

Morgan Lewis

Are You Ready? New Regulations to Go
into Effect Under the Family and Medical
Leave Act (FMLA)

Corrie Fischel Conway
Carrie Gonell
Michael J. Ossip

December 4, 2008

December 9, 2008

FMLA Refresher

- FMLA provides 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:
 - The birth and care a newborn child of the employee;
 - The placement with the employee of a son or daughter for adoption or foster care;
 - The care of an immediate family member (spouse, child, or parent) with a serious health condition; or
 - Medical leave when the employee is unable to work because of a serious health condition.

FMLA Refresher – cont'd

- To be eligible for leave, employees must be employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.
- Substitution of paid leave allowed in certain circumstances.
- Regulations include detailed notice and certification requirements.

DOL Website

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>

Definition of “Serious Health Condition”

- Will continue to include seemingly minor illnesses, such as colds and flu.
- DOL recognized that an “overwhelming majority” of comments expressed “disappointment” at DOL’s failure to address in any substantive way the definition of “serious health condition.”
- DOL concluded 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.”

Definition of “Serious Health Condition” – cont’d

- Final rule made several modest clarifications in definition of serious health condition:
 - Two visits with a medical provider need to be completed within 30 days of incapacity;
 - The healthcare provider needs to determine whether a second visit is needed during the 30-day period; and
 - “Periodic” is clarified to mean visiting a healthcare provider at least two times per year for the same condition.

Coverage to Care for a Family Member

- Final rule provides several clarifications as to when an employee can take leave to care for a family member with a serious health condition and the documentation an employer can require in connection with such leave requests.
- The 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
- Increments of Intermittent Leave
- Calculating Intermittent Leave
- Overtime and Intermittent Leave

Scheduling Intermittent Leave

- Current regulations: 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.
- Final rule: an employee must make a “reasonable effort” to avoid disruption.
- However, 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

- Current regulations: 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.
- Final rule: 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 if it is not greater than one hour and if an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

Increments of Intermittent Leave – cont'd

- Final rule will not require employers to account for FMLA leave in small increments simply because their payroll systems are capable of doing so - 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 (30 minutes) for FMLA purposes.

Increments of Intermittent Leave – cont'd

- 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—but only if that increment is no more than one hour.
- Employers cannot deduct time during which the employee is working against an employee's FMLA entitlement.
 - e.g., if employee becomes ill 30 minutes before the end of a shift, employer may not deduct one hour of leave, even if employer uses one hour as its smallest leave increment.

Increments of Intermittent Leave – cont'd

- Narrow exception to the minimum increment rule for “physical impossibility”—where 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

- Final rule changes the method of calculating an employee's leave entitlement when an employee works a schedule that varies from week to week.
- Current regulations: employer must determine the average number of hours worked using the 12-week period prior to the employee's commencement of leave.
- Final rule: employers will be required to use the 12-month average of hours worked prior to the commencement of the employee's FMLA leave.

Overtime and Intermittent Leave

- Final rule clarifies use of intermittent leave by modifying interpretation as to when overtime hours taken as intermittent leave can be counted against FMLA entitlement.
- Current regulations: unclear whether an employee who presents a note that he or she can't work more than 40 hours a week (and therefore cannot work overtime) is taking "leave."

Overtime and Intermittent Leave – cont'd

- Final rule: if the employee would have been required to work the overtime hours but can't do so because of an FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked.
- However, employers can't discriminate in the assignment of overtime hours to deplete FMLA leave-takers of their FMLA leave entitlement.

Substitution of Paid Leave Issues

- Enforcing Terms and Conditions of an Employer's Paid Leave Policy
- Interplay of Paid Leave with Disability Benefits
- Interplay of Information Required for Disability Plans or Workers' Compensation Benefits

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

- Final rule: 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.
- Current regulations: employers cannot impose such terms and conditions except in a limited manner in connection with the use of paid leave.

