a new prototype Rights and Responsibilities notice that reflects the final regulations.

Designation Notice Requirement

29 C.F.R § 825.300(d)

A “designation notice” informs the employee whether the particular leave requested will be designated as FMLA leave. *See* 29 C.F.R. § 825.208(c). The final rule increases the time for an employer to provide the designation notice from two to five business days “absent extenuating circumstance,” and also modifies the start of the time limit; it begins only after “the employer has sufficient information to determine whether the leave is being taken for an FMLA-qualifying reason.” The regulations also require employers to inform the employee, if possible, of the number of hours, days, or weeks, that will be designated as FMLA leave. The final rule differs from the current rule in that the current rule requires an employer to actually designate, or at least provisionally designate, the leave at the time the notice of the rights and responsibilities is provided (i.e., within two business days of the employee’s request for leave.) In contrast, the timing of the designation notice will now in most cases be triggered by the receipt of the medical certification.

In the final rule, when the amount of leave needed is unknown at the time the designation notice is given (e.g., intermittent leave for a chronic serious health condition), the employer will need to inform the

employee of the number of hours counted against the FMLA leave entitlement upon employee request, but no more often than every 30 days if FMLA leave was taken during that period.

A new requirement associated with the designation notice contained in the final rule is that the designation notice must also do the following:

- Notify the employee if the leave is not designated as FMLA leave due to insufficient information or a nonqualifying reason.
- Include a statement of the employee's essential job functions, if the employer will require that those functions be addressed in a fitness-for-duty certification. As discussed below, the final rule now allows an employer to request an employee have his or her healthcare provider certify that he or she is able to perform all of the essential functions of the job before returning from FMLA leave, as opposed to a "simple statement" as provided by the current regulations.

The final rule includes a new prototype designation notice that reflects these regulatory changes.

Retroactive Designation of Leave

29 C.F.R § 825.301

As expected, the final rule addresses the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which invalidated the penalty provision in 29 C.F.R. § 825.700(a). The provision states, "[i]f an employee takes . . . leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." The Court noted that in such circumstances, an employee could receive more than 12 weeks of leave, which is well beyond the statutory leave requirement. The Court did not invalidate the notice provision, however, and reached its decision in part because such a "categorical" penalty did not take into account individualized harm. Since *Ragsdale*, courts have been taking an individualized look at whether the employee was harmed as a result of the employer's failure to timely designate leave.

Incorporating this new legal standard, the final rule provides that employers now may retroactively designate leave, provided that there is no individualized harm to the employee caused by doing so. This will often be the case where an employee's own serious medical condition is at issue. On the other hand, where an employee plans on taking leave for the care of a family member, he or she may plan with a spouse how to allocate their collective leave requirements and, therefore, an employee could likely argue that the failure to designate caused harm, because the employee could have made alternative coverage arrangements had the employer timely designated the leave.

If the employee establishes individual harm, the final regulations incorporate the remedies provided by the statute, including monetary liability.

EMPLOYEE NOTICE REQUIREMENTS

Enforcement of Employer Call-In Procedures

29 C.F.R § 825.302(d)

The final rule adopts an important change related to employee notice obligations when leave is unforeseeable. Under the current regulations, when leave is unforeseeable, employees must provide notice to employers "as soon as practicable." 29 C.F.R. § 825.303. "Ordinarily," the regulations explain, this notice should happen within one or two days of when the need for leave becomes known to the employee. DOL has interpreted this language to mean that an employer can wait up to two business days to report the FMLA absence from the time the employee becomes aware of the need for such leave. *See* WH

Admin. Op. FMLA101 (Jan. 15, 1999). DOL has also interpreted the current regulations to mean that employers cannot enforce normal call-in procedures in such circumstances, such as a requirement that an employee call the human resources department to report an absence. Courts have disagreed as to whether this position is correct.

In contrast, the final rule states that employees may be required to follow established call-in procedures for calling in absences and requesting leave absent “unusual circumstances” (e.g., no one answers the call-in number). The final rule explicitly states that where an employee does not comply with the employer’s usual procedure, and no usual circumstances justify that failure, the employer may properly delay or deny FMLA leave.

Sufficient Notice

29 CFR §825.302(d)

DOL retains in 29 C.F.R. §§ 825.302(c) and 825.303(b) the standard that an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for leave, and opted not to adopt a stricter standard as to what constitutes sufficient information from the employee to trigger the employer’s obligations to consider whether the FMLA is at issue. The final rule does however, provide examples of what constitutes sufficient notice, including the following: that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; that the employee or the employee’s family member is under the continuing care of a healthcare provider; that the leave is due to a qualifying exigency, that a covered military member is on active duty or called to active duty status; and, if the leave is for a family member, that the condition renders the family member unable to perform daily activities. Also, the final rule makes clear that calling in “sick” in the case of unforeseeable leave is not enough to trigger an employer’s obligations to determine if the leave is arguably FMLA-protected.

