The 2009 Amendments to the Federal Family and Medical Leave Act Regulations

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INTRODUCTION

On November 17, 2008, the U.S. Department of Labor published amended Family and Medical Leave Act (FMLA) regulations.[1] The complete publication included nearly 285 pages of preamble and explanatory material, approximately 90 pages of actual regulations, and multiple appendices. The new regulations took effect on January 16, 2009. The DOL has a "Final Rule" website available for downloading the regulations and related information: http://www.dol.gov/esa/whd/fmla/finalrule.htm. In addition, the Connecticut Department of Labor has issued a publication containing a review of the federal changes and, where applicable, the corresponding proposed changes to the state law. That publication can be found at the following address: http://www.ctdol.state.ct.us/wgwkstnd/fmla/FMLA-Guidance.pdf.

TOP CHANGES LIST

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(1) *Separate* medical certification forms for:

(a) employee's serious health condition

(b) family member's serious health condition

(c) military servicemember serious health condition

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(3) Designation Notice

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E. "Qualifying Exigency" rules for military matters now set out

F. Calling in "sick" is no longer sufficient for previously qualified FMLA leave – employee must specifically reference

[1] Bear in mind that public school districts (and municipalities and private elementary and secondary schools) are not subject to the state version of FMLA – that law applies only to Connecticut private sector employers with 75 or more employees.

either the qualifying reason or the need for FMLA

G. Medical certification – employers will be able to contact health care providers directly for "clarification" or "authentication" of medical certifications, but very specific rules will apply

H. Employers will now be able to require fitness-for-duty return to work certifications that address the employee's ability to perform essential functions of the job, but specific rules will have to be followed to get this information

I. Employees seeking intermittent leave must make a reasonable effort to schedule such leave so as not to disrupt employer's operations, not merely "attempt" to do so.

J. Serious Health Condition – the definition of "serious health condition" has been amended, in particular, to require that employees must actually visit their health care provider within certain time frames.

TOP CHANGES – IN DEPTH

A. Employer notification and designation of leave obligations

(1) Posting requirement. As under the former regulations, employers must post "in conspicuous places" a general notice of FMLA information, including the procedures for filing a complaint with the DOL Wage and Hour Division. As in the past, it is recommended that employers simply download the poster from DOL's own website once it becomes available. The new poster will incorporate information about the military leave provisions, currently available on DOL's website as an "insert" to the regular poster.

Electronic posting will be considered sufficient so long as all employees have access to such a posting.

If an employer is FMLA covered, but has no eligible employees, it still must make this general posting.

(2) Inclusion of "general" information about FMLA in employee handbooks, or distribution of general information to each new hire.

Covered employers who have eligible employees must, in addition to the posting requirement, provide a general notice of FMLA information to each employee in any employee handbook or other "written guidance" concerning employee benefits or leave rights, if the employer maintains such written materials.

Alternatively, the employer must provide a written, general notice of FMLA information to each new employee upon hire.

DOL's poster notice can serve for this purpose as well, and employers can simply take the poster language and add it their employee handbook.

(3) Eligibility notification. When an employee requests FMLA, or an employer acquires information that an employee may need FMLA leave, *within five (5) business days* the employer must notify the employee

whether or not the employee is eligible for such leave as a threshold matter.

The notice must clearly state that the employee is eligible for FMLA leave, or if the employee is not eligible, the notice must state at least one reason why not, e.g. employee has not been with the employer for at least 12 months of employment, or e.g. employee does not have the required 1,250 hours of actual work in the preceding 12 month period (measured looking back as of the date the requested leave would otherwise commence).

