

The New Family and Medical Leave Act Regulations – Effective January 16, 2009

BY RACHAEL PADGETT

Last November, the U.S. Department of Labor (“DOL”) issued final regulations under the Family and Medical Leave Act (“FMLA”). These regulations mark the first comprehensive changes made to the FMLA since its enactment in 1993. The regulations provide additional leave benefits to family members of individuals in the Armed Forces. They also update and clarify existing portions of the FMLA. The regulations go into effect Friday, January 16, 2009.

Since 1993, family and medical leave has been available to eligible employees to attend to their own serious health condition, the serious health condition of a spouse, child or parent, or for the birth and care of their newborn or adopted child. The new regulations expand the scope of leave available to eligible employees and make several changes to existing requirements.

MILITARY FAMILY LEAVE PROVISIONS

Military Caregiver Leave This amendment to the FMLA expands FMLA leave to cover any eligible employee who is a spouse, son, daughter, parent, or “next of kin” of a covered servicemember. It allows the eligible employee to take up to 26 weeks of leave in a “single 12-month period” to care for a covered servicemember with a serious illness or injury incurred in the line of duty. A “covered servicemember” is a member of the Armed Forces, including a member of the National Guard or Reserves. The 26 weeks of leave is cumulative of, and not in addition to, FMLA leave taken for any other reason.

The definition of “son or daughter” under the military family leave provisions covers adult children, unlike the other provisions of the FMLA, which restrict the definition to minor children or those incapable of self-care. “Next of kin” is defined as “the nearest blood relative” of a covered servicemember.

“Qualifying Exigency” Leave This amendment allows eligible employees of covered employers to take up to 12 weeks leave for any “qualifying exigency” arising out of the fact that a spouse, child, or parent is on active duty with the Reserves or National Guard or has been notified of an impending federal call or order to active duty. Again, the 12 weeks allowed is cumulative of, and not in addition to, FMLA leave taken for any other reason. Qualifying exigency leave does not extend to family members of those in the Regular Armed Forces.

The final rule defines “qualifying exigency” by providing a specific and exclusive list of reasons for which an eligible employee can take leave because of a qualifying exigency. These reasons are divided into seven general categories:



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(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, (7) post-deployment activities, and (8) additional activities.

ADDITIONAL REGULATORY PROVISIONS

The new regulations are wide-ranging and detailed. Some of the most significant changes concern the employee's notice to the employer of his need for leave, the employer's notice of its requirements for the employee's leave to qualify under the FMLA, employer contact with the employee's health care provider, and handling of bonuses and other compensation.

Changes in Notification Procedures Under the old regulations, employees were required to give 30-days' notice for foreseeable FMLA leave, unless 30-days' notice was not practicable. The new regulations retain the 30-day notice requirement; however, in the event the employee does not provide 30-days' notice, the new regulations permit an employer to ask the employee to explain why providing 30-days' notice was not practicable.

With regard to unforeseeable FMLA leave, the old regulations had been interpreted to allow employees up to two business days after an absence to provide notice to their employer of their need for FMLA leave. The new regulations clarify that when an employee first becomes aware of the need for FMLA leave less than 30 days in advance of the leave, "it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day." The new regulations also clarify that an employer may require employees needing FMLA leave to provide notice through the employer's usual and customary call-in procedures for reporting an absence, except in unusual circumstances.

Employers' notice requirements have also been revised. Under the old regulations, employers generally had two business days after learning of the employee's FMLA qualifying condition to notify the employee that their leave would be designated FMLA leave. The new regulations extend the deadline for notifying employees of the FMLA designation to five days. The DOL has imposed additional notice requirements on employers in an "attempt to better inform employees and allow for better exchange of information between employers and employees."

Changes to the Medical Certification Process The old regulations prohibited employers from having direct contact with an employee's health care provider when attempting to verify that the health care provider completed and/or authorized the certification, or to clarify illegible handwriting or the meaning of a response on the certification. The new regulations eliminate this prohibition,



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allowing an employer to contact an employee's health care provider directly through a human resources professional, leave administrator, management official, or a health care provider. However, the employee's immediate supervisor may not contact the employee's health care provider. In addition, if authentication or verification entails the disclosure of individually-identifiable health information, the employee must have completed a HIPAA authorization with his health care provider.

Changes Concerning Bonuses and Other Compensation The revised regulations continue to specify that returning employees are entitled to any unconditional, "lock-step", or cost-of-living pay increases. Returning employees are also entitled to pay increases conditioned on seniority, length of service, or work performed to the same extent that employees on non-FMLA leave received those pay increases. But the new regulations clarify that bonuses or other compensation based on hours worked, products sold or perfect attendance can be denied employees who have not met these goals because they have taken FMLA leave, as long as employees who have taken non-FMLA leave are treated in the same manner.

Changes Concerning Intermittent Leave Previously, employees taking intermittent leave for planned medical treatment were required to "attempt to schedule their leave so as not to disrupt the employer's operations." The new regulations increase the employee's responsibility, to make a "reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations."

New Forms Finally, the Department of Labor has updated the forms for Certification of an Employee's Serious Health Condition; Certification of a Family Member's Serious Health Condition; Notice of Employee Eligibility, Rights and Responsibilities Under the FMLA; and Designation Notice. It has also developed forms for Certification of Qualifying Exigency for Military Family Leave and Certification for Serious Injury of Illness of Covered Servicemember's Leave. These forms are available at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.



AUSTIN OFFICE

600 Congress Avenue
Suite 2100

Austin, Texas 78701

512.495.6000

fax 512.495.6093

HOUSTON OFFICE

3200 One Houston Center
1221 McKinney Street

Houston, Texas 77010

713.615.8500

fax 713.615.8585

www.mcginnislaw.com