

## BUSINESS LAW NOTES

### FAMILY AND MEDICAL LEAVE ACT CHANGES EFFECTIVE JANUARY 16th

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The FMLA allows an eligible employee up to 12 weeks of unpaid leave during any 12-month period to care for a new-born or sick child, a spouse, or a parent, or to recover from the employee's own serious health condition. New regulations clarify the rights and responsibilities of employers and employees under the FMLA. The following is a brief summary of these changes.

#### Definitions

The new regulations retain the six separate definitions of what constitutes a "*serious health condition*". However, there are two clarifications of note. One definition of "*serious health condition*" is three consecutive full days of incapacity requiring two visits to a health care provider. Under the new regulations, an employee must make the initial visit within seven days of the day the incapacity begins, and both visits must occur within 30 days of the period of incapacity.

Another definition of "*serious health condition*" involves a period of incapacity or treatment for a chronic serious health condition that requires "*periodic treatments*." Under the new regulations, the phrase "*periodic treatments*" means two or more treatments per year by a health care provider.

Under the new regulations, a "*husband*" may take FMLA leave to care for his spouse who is incapacitated due to pregnancy. The old regulations used the term "*father*." The change from "*father*" to "*husband*" clarifies that leave is available only to spouses.

#### Employer Notice Requirements

The FMLA notice provision requires employers to provide employees with four types of notice:

General Notice. Employers must distribute to employees the same general notice that they are required to post. This notice may be included in the **employee handbook** or distributed to employees when they are hired.

Eligibility Notice. Employers must provide an employee with a notice of eligibility or ineligibility to take FMLA leave within five business days (up from two days under the old regulations) after the employee either requests leave or the employer learns that the leave may be FMLA-qualifying.

Rights and Responsibilities Notice. Employers must furnish a "rights and responsibilities" notice each time the eligibility notice is provided.

Employers now have five business days to notify an

employee that leave has (or has not) been designated as FMLA leave once the employer has sufficient information to make a determination.

The Department of Labor (DOL) has also created new prototype notices which allow for electronic posting and distribution of some notices.

#### Employee Notice Requirements

Employees must follow their employer's normal and customary call-in procedures to report an absence, unless there are unusual circumstances. As under the old regulations, an employee is not required to expressly assert his or her FMLA rights. However, if the employee is seeking leave for a previously-certified FMLA condition, the employee now must reference the particular reason for his or her need for FMLA leave.

#### Penalties for Employer's Failure to Comply with Notice Requirements

The new regulations remove a penalty provision of the FMLA that required an employer who failed to comply with the notice requirements to provide additional FMLA leave. However, if an employer fails to follow the notice requirements or provides incorrect information, the employer may be liable for individual harm to an employee caused by the employer's failure.

#### Medical Certification (Documentation) of the Need for Leave

Employers may require an employee to provide certification from a health care provider of the need for FMLA leave due to a serious health condition. Under the new regulations:

- ❑ Employers now have five (instead of two) business days to request certification after receiving notice of an employee's need for FMLA leave.
- ❑ Employers must give an employee 15 days to provide certification and then additional time if the employee cannot provide a certification within 15 days despite diligent, good-faith efforts.
- ❑ An employer does not have to notify an employee if certification is not received. However, if an employer receives deficient or incomplete certification, the employer must notify the employee in writing, explain what additional information is necessary, and give the employee seven days to provide the additional information.
- ❑ If an employee fails to provide sufficient certification, an employer may deny FMLA leave until receiving proper

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certification.

- ❑ Employers may request a new medical certification each year for medical conditions that last longer than one year.
- ❑ Employers also may request a recertification for an absence every 30 days. If the initial certification specifies a minimum period of incapacity of more than 30 days, the employer may not request recertification until that minimum period has passed. However, the new regulations allow an employer to request recertification of an ongoing condition every six months, in any event. Conditions for which the duration is indicated as "lifetime," "indefinite," or "unknown" would fall under the six-month provision.
- ❑ For long-term serious health conditions, an employer may provide the health care provider with information about the employee's absence record to determine whether such absences are consistent with the employee's condition.

**Employer Contact with Health Care Providers**

An employer's representative, who is a health care provider, human resource professional, leave administrator, or management official, may contact an employee's health care provider directly to obtain information required for certification (but only such information). However, an employee's direct supervisor is prohibited from making such contact. An employee may not be required to provide an authorization or waiver permitting the employer to contact the employee's health care provider directly.

**Fitness for Duty Certification**

Employers may require a fitness-for-duty certification before an employee returns to work and may further require that the certification confirm that the employee is able to perform the listed essential functions of the employee's job. The employer must inform the employee of this requirement when notifying the employee of the FMLA leave designation. If the leave is intermittent and safety concerns exist, the employer may require certification before the employee returns from intermittent leave, if this requirement is uniformly applied to all types of leave.

**Substitution of Paid Leave**

Employees may substitute accrued paid leave for FMLA leave but must follow the terms and conditions of their employer's paid leave policy [should be stated in the **Employee Handbook**]. Employers must notify employees of any additional requirements to use paid leave, along with the rights and responsibilities notice.

**"Light Duty" Assignments**

Time spent on light duty does not count against FMLA

leave. Employers may not require employees to accept light duty work instead of taking FMLA leave. Acceptance of a light duty assignment does not waive FMLA rights. However, the right to be restored to the same or an equivalent position expires when the 12-month FMLA period ends.

**Eligibility, Break in Service**

To be eligible for FMLA leave, an employee must have worked for the employer for 12 months. The new regulations allow for up to a seven-year gap in service when calculating the 12-month employment requirement. The seven-year maximum does not apply to breaks resulting from military service or when a written agreement exists concerning the employer's intention to rehire the employee after the break in service.

**Employee's Worksite**

Covered employers are those that employ at least 50 people within a 75-mile radius. In counting employees, the worksite of a jointly employed employee is generally the office from which the employee is assigned or to which the employee reports. If the employee has physically worked at a different location for at least one year, then the physical place where the employee works is the worksite. An employee's personal residence is not a worksite.

**Waiver of FMLA Rights**

Employees may waive any FMLA claims based on past conduct by an employer but may not waive future Employees may settle or release FMLA claims without DOL or court approval.

**Military Provisions**

The new regulations implement the National Defense Authorization Act of 2008 (NDAA). The NDAA provides that qualified family members of certain injured military personnel are entitled to up to 26 weeks (not 12 weeks) of FMLA leave to care for the injured person.

Also, family members of military personnel may take FMLA leave to manage their affairs in the event of "qualifying exigencies" arising from active duty or the call to active duty. The new regulations define "qualifying exigencies" to include short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities where the employer and employee agree to the leave.

**NOTE: The FMLA changes that become effective January 16, 2010 constitute just one of several areas where there are new employment law provisions that are effective in 2010. Employers should act now to bring their employment policy handbooks up-to-date for 2010.**