

NEW FMLA REGULATIONS ISSUED BY THE U.S. DEPARTMENT OF LABOR

On January 16, 2009, the Family and Medical Leave Act (“FMLA”) regulations issued U.S. Department of Labor went into effect. This is the first major update since the FMLA was enacted over 15 years ago. Although the basic rights have not changed, Congress amended the FMLA to provide new leave rights relating to military family leave and also updated and modified certain other FMLA regulations. A summary of the key items in the new regulations is provided below.

Serious Injury or Illness of Covered Service Member

The changes to the FMLA authorize up to 26 weeks of leave for certain family members to care for seriously ill or injured military personnel. The provision is not limited to just immediate family members. Rather, an employee eligible for this type of leave includes next of kin as well as immediate family members. The serious injury or illness provision is different from the FMLA’s serious health condition provision. A serious injury or illness is one that “may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating.” The regulations clearly state that an employee cannot combine the standard 12 weeks of FMLA leave with the 26 weeks of service member leave.

Qualifying Exigency for Military Personnel

The changes to this provision include up to 12 weeks of leave in a 12-month period due to a “qualifying exigency” relating to an employee’s immediate family member being on active duty, or who has been notified of an impending call to active duty, in support of a contingency operation. This type of leave does apply if the service member is a member of the regular armed forces – it applies only to members of the reserves or the retired forces.

According to the statute, a “qualifying exigency” includes: (1) any issue that arises from receiving short notice of deployment (seven or less calendar days of deployment), where leave can be used during the seven calendar days; (2) attendance at official ceremonies, programs, family support programs, or informational briefings; (3) arrangements of childcare or attendance at certain school activities; (4) to make or update legal or financial arrangements; (5) to attend counseling; (6) to spend time with a military service member on short-term rest and recuperation (limit of five days); and (7) post-deployment official programs, or issues relating to death. The need to take leave for one or more of the above reasons must be related to the service member’s active duty or call to active duty.

Serious Health Condition and Continuing Treatment

Under the current regulations, a serious health condition may be established by a three-day period of incapacity that is followed by subsequent treatment. However, under the new regulations, the subsequent treatment needs to occur within specific timeframes. If the subsequent treatment consists of two or more treatments, the treatment must occur within 30 days of the first day of incapacity. If the subsequent treatment consists of one visit followed by treatment, the visit (which must be in person) must occur within seven days of the first day of incapacity.

Certification/Fitness for Duty

There are several changes in regard to an employer's right to request certification under the FMLA. This includes the ability of the employer to request additional certifications at specific intervals. The new rules have rules regarding essential functions and serious health conditions. Specifically, they permit the employer to include information in the certification form directed to the employee's essential functions and the ability of the employee to perform those essential functions. This is very significant because a "serious health condition" is defined to include a three-day period of incapacity, which may include an inability to work. Under the existing regulations, there is no way to evaluate a health care provider's general assertion of incapacity. But with the new regulations, there will be an ability for the employer to request specific information relating to the alleged incapacity, through an evaluation of the employee's ability to perform the essential functions of his or her job. The fitness for duty form can now also request information about the employee's ability to perform the essential functions of his or her job.

Doctor Consent

One problem employers have had with collecting needed information was the prohibition on anyone other than the employer's medical professional contacting the employee's health care provider. This has changed. Under the new regulations, other individuals are also authorized to contact the employee's health care provider for authentication and clarification, including a human resources professional. Although a management representative may contact the employee's health care provider, this may not be the employee's direct supervisor.

New Forms

The Department of Labor has issued several new forms that fully comply with the new FMLA regulations. The new forms are not required to be used but will likely prove to be very helpful to employers. The forms are available at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.