In addition, with the eligibility notice the employer must include all the following, as appropriate:

(i) that the leave may be designated and counted against the employee's FMLA entitlement, if qualifying;

(ii) any requirement for employee to provide medical certification, or certification of a qualifying exigency arising out of a call to duty or active duty status, and employer should of course attach the appropriate DOL form(s);

(iii) employee's right to substitute accrued paid leave for otherwise unpaid FMLA, or whether employer will require this, and the conditions related to any substitution that will occur (and also that employee has the right to unpaid FMLA if conditions for paid leave use are not met e.g. employer only allows sick leave for employee's serious health condition, but FMLA leave is for a spouse's illness);

(iv) any requirements for employee to make premium payments to maintain health insurance and arrangements for such payments;

(v) whether employee is a "key employee;"

(vi) employee's right to continued health insurance during the leave, and the right to restoration to same or equivalent job upon return from FMLA leave;

(vii) employee's potential liability for payment of health insurance premiums the employer has covered during FMLA if employee fails to return to work after FMLA leave.

(viii) such other information as employer chooses, e.g. any requirement for periodic reports by employee on status and intentions for returning to work.

(4) Designation of leave. Once the employer has enough information to determine whether or not the leave is for an FMLA qualifying reason, e.g. upon receipt of a fully completed medical certification form, employer must "designate" FMLA leave within five (5) business days thereafter. If, instead, the employer determines that the leave does not qualify, e.g. the medical certification

reveals the absence is not for an FMLA "serious health condition," employer must send a "simple statement" to the employee stating that the leave is not designated as FMLA.

Note: an employer is free to send both the eligibility notice (item II. 3. above) and the designation notice at the same time. For example, if employer is fully aware of the circumstances of the leave, the employee is clearly eligible and the circumstances are clearly qualifying, employee can do both steps at once.

Note: the net effect of the new two-step process the regulations set out is the elimination of the previous "preliminary" designation of leave approach that employers had the option to use when they did not have sufficient information initially to make a complete determination and a full designation of FMLA leave.

Very important! If the employer will require a "fit for duty" certification for employee to return to work, employer must tell the employee this at the time of designation notice, ***and***, if will require the fit for duty certification to address the employee's ability to perform the essential functions of his/her position, employer must tell the employee this *and* include a complete list of all those essential functions.

In addition, as part of the designation notice the employer must also tell the employee the amount of leave that will be counted against the employee's FMLA entitlement (if known at the time) giving the number of hours/days/weeks. If this is not possible, e.g. due to unforeseeable intermittent leave, the employer must provide notice of the amount counted against the employee's entitlement upon request by the employee, but need do so no more often than once in 30 days, and only if leave was taken in that 30 day period. This can be done with a simple statement, and can even be an item included on the employee's payroll stub.

B. Retroactive designation of leave permissible in certain cases

(1) If the employer fails to designate leave as set out above, it can retroactively designate leave, "with appropriate notice" to the employee (i.e. go back and follow the process set out above).

(2) Note, the employer can only do this if the failure to designate timely has not caused any harm or injury to the employee. However, the regulations also provide that an employer and an employee can mutually agree that leave be designated retroactively as FMLA covered.

(3) Regardless of this new provision, employers should not rely on the possibility of retroactive designation. It remains extremely important to designate leave in timely fashion in every single FMLA circumstance, following the new procedures set out above. This is the best possible way to avoid problems and to ensure that the FMLA "clock" is started at the earliest possible time.

C. New prototype forms

(1) The DOL has included with the new regulations s*eparate* medical certification forms for:

(a) employee's serious health condition

(b) family member's serious health condition

(c) military servicemember serious health condition

(2) DOL also included a new prototype Notice of Eligibility and Rights and Responsibilities

(3) Finally, DOL included a new prototype Designation Notice

forms since 1995, when the original regulations were published, to avoid potential arguments with employees and/or their union representatives, use of the DOL forms is preferable. Employers should *not*, however, attempt to use the forms as printed in the appendices to the regulations, as these forms do not have actual federal Office of Management and Budget expiration dates included.