The final rule also provides that when an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must *specifically reference* the qualifying reason for leave in notifying the employer.

MEDICAL CERTIFICATION PROCESS

Content of Medical Certification; New Form

29 C.F.R § 825.306

As to the content of the certification, DOL has adopted two simplified forms—one form to be used when the employee needs leave for his or her own serious health condition, and a second form to be used when the need for leave is to care for a family member with a serious health condition. The forms contain new areas for medical providers to provide sufficient medical facts—symptoms, doctor visits, medical treatment regimen—for employers to make a determination as to eligibility. The forms specifically allow doctors to provide a diagnosis, which is not permitted under the current regulations. (Employers, however, cannot reject certifications that do not contain diagnoses and employers still need to be cognizant of state laws, such as those in California, that prohibit an employer from requesting such information under state law.)

Time Frame to Correct Deficient Certification

29 C.F.R § 825.305(c)

The final regulations make a wholesale adoption DOL’s proposed clarification on the process for curing an incomplete or insufficient certification. The revision requires that when an employer determines a certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and allow the employee seven calendar days to cure the deficiency. Additional time must be

allowed if the employee notifies the employer within the seven-calendar-day period that he or she is unable to obtain the additional information despite diligent, good-faith efforts. If the deficiencies are not cured in the resubmitted certification, the employer may deny leave.

Contact with Healthcare Provider as Part of Clarification Process

29 C.F.R. § 825.307

Under the current regulations, employers can only contact an employee's healthcare provider to authenticate a certification or to obtain clarification of the information provided, with the employee's permission and through the employer's healthcare provider. See 29 C.F.R. § 825.307. The final rule eliminates the need for the employee permission to authenticate or clarify the certification, although clarification cannot occur until after the employer has given the employee seven days to cure any deficiency unless the employee waives this seven-day period. The final rule also eliminates the need for an employer to use its healthcare provider for the clarification process. Thus, going forward, it will be acceptable for the employer's human resources department or other management officials to make such contact. The final rule does make clear, however, that in no circumstance may the employee's direct supervisor make contact with the employee's healthcare provider. It also confirms that employees will need to provide all necessary Health Insurance Portability and Accountability Act (HIPAA) releases so that the employer can obtain sufficient information. If the employee chooses not to provide such releases, and the employee has not provided information that is sufficiently clear for an employer to determine that the leave qualifies for the FMLA protections, the FMLA leave request may be denied.

Frequency of Recertification

29 C.F.R. § 825.308

The current regulations provide that an employer may request certification every 30 days in connection with an absence for chronic and permanent conditions, or when leave is taken for incapacity associated with pregnancy. However, when a certification provides a set time-period during which the condition will last, an employer may not request recertification before that time period expires unless an employer obtains information to doubt the validity of the initial certification, circumstances change, or an employee requests an extension of leave. Under the current regulations, there was uncertainty as to whether an indefinite period of time constitutes a "set" period of time for purposes of the recertification rules. See 29 C.F.R. § 825.308.

The final rule makes clear that an employer may request recertification every 30 days in connection with an absence unless the medical certification indicates that the minimum duration is more than 30 days. The final rule provides that if a longer period is provided, certification cannot occur before the time period expires, unless circumstances change, or an employer has reason to doubt the validity of the initial certification. In all cases, however, employers will be able to request recertification every six months, even where the certification states a longer period. The regulations suggest that a certification that states a "lifetime" condition exists is information that indicates the condition will last in excess of six months.

The final rule also confirms that each new leave year gives the employer the opportunity to obtain a new "initial" certification, and thus obtain a second- and third-opinion if there is a reason to doubt the validity of the certification. DOL previously stated this position in a 2005 Opinion Letter. See FMLA 2005-2-A (Sept. 14, 2005). This regulatory change is significant when an employer suspects an employee of FMLA abuse, since under the current (and final) regulations, employers may not obtain second opinions upon recertification.

Background Information in Connection with Second-Opinion Process

29 C.F.R. § 825.308

The final rule provides that employees (or family members) be required to authorize the release of relevant background medical information regarding the condition for which leave is sought from the employee's (or family member's) healthcare provider to the second- or third-opinion provider. Under the current regulations, it was unclear whether such information may or must be provided.