Enforcing Terms and Conditions of an Employer's Paid Leave Policy – cont'd

Examples:

- 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.
- 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.
- Note: employers are required to make employees aware in writing of any such restrictions associated with paid leave use, and 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

- Final rule: FMLA substitution provisions continue to be inapplicable when an employee receives disability benefits while taking FMLA leave.
- However, an 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

- Final rule: if an employer has a disability benefit plan that requires an 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.
- Same rule applies in the case of workers' compensation benefits.
- Employer may use this additional information to determine whether the need for leave qualifies under the FMLA.

Coverage of Professional Employer Organizations

- Final rule: 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.
- Case-by-case analysis will be required to determine if joint employment status exists.

Eligibility Requirements Issues

- Consecutive Employment
- Counting Leave as “FMLA Leave” When Eligibility Commences “Midstream”
- Definition of “Worksite”

Consecutive Employment

Issue: how does an employer combine nonconsecutive periods of employment, including periods separated by years?

- Final rule: employers not required to aggregate service when there is a break of *seven* years or longer except for breaks in service of any length resulting from either fulfillment of military obligations or a written agreement or collective bargaining agreement already in existence that expresses the intent to rehire the employee.
- Thus, employers are required to look at prior service for up to seven years before the leave is taken in order to determine employee eligibility.
- Burden is 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”

- Final rule: if the employee is not eligible for FMLA leave at the commencement of a leave because he or she has not met the 12-month length-of-service requirement, he or she may meet this requirement while on FMLA leave, because leave time counts toward length of service.
- Thus, 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”

- Current regulations: an employee’s worksite is the primary employer’s office from which the employee is assigned or to which he or she reports.
- Final rule: 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.
- Regarding telecommuting arrangements, DOL makes clear that “employees who work out of their home do not have their personal residence as their worksite.”
- “Virtual” or “remote” employees are considered to work in the offices to which they report and from which assignments are made.

Counting FMLA Leave - Treatment of Holidays

- Final rule reaffirms DOL's interpretation 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.
- But 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 employee regularly works Mondays through Fridays but requires only Wednesday, Thursday, and Friday for leave, employee would use only two-fifths of a week if Friday is a holiday.
 - If same employee needed Monday through Friday for leave, the employer may deduct a full week of leave despite the Friday holiday.

Light Duty

- Current regulation: when an employee accepts a light-duty assignment, “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 interpreted this provision to mean an employee uses up her 12-week FMLA leave entitlement while performing work in a light-duty assignment.
- Final rule: the time an employee works in a voluntary light-duty position does *not* count against the employee’s FMLA entitlement. Right to restoration is held in abeyance during the period of time the employee performs a light-duty assignment.

Light Duty – cont'd

- For example, an employee who takes four weeks of FMLA leave and voluntarily accepts a light-duty assignment for 10 weeks, has the right to restoration at the conclusion of that 10-week period (or, if the employee is unable to return to the position, he or she may take the remainder of his or her FMLA entitlement).
- When an employee uses his or her full 12-week FMLA allotment and voluntarily returns to a light-duty position because he or she is unable to resume working in his or her original position, the employee no longer has a right to restoration.

Perfect Attendance Awards

- Eliminates the distinction between an attendance and production bonus, and 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.
- This new rule applies to attendance bonuses.

Waiver and Release of FMLA Claims

- Final rule disagrees with the Fourth Circuit Court of Appeals' decision in *Taylor v. Progress Energy* that FMLA rights cannot be waived.
- Employees and employers can agree to the settlement of past claims without having to first obtain the permission or approval of DOL or a court.

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
 - designation notice
- Employers are also “expected to responsively answer questions” from employees regarding their use of FMLA leave.

General Notice

- Employers who do maintain a handbook should include the general notice in their handbook.
- Employers who do not maintain a handbook are required to distribute a copy of the general notice to each employee at the time of the employee's hire, either in paper or electronic form.
- It would no longer be sufficient to distribute general notice in connection with an FMLA leave request.
- If an employer's workforce is composed of a significant portion of workers who are not literate in English, the notice needs to be issued in a language in which the employees are literate.

