

FMLA Regulations Effective January 16, 2009

It is essential that front-line supervisors and management be trained about their general duties under the Family Medical Leave Act (“FMLA”), as they are often the first to learn about a potential serious health condition. FMLA remains a rule-driven law, and while complicated at times, supervisors need to be able to spot FMLA issues in order to ensure compliance and minimize the risk of legal liability

This newsletter is the second in a series of two newsletters discussing changes to the FMLA. The previous issue discussed topics such as “Employer and Employee Notice Requirements” and the definition of a “Serious Health Condition”. The following is a summary of additional important changes to the FMLA:

Medical Certification. The new regulations change the timing, content, mechanics and consequences of noncompliance for the medical certification.

Timing. The new regulations increase the employer’s time frame for requesting certification from two to five days after the employee gives notice of the need for leave (or the date the employee begins leave if it is unforeseeable). As under former regulations, employees must provide the completed certification form within 15 calendar days unless it is not practicable despite the employee’s diligent, good-faith efforts.

Content. The content of the certification is changed significantly. The certification now must include the health care provider’s specialization, medical facts regarding the patient’s condition, and whether intermittent or reduced schedule leave is medically necessary. The new regulations include sample certification forms.

Incomplete and Insufficient Certifications. If the employee provides an incomplete or insufficient certification, the employer must notify the employee, in writing, of the deficiency and give the employee seven calendar days to cure it. Leave may be denied if the employee fails to cure the deficiency.

Authentication and Clarification. In a significant change from former rules, the new regulations expand the personnel who may contact the employee’s health care provider directly to authenticate the certification form or to obtain clarification. The employer’s health care provider, HR professional, leave administrator, or management official (but not the employee’s direct supervisor) may now directly contact the employee’s health care provider. The former regulations only allowed the employer’s health care provider to contact the employee’s health care provider.

Production and Attendance Bonuses. Under the former regulations, a FMLA absence could not disqualify an employee from receiving a perfect attendance award. This has changed. The new regulations provide that bonuses or payments that are based on achievement of a specific goal including perfect attendance, hours worked, or products sold may be denied if the employee has not met the goal due to FMLA leave. The caveat is that the employer treat employees on non-FMLA leave the same way. For example, if paid vacation does not disqualify an employee from receiving a perfect attendance award, paid vacation used during FMLA leave cannot be considered a disqualifying absence. However, employers still cannot hold FMLA absences against an employee under its attendance control policy.

Release of FMLA Claims. The new regulations expressly permit employees to settle and release past actual or potential FMLA claims without approval of the DOL or a court. This resolves a split in the federal courts, some of which had held that FMLA claims could not be privately settled or released without DOL or court approval.

Military Family Leave. The FMLA was amended in February 2008 to provide leave to employees who provide care for military service members with a serious injury or illness and because of qualifying exigencies relating to military service. An eligible employee is entitled to 26 work weeks of leave to care for a covered service member in a “single 12-month period,” regardless of the method used by the employer to determine the employee’s 12 work weeks of leave entitlement for other FMLA-qualifying reasons. The employee is entitled in that period to no more than 12 weeks of leave for any of the other types of FMLA leave (i.e. birth of a child, serious health condition, etc.).

Military Caregiver Leave is available to a wide range of family members – spouses, children, parents, and those “next of kin” of the covered service member. The term “next of kin” is new to the FMLA, and the term does not apply to the other types of FMLA leave. It means the nearest blood relative of the service member, expanding the definition to include siblings, grandparents, aunts and uncles, and first cousins.

Employers may require an appropriate certification completed by a health care provider, and the DOL has developed an optional form which may be used for this purpose. While employers may use their own forms, they must not require information beyond what is specified in the regulations. Unlike other types of FMLA leave, you are not permitted to request second and third opinions nor to require recertification.

Qualifying Exigency Leave. Qualifying Exigency Leave is a new type of FMLA leave (also created in February 2008, but never implemented until now) which the employee may take to handle various non-medical exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on active duty or on call to active duty status. As with most other types of FMLA leave, it is subject to the usual maximum of 12-weeks of total FMLA leave in a year. The regulations list eight types of “qualifying exigencies” which may qualify for this type of FMLA leave:

Short-notice deployment: leave to address any issue that arises from an impending call or order to active duty in support of a contingency operation seven days or less prior to the date of deployment;

Military events and related activities: leave to attend any military ceremony, program, or event related to the active duty or call to active duty status or to attend certain family support or assistance programs and informational briefings;

Childcare and school activities: leave to arrange or provide for childcare or school-related activities;

Financial and legal arrangements: leave to make or update various financial or legal arrangements;

Counseling: leave to attend counseling (by someone other than a health care provider) when necessary as a result of the active duty or call to active duty status;

Rest and recuperation: leave to spend time with a covered military member who is on short-term, temporary, rest-and-recuperation leave during the period of deployment (up to five days);

Post-deployment activities: leave to attend arrival ceremonies (including funeral or memorial services), reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following active duty status; and

Additional activities: leave to address other events arising from military duty agreed upon between employer and employee.

An employer may require a copy of the covered military member's active duty orders or other military documentation to support the qualifying exigency, but only once. An employer may also require the employee to complete an appropriate certification form setting forth various details of such leave, such as the one developed by the DOL and available in the regulations.

Serious Health Condition

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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

***REMINDER: ADA Changes went into effect on
January 1, 2009***