Fitness for Duty

29 C.F.R. § 825.312

Intermittent Absences

The current regulations provide that an employer cannot obtain a fitness-for-duty certification in connection with intermittent leave absences. The final regulations contain a change that provides that an employer may require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns (i.e., a reasonable belief of significant risk of harm to the individual employee or others) exist, provided that the employer includes that requirement in its designation notice. The employer may not terminate the employment of the employee while awaiting such a certification of fitness for duty for an intermittent or reduced-schedule leave of absence.

Return from a Block of Leave

The final regulation also retains the basic fitness-for-duty certification procedures when an employee returns from a block of FMLA leave with one important modification. Under the current regulations, the certification need only contain a "simple statement" regarding an employee's fitness for duty. 29 C.F.R. § 825.310. Under the final rule, when an employer (1) provides the employee with a list of the employee's essential job duties no later than with the designation notice (described above) 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 healthcare provider to certify that the employee can perform those duties. When providing a fitness-for-duty certification, the healthcare provider must assess the employee's ability to return to work against these identified essential functions.

OTHER ISSUES

Perfect Attendance Awards

29 C.F.R. § 825.215(c)(2)

Under the current regulations, employers cannot disqualify an employee from a perfect attendance or safety award because the employee has taken FMLA leave. *See* 29 C.F.R. § 825.215. Employers can prorate production bonuses under the current regulations. What constitutes an attendance bonus versus a production bonus has been confusing to employers over the years. The final rule eliminates the distinction between an attendance and production bonus, and instead provides that an employer may disqualify an employee from a bonus or award predicated on the achievement of a specific goal (e.g., hours worked) where the employee fails to achieve that goal as a result of an FMLA absence, as long as the disqualification standards are not discriminating against FMLA users. The final rule makes clear that it applies to attendance bonuses.

Waiver and Release of FMLA Claims

29 C.F.R. § 825.220(d)

DOL makes clear in its final rule that it disagrees with the U.S. Court of Appeals' decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), which held that employees cannot voluntarily settle their past FMLA claims based on the language in the current 29 C.F.R. § 825.220. The final regulations explicitly state, in response to *Taylor*, that employees and employers should be permitted to voluntarily

agree to the settlement of past claims without having to first obtain the permission or approval of DOL or a court.

MILITARY LEAVE AMENDMENTS

DOL provides needed guidance in the final rule as to employer and employee rights and responsibilities associated with the National Defense Authorization Act for Fiscal Year 2008 (NDAA) FMLA amendments. This legislation provides additional leave protections to employees with family members in the armed services. In so doing, the DOL expressly declined to create a separate regulatory framework for family military leave, adopting instead existing FMLA framework. However, many provisions applicable to these new entitlements differ from the provisions applicable to existing FMLA leave entitlements. Highlights of these differences are set forth below.

Exigency Leave

29 C.F.R. § 825.126

In describing qualifying exigency leave, the NDAA simply states that leave can be taken “[b]ecause of any qualifying exigency . . . arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.” To make that portion of the NDAA workable, however, DOL needed to define what qualifies as an “exigency.”

Definition of Exigency

The final regulation identifies eight different circumstances that will qualify as an “exigency”:

- *Short-term notice deployment*, when a covered military member is notified of an impending call to duty seven or fewer calendar days prior to the date of deployment. In such circumstances, an employee is entitled to up to seven days of leave for this purpose
- *Military events and related activities*, including official ceremonies, programs or events sponsored by the military related and family support or assistance programs sponsored or promoted by the military, military service organizations, or the American Red Cross
- *Childcare and school activities*, including the arrangement of alternative childcare and attendance at school meetings
- *Financial and legal arrangements*, to make or update legal arrangements for the covered military member or act as his or her representative before a government agency
- *Counseling*, for oneself, for the covered military member, or for a child of the covered military member
- *Rest and recuperation*, to spend time with a covered military member who is on short-term leave during the period of deployment (up to five days for each leave)
- *Post-deployment activities*, including arrival ceremonies and funeral arrangements
- *Additional activities*, provided that the employer and employee agree that such activities shall qualify as an exigency

The final rule also makes clear that exigency leave is limited to circumstances involving a family member in the National Guard or Reserves or a retired member of the regular armed forces or the reserve. This entitlement does not apply to employees who have family members in the Regular Armed Forces. Moreover, a call to active duty does not include state calls unless pursuant to the order of the President in

certain circumstances. Also, exigency leave is an additional qualifying reason available for an employee to take the standard 12-week leave entitlement (i.e., leave for the employee's own or a family member's serious health condition, and leave for the birth, adoption, or foster care placement of a child) provided by the FMLA. It is not a 12-week entitlement in addition to the standard 12-week entitlement.

