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FMLA Final Regulations Become Effective January 16, 2009

Executive Summary

On November 17, 2008, the U.S. Department of Labor published its Final Rule amending the federal regulations that govern the Family and Medical Leave Act of 1993 ("FMLA"). These regulations will become effective January 16, 2009. The FMLA regulations were last amended in 1995. Consequently, some significant substantive changes and clarifications have been made which employers should quickly become familiar with in order to timely implement any necessary changes in existing applicable leave policies, practices and procedures. The regulations themselves have also been reorganized with the addition of entirely new provisions governing new types of military leave that were signed into law by President Bush in the National Defense Authorization Act for FY 2008. Some of the most significant substantive changes are outlined below.

Reference: Federal Register, Monday November 17, 2008, Volume 73, No. 22, beginning at page 67934,
<http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf>

Detailed Analysis

The substantive changes outlined below are organized by the federal regulation section referenced in the new regulations. Many sections of the current regulations are being incorporated or consolidated into the new regulations. In many instances, the new regulations rearrange the subject matter of the old regulations. Only changes in the current regulations are noted. Importantly, military family leave entitlements have been incorporated into the current FMLA regulations by these amendments, as well. Some of the key regulatory sections applicable to military family leave entitlements are discussed below. But, in general the Department of Labor has attempted to apply the same procedures for FMLA leave wherever possible and applicable to military leave. Here is a summary of the new regulations.

Joint Employer Coverage § 825.106 now addresses the temporary employment agencies and Professional Employer Organizations ("PEOs"). Whether employment agencies are considered to be joint employers with the employers or clients they serve turns on the economic realities of the facts and circumstances

of each situation. Typically employment agencies that provide merely payroll and administrative benefits services for the existing employees of its clients will not be considered joint employers. But, if the agency has the right to hire, fire, assign, direct or control the employees of its client, their benefits or the work they perform, then the agency might be considered a joint employer with its clients.

Eligible Employee § 825.110 now provides that, for purposes of counting an employee's prior service to determine eligibility, prior service is not required to be counted where there has been a continuous break in service of seven years or more. However, there are exceptions where the break in service results from military service obligations and where the breaks are addressed by a written agreement concerning intent to rehire after the break in service. Since the FMLA only requires employers to retain records for three years, the burden of proving eligibility is always on the employee. Employers may choose to consider employment that falls outside the seven-year cap if done uniformly with respect to all employees with similar breaks.

- Time that would have been worked but for the fulfillment of national guard or reserve military obligations counts toward the 12-month and 1250 hour requirements.
- The regulations also clarify that employees may attain FMLA eligibility where they reach 12 months of service while out on a leave.

Determining Whether 50 Employees are Employed Within 75 Miles § 825.111

- The worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location.

Qualifying Reasons for Leave, General Rule § 825.112

- This section has been reorganized with modifications to reflect new military leave entitlements.

Serious Health Condition § 825.113

- The phrase "resulting from stress" has been removed to clarify that a mental illness can be considered a serious health condition, regardless of its cause.

Continuing Treatment § 825.115

- In subsection (a), the word "full" has been added to indicate the "more than three calendar days requirement" cannot be met by partial days.
- Subsection (a)(1)'s requirement that two treatments occur within 30 days, is clarified to state that the 30-day period begins on the first day of incapacity.

- The first visit, in the case of 2 treatments under (a)(1), or the only visit, under (a)(2), must occur within seven days of incapacity.
- "Treatment" must be an in-person visit to a health care provider for examination, evaluation or specific treatment, it does not include phone calls, letters, emails or text messages.
- So that employees cannot meet the requirement of 2 visits within 30-days by simply scheduling follow-up visits simply to meet the test, the regulations clarify that the health care provider, not the employee, must make the determination of whether a second visit is needed during the 30-day period.
- The "extenuating circumstances" exception to the 30-day rule has been defined as circumstances that prevent the follow-up visit from occurring as planned by the health care provider.
- "Periodic treatment" as used in the definition of a "chronic serious health condition" means treatment at least twice a year.

Definitions of Spouse, Parent, Son or Daughter, etc § 825.122

- "Parent" can be biological, adoptive, step, foster or an individual who stood *in loco parentis* to the employee.
- In order for leave to care for an adult child to be covered, the adult child must be incapable of self-care because of a disability "at the time the leave is to commence."
- Adds definitions unique to military family leave provisions, including "next of kin of a covered service member."

Unable to Perform the Functions of the Position § 825.123

- Clarifies certification is sufficient if it specifies what functions of the position the employee is unable to perform such that an employer can determine whether the employee is unable to work at all or is unable to perform any on of the essential functions of the employee's position.

Definition of Health Care Provider § 825.125

- Physician assistants have been added.

Leave Because of Qualifying Exigency § 825.126, regarding active duty or a call to active duty in the military.

- Applies to "son or daughter" of any age.
- Sets forth a specific and exclusive list of the reasons eligible employees can take leave because of a qualifying exigency, divided into seven general categories:

(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; and (7) Post-deployment activities.

