

New FMLA Regulations

On November 17, 2008, the Department of Labor issued new, final regulations interpreting the Family and Medical Leave Act (FMLA). The FMLA, originally passed in 1994, allows an employee to take unpaid leave due to a serious health condition that makes the employee unable to perform his or her job or to care for a sick family member or to care for a new son or daughter (including by birth, adoption or foster care). In an effort to combat abuse, the new regulations tighten the requirements for FMLA leave. The new regulations also address the February 2008 amendment to the FMLA expanding the scope of leave to include military families. The new regulations are over 200 pages long and may be downloaded at:

http://www.huddlestonbolen.com/email_newsletter/december2008/E8-26577.pdf

What is Changing?

In this newsletter we summarize the changes in Employer and Employee Notice Requirements, as well as the definition of a "Serious Health Condition" contained in the regulations. Next month, we will cover other changes, including those to military family leave. The new regulations become effective on January 16, 2009, so Employers should utilize the next month to provide training on the new regulations, establish procedures, and update policies for compliance in advance.

Employee Notice Requirements

The new regulations require employees to have greater responsibility in their FMLA leave requests.

Timing. The new regulations retain the existing requirement that employees provide at least 30 days' advance notice if the need for leave is foreseeable, and provide notice as soon as practicable if the need for leave is not foreseeable. The new regulations specify that "as soon as practicable" generally means the same or the next business day. If the employee fails to provide timely notice without reasonable excuse, or fails to follow the employer's usual notice and procedural requirements for calling in absences or requesting leave, the regulations now permit the employer to delay the leave.

Content. The new regulations specify that the employee must provide adequate information to enable the employer to determine whether the leave is FMLA-qualifying. Calling in sick without providing additional information is insufficient. If the employee fails to respond to the employer's reasonable inquiries for further information, leave may be denied.

Employer Notice Requirements

The new regulations substantially change the requirements for employers to provide notice to employees. They also contain sample notices that employers may use.

General Notice. The general notice of FMLA rights may now be posted electronically, provided all employees and applicants have access. Paper posting and employee handbook notices remain acceptable, as well.

Eligibility Notice and Rights and Responsibilities Notice. After receiving notice of an employee's request for leave, employers have five business days (rather than the current two business days) to notify the employee of his or her eligibility for leave. If the employee is not eligible, the notice must state at least one reason why (e.g., lack of 12 months' service or 1,250 hours; not employed at a site with 50 or more employees within 75 miles; exhausted 12 weeks of leave). Simultaneously, the employer must provide a notice of rights and responsibilities.

Designation Notice. Once the employer has enough information to determine if the leave is FMLA-qualifying, it must notify the employee of the designation within five business days (rather than the current two business days). If the employer will require a fitness-for-duty certification to return to work, it must provide notice of that requirement with the designation notice. A list of essential job functions also must be supplied if the employer will require certification of the employee's ability to perform the essential job functions.

Increased liability and penalties. The regulations state that failure to provide the required notice can be considered "interference" with the employee's FMLA rights. The new regulations also expand the penalties for interference claims to "any other relief tailored to the harm suffered."

Serious Health Condition

The new regulations retain the same broad definition of a serious health condition. For a serious health condition involving continuing treatment by a health care provider (as opposed to in-patient care), however, the new regulations require the employee (or sick family member) to make an in-person treatment visit with a health care provider within seven days of the first day of incapacity. The current regulations do not contain such a time limit. Also, to qualify as a chronic serious health condition (which often is the basis for intermittent leave), the condition must require at least two visits to a health care provider per year.

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Scott K. Sheets – Huntington, WV • (304) 529-6181

Kevin A. Nelson – Charleston, WV • (304) 344-9869

James E. Cleveland III – Ashland, KY • (606) 329-8771

Kathiejane (K.J.) Oehler – Louisville, KY • (502) 339-8188

Ashley W. French – Charleston, WV • (304) 344-9869