Certification Requirements

29 C.F.R. § 825.309

The first time that an employee requests FMLA exigency leave, an employer may require that the employee provide a copy of the family member's active duty orders or other reasonable documentation. However, an employer may only request this information once per family member. The final rule also provides the type of information an employee can request as certification of the need for leave in addition to the active duty orders, and under what circumstances an employer can verify the information. There are no second opinion or recertification provisions associated with this type of leave.

Notice and Other Requirements

29 C.F.R. § 825.126

The standard FMLA notice (described above) applies to covered servicemember leave. Employees may take this leave on an intermittent or reduced schedule basis. Other FMLA regulatory requirements generally apply, including the eligibility requirements and the substitution of paid leaves.

Leave to Care for Covered Servicemember

29 C.F.R. § 825.127

The final rule also provides clarity as to when an employee can take leave to care for a family member who became ill or injured as a result of service in the military—another leave entitlement provided by the NDAA earlier this year. In short, under this form of leave, an employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember is entitled to up to 26 weeks of unpaid leave in a single 12-month period to care for that servicemember ("covered servicemember leave"). The statutory definitions applicable to the leave amendments have been incorporated into the final rule. In addition, the final rule provides important definitions applicable to the leave entitlement that were not addressed in the statute.

Covered Family Members

The final rule defines "son or daughter" as including adult children for purposes of the covered servicemember leave entitlement. Also, the rule defines "next of kin" as the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority:

- Blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions
- Brothers and sisters
- Grandparents
- Aunts and uncles
- First cousins

If the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA, that family member will be deemed next of kin. In such circumstances, only that designated next of kin may take FMLA leave to care for the covered servicemember. When a covered servicemember does not make such a designation, and there are multiple family members with the same level or relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin.

An employer is entitled to require an employee to provide reasonable documentation of the family relationship.

Tracking the 26 Weeks of Leave

The regulation explains that the 12-month period to be used for purposes of tracking this leave entitlement begins when the employee starts using his or her leave. Therefore, the 12-month period utilized for tracking other forms of FMLA leave may *not* be utilized for purposes of tracking this entitlement. If the leave covers “covered servicemember leave” protections and protection under the regular FMLA provisions (e.g., to care for a parent with a serious health condition), the employer shall designate the leave as “covered servicemember” leave. An employee is not entitled to more than 26 weeks of FMLA leave during the 12-month period that commences with the need for leave. Therefore, an employee is *not* entitled to 26 weeks of leave to care for a family member under this provision, plus an additional 12 weeks of leave for other FMLA-qualifying reasons.

Significantly, the regulations make clear that an employee may utilize the 26-week entitlement for *each* servicemember and for *each* illness or injury incurred—a question left open after the initial passage of the NDAA. Therefore, an employee may take 26 weeks of leave in consecutive 12-month periods for family members covered by this provision.

Certification Requirements

29 C.F.R. § 825.310

The final rule contains prototype certification forms for this leave entitlement, and provides that a certification can be requested from an “authorized healthcare provider.” The rule provides that Department of Defense (DOD) healthcare providers, a healthcare provider from the U.S. Department of Veterans Affairs (VA), and DOD TRICARE network and nonnetwork authorized healthcare providers are considered “authorized” healthcare providers for this purpose. DOL explains that TRICARE is a DOD system of authorized healthcare providers to ensure military personnel can obtain medical care even in remote locations.

The final rule further provides the specific information an employer may request to determine leave entitlement. Because the eligibility for this leave is different from regular leave, different information is required. It is important to note that while the standard FMLA authentication and clarification provisions apply, an employer may not utilize the second opinion or recertification process for this leave entitlement. However, if an extension of leave is required, an additional certification may be obtained.

Notice and Other Requirements

29 C.F.R. § 825.127

The standard FMLA notice (described above) applies to covered servicemember leave. Employees may take this leave on an intermittent or reduced-schedule basis. Other FMLA regulatory requirements generally apply, including the eligibility requirements and the substitution of paid leave provisions.

Please join us for our webcast presentation, **Are You Prepared? New Regulations to Go into Effect Under the Family and Medical Leave Act (FMLA)**. This will be a one-hour interactive webcast presentation on the new FMLA regulations with our attorneys Corrie Fischel Conway, Carrie Gonell, and Michael Ossip, on December 4 and December 9 at 2:00 p.m. ET. To register, and for additional information, go to <https://morganlewis.webex.com/mw03051/mywebex/default.do?siteurl=morganlewis>.

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