An eighth catch-all category of "Additional activities" is also added

for other types of qualifying exigencies the employer and employee agree are covered.

Leave to Care for a Covered Servicemember with a Serious Injury or Illness § 825.127

- Serious illness or injury incurred in the line of active duty for which the servicemember is (1) undergoing medical treatment, recuperation or therapy; or (2) otherwise in outpatient status, or (3) otherwise on the temporary disability retired list.
- "Covered servicemembers" do not include former members of the military or those on the permanent disability and retired list.
- "Next of kin" defined as the servicemember's nearest blood relative, other than the servicemember's spouse, parent, son or daughter, in the following order of priority: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the servicemember specifically designated in writing another blood relative. Employers may request reasonable documentation of the familial relationship.
- No more than 26 workweeks of leave in a "single 12-month period"
 - Limit is applied per-service member and per-injury entitlement, meaning an employee may take 26 workweeks of leave to care for one covered servicemember in a "single 12-month period" and then take another 26 workweeks of leave in a different "single 12-month period" to care for another covered service member or the same covered service member who suffers from a subsequent injury or illness.
 - 12-month period begins on the first day the eligible employee takes military caregiver leave.
 - Employers should designate leave that qualifies as both military caregiver leave and leave taken to care for a family member with a serious health condition.
 - Eligible employees are entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a single 12-month period.

Amount of Leave 825.200

- If an employee needs less than a full week of FMLA leave, and a holiday falls within that partial week of leave, the hours the employee does not work on the holiday cannot be counted against the employee's leave entitlement if the employee would not otherwise have been required to report for work that day.

Intermittent or Reduced Leave Schedule 825.202

- Deleted "(as distinguished from voluntary treatments and procedures)" and the word "related" from the phrase "treatment of a related serious health condition."

Scheduling of Intermittent or Reduced Schedule Leave 825.203

- Confirmed statutory requirement that employee must make "a reasonable effort" to schedule such treatment so as not to disrupt unduly the employer's operations.

Increments of FMLA Leave for Intermittent or Reduced Schedule Leave § 825.205

- The "employer must account for the intermittent or reduced schedule leave under FMLA "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than on hour."
 - This emphasizes that just because an employer's payroll system is capable of using a smaller increment the employer is not required to do so.
- Calculation of Leave
 - The method of determining the amount of FMLA leave taken is to compare the number of hours actually worked by the employee in a FMLA workweek to the number of hours the employee would have worked in that workweek, but for the FMLA leave taken.
 - Where an employee's hours fluctuate such that a "normal" schedule cannot be determined, an employer must look to the average worked each week in the prior 12 months (as opposed to 12 weeks).
 - Missed overtime must be counted against the employee's FMLA leave if the employee would otherwise be required to report for duty, but for the taking of FMLA leave. However, employers are prohibited from discriminating against FMLA takers by mandatory assignment of overtime to them in order to deplete FMLA entitlement, while allowing other employees to volunteer for overtime.

Substitution of Paid Leave § 825.207

- Employers may apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave, only limited by the terms and conditions of the employer's applicable policies.
- Employers must notify employees of any additional requirement for the use of paid leave, with the required FMLA rights and responsibilities notice.

Equivalent Position § 825.215

- An employer may disqualify an employee from a bonus or other payment (including a pay increase) based on the

achievement of a specified goal, such as hours worked, products sold or perfect attendance, where the employee has not met the goal due to FMLA leave unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights § 825.220

- Employees and employers can now voluntarily settle or release FMLA claims based on past employer conduct without the approval of the Department or a court.
- Voluntary acceptance of a light duty position, does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held when the FMLA leave commenced, or an equivalent position, until the end of the 12-month period that the employer uses to calculate FMLA leave.
- The time an employee works in a light duty assignment does not count as FMLA leave.

Employer Notice Requirements § 825.300

- General Notice
 - Posting requirement may be met by posting electronically, provided all employees and applicants have access.
 - Employers that do not have employee handbooks or other written materials concerning benefits and leave that are distributed to all employees must provide general notice of FMLA rights to each employee when the employee is hired.
 - Penalties for willful violations of the posting requirements have increased from \$100 to \$110.
- Eligibility Notice
 - The time frame for providing eligibility notice has increased from two to five business days of the employee's request for leave or of the employer acquiring knowledge that the leave may be for a FMLA-qualifying reason.
 - The notification that an employee is ineligible for FMLA leave may be limited to listing any one of the potential reasons why an employee fails to meet the eligibility requirements.
- Rights and Responsibilities Notice
 - Required at the same time as eligibility notice, if eligible.
 - Requires employer to notify the employee of any changes within 5 days of the first notice.
 - Must indicate the method used for establishing the 12-month period for FMLA entitlement, or in the case of military caregiver leave, the start date of the "single 12-month period."
 - Must include in the eligibility notice an explanation of

conditions applicable to the use of paid leave that runs concurrently with unpaid FMLA. This requirement may be met by referencing existing, employee-accessible copies of such policies.