Employer Notice Requirements: Form of General Notice

- The requirement to “post” the general notice could be satisfied through *electronic means*, provided that:
 - Electronic posting is in a conspicuous place on the employer’s website.
 - It is accessible to all applicants and current employees (not just on an internal intranet site).
 - All employees have access to company computers that post the information in a conspicuous manner.

Eligibility and Rights & Responsibilities Notices

- The final rule regarding new eligibility and rights and responsibilities notices combines different provisions of the existing regulations with some modifications on the content and timing of the notice.
- Employers are required to, among other things:
 - Provide eligibility and rights and responsibilities notices within five business days from when the employee requests FMLA leave (“absent extenuating circumstances”);
 - Notify the employee whether the employee has met the eligibility requirements for leave and, if the employee is not eligible, the employer must indicate the reasons why the employee is not eligible;
 - Notify the employee of his or her right to take unpaid leave if the employee does not meet the terms and conditions of the employer’s paid leave policies to substitute paid leave; and
 - Notify the employee of other issues, as previously required by the existing FMLA regulations, including that leave may be designated and counted against any FMLA entitlement, how to handle payment of insurance premiums, and key employee status.

Designation Notice

- The final rule:
 - Increases the time for an employer to provide the designation notice from two days to five days (“absent extenuating circumstances”) after an employer has sufficient information to determine if the leave is being taken for an FMLA-qualifying reason;
 - Requires the employer to inform the employee, if ascertainable, of the number of hours, days, or weeks that will be designated as FMLA leave;
 - Requires the employer to notify the employee if the leave taken is not designated as FMLA leave due to insufficient information or because it was taken for a non-FMLA-qualifying reason;
 - Requires that 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 the employee’s request, but no more often than every 30 days if FMLA leave was taken during that period; and
 - Requires the employer to notify the employee if a fitness-for-duty certification will be required and to list the essential job functions if the certification will be required to address them.

Clarification of What Constitutes Sufficient Notice

- DOL clarified the standard as to what constitutes sufficient information from the employee to trigger the employer's obligations to consider FMLA eligibility.
- For example, the employee would need to inform the employer of the anticipated duration of the leave and:
 - That the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities); or
 - Whether the employee (or family member) intends to visit a healthcare provider or is receiving continuing treatment.
- 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 when notifying the employer.
- In cases of foreseeable leave where an employee is required to provide at least 30 days' notice of the need for leave and does not, the employee has to explain their failure to do so if requested (employer can delay FMLA coverage if no response)

Enforcement of Employer Call-In Procedures

- Under the current regulations, an employee must provide notice “as soon as practicable.”
 - 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.
 - DOL has taken the position that employers cannot enforce normal call-in procedures in such circumstances.
- The final rule marks a change of the DOL’s position, stating that employees may be required to follow established call-in procedures in connection with an FMLA leave request.
 - Failure to follow such procedures would result in a delay or denial of FMLA protection.

Content of Medical Certifications

- DOL has adopted two new simplified medical certification forms—one form to be used when the need for leave is for the employee's own 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 that would:
 - Include more specific areas for healthcare providers to provide medical facts;
 - Ask the healthcare provider to provide information on symptoms, doctor visits, and the medical treatment regimen to better enable the employer to make a determination whether the leave qualifies under the FMLA; and
 - Specifically allow doctors to provide a diagnosis, which is not permitted under the current regulations.

Medical Certifications

- The final rule also:
 - Alters the time frame to correct a deficient certification (seven calendar days);
 - Alters an employer's ability to contact the employee's healthcare provider as part of the clarification process (with a HIPAA release the employer-not just the employer's healthcare provider-can contact the employee's healthcare provider for clarification); and
 - Clarifies that employees (or family members) are 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.