D. Supplement to Workers' Compensation benefits via "substitution rules" is now permissible.

Under the prior rules, a quirk of the substitution of available accrued paid leave rules was the fact that DOL did not allow the substitution of even a small increment of e.g. sick leave, when an employer ran FMLA leave concurrently with a Workers' Compensation injury absence. Such concurrent leave was expressly permitted, just not the use of any substitution of paid leave at the same time. This seemed to produce a result that was not "employee friendly," in that Workers' Comp benefits are lower than the usual take home pay.

Apparently in recognition of this, the new regulations now provide that "employers and employees may agree," to have available accrued paid leave supplement Workers' Comp benefits, such as in the case where those benefits only provide replacement income for two-thirds of an employee's salary.

E. "Qualifying Exigency" rules for military matters now set out.

The new regulations list eight circumstances that can meet the "qualifying exigency" rules for leave due to active duty military status or call to active duty:

(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
(8) additional activities where the employer and employee agree to the leave

F. Calling in "sick" is no longer sufficient for previously qualified FMLA leave – employee must specifically reference either the qualifying reason or the need for FMLA.

If an employee wants to use leave for an FMLA qualifying reason, for which the

employer has previously provided FMLA protected leave e.g. a chronic/intermittent serious health condition, the employee must specifically reference the qualifying reason for the leave. The regulations specify that "an employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying."

G. Medical certification – employers will be able to contact health care providers directly for "clarification" or "authentication" of medical certifications, but very specific rules will apply.

If an employee submits a complete and sufficient medical certification, an employer may never request additional information from the health care provider (but if employer has "reason to doubt" the certification's *validity*, employer can exercise the second opinion option). However, if the submitted certification is incomplete, or insufficient, the employer can now contact the health care provider for purposes of clarification or authentication. It will be the employee's responsibility to provide any HIPAA required authorization necessary for the employer to obtain clarification.

"Clarification" means contacting the health care provider to understand e.g. handwriting on the certification form, or to understand the meaning of a response.

"Authentication" means giving the health care provider a copy of the certification that the employer received and requesting verification that the information in the certification was completed, and/or authorized, by the health care provider who signed the document.

Very Important! "under no circumstances… may the employee's direct supervisor contact the employee's health care provider." Rather, the employer will have the option of using, e.g. a human resources professional, a leave administrator, or a management official.

H. Employers will now be able to require fitness-for-duty return to work certifications that address the employee's ability to perform essential functions of the job, but specific rules will have to be followed to get this information.

The prior regulations allowed for a "simple" statement of fitness for duty from the employee's health care provider, and this often left employers unsure that the employee was truly able to return to work and perform all the essential functions of his or her position.

Now, pursuant to a uniformly applied policy or practice to require all similarly-situated employees (same occupation, same serious health condition), employers can require returning employees to obtain and present a fit for duty certification from the health care provider that the employee is able to resume work. Importantly, the employer can now require that this certification specifically cover the returning employee's ability to perform the essential functions of the employee's job

However, in order to get essential functions certification, the employer *must* have provided the employee with a

list of those essential functions with the designation of FMLA leave notice (see above). The employer *must* also indicate in the designation notice that the required fit for duty certification has to address the employee's ability to perform those essential functions.

Similar to medical certification situations, the employer will now be able to contact the employee's health care provider for clarification or authentication of the fit for duty certification.

I. Employees seeking intermittent leave must make a reasonable effort to schedule such leave so as not to disrupt employer's operations, not merely "attempt" to do so.

In another important change from the old rules, the new regulations specifically state that an employee seeking intermittent leave, or reduced schedule leave, for the purpose of planned medical treatments, "*must* make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations." (emphasis added).

J. Serious Health Condition – the definition of "serious health condition" has been amended, in particular, to require that employees must actually visit their health care provider within certain time frames.

(1) if leave is based on three or more days of incapacity, plus two visits to doctor, visits must occur within 30 days of the period of incapacity, with first visit within the first 7 days, "unless extenuating circumstances exist";

(2) if leave is based on a chronic condition, that requires "periodic visits" to a healthcare provider, then employee must have at least two such visits per year.

This means "an in-person visit."