- Electronic provision of notice is permissible provided the employer can demonstrate the employee has access to the information (such as being able to access employer-provided electronic information if already on leave).
- Designation Notice
 - If employer requires that the fitness-for-duty certification specifically address the employer's ability to perform the essential functions of the employee's job, the employer must provide the employee with a list of the essential functions with the designation notice, and the employer must also indicate in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions. If fitness-for-duty certification requirement is in handbook, then this notice may be oral.
 - Employer must notify employee within 5 days of when the employer has sufficient information to determine whether the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances.
 - Only one designation is required for each FMLA-qualifying reason per leave year.
 - Employer must inform the employee of the number of hours counted against the FMLA leave entitlement only upon employee request and no more often than every 30 days if FMLA leave was taken during the period. It may be orally first with written follow-up by the next pay day.
 - Notification of hours counted against FMLA leave may be done on pay stubs.

Employer Designation of FMLA Leave § 825.301

- "Provisional" designation has been removed from the regulations to eliminate uncertainty as to whether provisionally designated leaves are protected. Only leave that is ultimately determined to be FMLA-qualifying is protected, regardless of whether it was "provisionally" designated or treated as FMLA or not.

Employee Notice Requirements for Foreseeable FMLA Leave § 825.302

- When an employee gives less than 30 days notice of a foreseeable leave, the employee must respond to a request from the employer to explain why it was not practicable to give the 30 days notice.

Employee Notice Requirement for Unforeseeable FMLA Leave § 825.303

- It should generally be practicable for employees to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.
- Employees seeking leave for a previously certified FMLA condition, covered servicemember's serious injury or illness, or qualifying exigency must inform the employer that the leave is for a condition, covered servicemember's serious injury or illness, or qualifying exigency that was previously certified or for which the employee has previously taken FMLA leave.
- Calling in "sick" without providing additional information, is not sufficient notice of the need for FMLA leave.

Certification, General Rule § 825.305

- Employers have 5 days after employee gives notice of need for leave (or if need unforeseen, then 5 days after leave commenced) to request certification.
- Employees must respond to all requests for certification within 15 days, unless it is not practicable under the circumstances despite the employee's diligent, good faith efforts.
- Sets forth a procedure for curing deficient employee certifications, giving an employee seven calendar days to cure upon the employer providing written notice of what additional information is necessary.

Content of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member § 825.306

- WH-380 has been revised into two separate forms, one for employee's own serious health condition and one for the serious health condition of family member.

Authentication and Clarification of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member § 825.307

- Sets forth the process by which an employer may contact an employee's health care provider to clarify certification.
- HIPAA requirements must be satisfied whenever individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider.
- Employer representative contacting the employee's health care provider must be either a health care practitioner, a human resources professional, a leave administrator, or a management official, but in no case may the employer representative be the employee's direct supervisor.

Recertifications for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member § 825.308

- No more frequently than every 30 days and only in connection with an absence. If minimum duration of incapacity is more than 30 days, then must wait until minimum duration expires. However, if serious health condition is expected to last an extended period or if duration is "indefinite" or "unknown," then the employer can require recertification every six months.

Certification for Leave Taken Because of a Qualifying Exigency § 825.309

- Each time leave is first taken for one of the qualifying exigencies, an employer may require certification.
- Form WH-384 has been adopted for use in obtaining certification.
- No recertification permitted.

Certification for Leave Taken to Care for a Covered Service Member (Military Caregiver Leave) § 825.310

- Form WH-385 has been adopted for use in obtaining certification.
- Must come from specific DOD/VA authorized health care provider.
- No recertification permitted.

Fitness-for-Duty Certification § 825.312

- Employer may require that fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job.
- If fitness-for-duty certification will be required the employee must be advised when given designation notice.
- Can be required up to once every 30 days if an employee has used intermittent or reduced schedule leave during the 30-day period and if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.

Interaction with Federal and State anti-discrimination laws § 825.702

- Highlights that pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) a returning service member would be entitled to FMLA leave if the hours that he or she would have worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold.

ACTION STEPS FOR EMPLOYERS

The new FMLA regulations mean that all covered employers will need to carefully review and revise their FMLA policies, procedures and forms between now and January 16, 2009. Consider these steps:

1. Review existing FMLA Policy for compliance with the new regulations.
2. Review and revise current FMLA forms for compliance with the new sample forms contained in the appendix of the new regulations.
3. Print new forms and discard the outdated forms.
4. Check to assure all appropriate postings are current.
5. Download and copy the new regulations and forms to serve as a management reference.
6. Educate and train all management and supervisory employees who are involved in FMLA administration on the new regulations. (Remember, there is personal liability under the FMLA for management employees who violate employee rights).
7. Revise Employee Handbook and Intranet FMLA references to comply with the new regulations.
8. Select and FMLA Action Team to oversee the timely implementation of the new regulations.

Should you have any questions, or need assistance in understanding the new FMLA regulations please do not hesitate to contact your local counsel or Steve Lyman, John Ryan, Kevin Stella, John Bumgarner, Dana Stutzman, Jennifer Richter or Kevin Gfell at Hall, Render, Killian, Heath & Lyman, P.C. at 317/633-4884.

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