Frequency of Recertifications

- 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. 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 that 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. This regulatory change is significant when an employer suspects an employee of FMLA abuse, since under the existing (and final) regulations, employers may not obtain second opinions upon recertification.

Family Member Military Leave Amendments: Background

- Two major provisions:
 - Expanded leave to care for ill or injured service member.
 - Created new leave for a “qualifying exigency” related to military service.

Military Leave Amendments

- There is no independent regulatory framework for military family leave. The legislature adopted the existing FMLA framework.
 - Many provisions differ, however...

Family Member Military Leave Amendments: Leave to Care for Ill or Injured Service Member

- Son, daughter, spouse, parent, or **next of kin** of a covered service member up to **26 weeks** of unpaid leave **in a single 12-month period** to care for service member.
 - “Next of Kin” - like grandparents, for example - did not typically qualify for FMLA leave.
 - 26 weeks more than doubles existing leave time.

Family Member Military Leave Amendments: Leave to Care for Ill or Injured Service Member

- “Covered service member” is defined to include “a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness.”
- A “serious injury or illness” is defined as one incurred in the line of active duty that “may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”
- “Active duty” is defined as duty under a call or order under a provision of law as defined by the United States Code.

Next of Kin

- The rule defines “next of kin” as the nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority:
 - Blood relatives who have been granted legal custody of the service member by court decree or statutory provisions
 - Brothers and sisters
 - Grandparents
 - Aunts and uncles
 - First cousins

Next of Kin

- The covered service member may specifically designate in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave
 - In such circumstances, only that designated next of kin may take FMLA leave to care for the covered service member.
 - When a covered service member does not make such a designation, and there are multiple family members with the same level or relationship to the covered service member, all such family members shall be considered the covered service member's next of kin.
- An employer is entitled to require an employee to provide reasonable documentation of the family relationship.

Tracking 26 Weeks of Leave

- Military leave is tracked in a 12-month period separate from any other 12-month period of FMLA leave
 - Must be designated as “covered service member” leave.
 - However, 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.

26 Weeks for Each Service Member

- An employee may utilize the 26-week entitlement for **each** service member and for **each** illness or injury incurred.
- Therefore, an employee may take 26 weeks of leave in consecutive 12-month periods for family members covered by this provision.

Family Military Leave Certification

- Certification can be requested from an “authorized healthcare provider,” which includes:
 - Department of Defense healthcare providers, including TRICARE network and nonnetwork authorized healthcare providers; and
 - Healthcare providers from the U.S. Department of Veterans Affairs.
- Prototype Certification forms are provided in the new regulations.
- ITOs and ITAs also will constitute sufficient certification

Notice for Family Military Leave

- The standard FMLA notice applies to covered service member 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.

Family Member Military Leave Amendments: Exigency Leave

- Allows an employee to take up to 12 workweeks of leave for a “qualifying exigency” arising out of that employee’s spouse, son, daughter, or parent being on active duty or having been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.

Definition of Exigency

- The regulations identify eight circumstances that qualify:
 - *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 and related 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

Definition of Exigency – cont'd

- *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

Limitations

- Exigency leave is limited to employees who have family members in the:
 - National Guard
 - Reserves
 - Regular Armed Forces or the Reserves who are retired
- Exigency leave is NOT available to employees who have family members in the Regular Armed Forces.
- Additional limitations apply to calls to active duty from the states.

Military Leave and Regular FMLA Leave

- 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 for Exigency Leave

- An employer may require that the employee provide a copy of the family member's active duty orders or other reasonable documentation.
- An employer may only request this information once per family member.

Notice for Exigency Leave

- The standard FMLA notice applies
 - 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.

Questions



Michael J. Ossip
Partner
Philadelphia
215.963.5761
mossip@morganlewis.com



Carrie Gonell
Partner
Irvine
949.399.7160
cgonell@morganlewis.com



Corrie Fischel Conway
Of Counsel
Washington, D.C.
202.739.5081
cconway@morganlewis.com