

January 15, 2009

RE: New FMLA Regulations Require Employers to Update FMLA Policy

The Department of Labor's new FMLA regulations will take effect this Friday, January 16, 2009.

The regulations deal with the new military related leave that Congress enacted in early January 2008. In addition, the regulations clarify certain recurring issues under the FMLA. The clarifying provisions of the new regulations should, for the most part, make it easier for employers to administer the FMLA. The federal FMLA and these new regulations only affect employers with at least fifty employees. Please note that a number of states have separate state FMLA laws that cover employers with fewer employees.

HIGHLIGHTS OF THE NEW FMLA REGULATIONS

Military Family Leave

Employers who are covered by the federal FMLA must now provide eligible employees with two different types of military family leave. Eligible employees who have an immediate family member who is in the National Guard or Reserves can take up to 12 weeks of FMLA job protected leave to use for a "qualifying exigency" arising out of the fact that a family member is on active duty or called to active duty status in support of a contingency operation. A qualifying exigency is broadly defined under the regulations to include short-notice deployment, military events and related activities, childcare and school activities, time to make financial and legal arrangements, counseling, time to spend with a covered family member in the military who is on a short term rest and recuperation leave, post-deployment activities and additional activities by agreement of the employer and employee.

Second, eligible employees who are family members of covered servicemembers are also now eligible to take up to 26 workweeks of leave in a single 12-month period to care for the servicemember with a serious illness or injury incurred in the line of duty while on active duty. The new law extends this particular leave benefit to employees who are the next of kin of the military member even if the military member is not part of the employee's immediate family.

Clarifying Changes to FMLA Regulations

Serious Health Condition. The Department of Labor has provided more detail regarding the definition of what constitutes a serious health condition and has clarified what it means to be under the care of a health care provider. The revised definition should be included in your written policy.

Perfect Attendance Awards. Employers may now deny a perfect attendance award to an employee who does not have perfect attendance because of taking FMLA leave as long as the employer treats employees taking non-FMLA leave in an identical manner. Please note though that an employer may still not be able to deny a perfect attendance award to either an employee on a workers' compensation leave or an employee who qualifies for leave under a state FMLA law. We should review any perfect attendance award programs that you have in place. We can help structure the program to address any restrictions created by workers' compensation and state FMLA laws.

Employer Notification Obligations. Employers are required to provide employees with a general notice about FMLA (we also recommend using a detailed written policy), an eligibility notice, a rights and responsibilities notice and a designation of leave notice. Employers now have five business days from the date an employee requests leave that is covered under the FMLA to provide these various notices to the employee. You can find most of these notices (other than the detailed policy that we should draft for you) online at www.dol.gov.

Employee Notice. Absent unusual circumstances, an employee must now follow the employer's usual and customary call-in procedures for reporting an absence.

Medical Certification Process. An employer's representative now may contact directly an employee's medical provider. However, for the purposes of this type of contact, an employer's representative is limited to a healthcare provider designated by the employer, a human resource professional, a leave administrator or a management official. In no case may the employee's direct supervisor contact the employee's medical provider. Employers still may not ask for information beyond that required under the Department of Labor's revised certification form. This revised certification form now permits (but does not require) the employee's medical provider to include a diagnosis of the employee's health condition as part of the certification. You can find the revised certification form at www.dol.gov or contact us and we can provide you with this form. If an employer deems the medical certification incomplete, the employer must specify in writing what information is lacking and then must give the employee seven days to cure the deficiency.

Fitness For Duty Certifications. Employers may continue to require return to work certifications for employees returning from a leave. The new regulations now

also allow an employer to insist that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Also, where reasonable job safety concerns exist, an employer may also require a return to work certification before an employee may return to work from an intermittent leave.

RECOMMENDATION

Given the number of changes made to the FMLA regulations, all employers who are covered by the federal FMLA should contact us to have your FMLA policy revised. Also, a number of states have separate state FMLA laws that provide employees with additional and/or different benefits. As an example, Maine employers must also deal with a Maine family medical leave law that is much broader in its coverage than the federal law. The Maine law should now either be incorporated into a unified FMLA Policy or Maine employers should maintain two separate written policies: one covering the federal FMLA and one covering the Maine FMLA. Please contact me or Peter Bennett with any questions about the changes to either the federal FMLA or the leave laws in the states in which you do business.

Sincerely,

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