New Regulations both Simplify and Complicate Family & Medical Leave

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On January 16, 2009 new regulations implementing the federal Family Medical Leave Act (FMLA) went into effect. These new regulations change the way FMLA must be administered. There are some basic changes that provide employers with more flexibility, but with increased record keeping requirements. Overall, they emphasize the importance of communication with employees so that they understand their rights, what they need to do to obtain leave, and what they must do to preserve their reinstatement rights. The following briefly highlights some of the important changes.

First, keep in mind that the federal regulations cover employers with 50 or more employees, while those with 75 or more employees are also covered by Connecticut law ("CFMLA"). This is significant as some federal and state requirements conflict. When that occurs, employers are required to follow the provision that is most favorable to the employee.[1]

For FMLA, there is a new workplace poster reflecting the new regulations. Copies are available from the DOL website www.dol.gov/esa/whd/fmla/finalrule.htm. The general FMLA notice must also be included in any employee handbook or benefit information and, if not, must be provided at the time of hiring. It can also be posted electronically so long as all employees have access to the format.

Under the new federal regulations, employers must satisfy multiple notification requirements, including an Eligibility and Rights and Responsibilities Notice, and Designation Notice. The time periods pertaining to FMLA notices is now 5 business days, however, under CFMLA employers still only have 2 business days to provide written designation of leave notices to their employees. In fact, while the federal regulations provide 5 days in several different situations, employers covered by CFMLA still must respond in 2 days.

In the Eligibility Notice, the employee must be advised whether leave is still available and if not, why not, including that the employee has not worked long enough or has exhausted the amount of leave for which he/she would otherwise be eligible. It also must explain whether and when medical certifications will be required, what payments of insurance premiums for continuing coverage are required, what are the employee's job restoration rights, and under what circumstances the employee can substitute and/or supplement unpaid leave with paid leave.

If an employer requires employees to provide medical certification to establish eligibility for a FMLA leave the employee has at least 15 calendar days to provide the information. There are new federal medical certification forms for employee's own serious health condition and for certification of a qualifying family member's serious health condition.

The new regulations recognize and require compliance with HIPAA as they now permit more detailed information about the employee's medical condition. If the employee provides the necessary authorization for the release of information, an employer may obtain a description of symptoms, diagnosis, hospitalizations, doctor visits, whether medication has been prescribed, referrals for evaluation or treatment or any other regimen of continuing treatment through the new forms.

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As this information may determine whether the leave is properly designated as FMLA leave, the employee will understand the importance of providing the necessary permission. However, the new forms do not comply with CFMLA's requirements as the federal forms include a request for a diagnosis from the health care provider. Under CFMLA, an employer cannot ask for a diagnosis. If the federal form is going to be used and the employer is CFMLA covered as well, questions concerning a diagnosis must be crossed-out or masked in some way.

If the employer finds that the information provided is insufficient or incomplete, it can deny the leave, but it must advise the employee in writing what additional information is needed and give the employee at least 7 calendar days to provide the needed information or clarification. Once the employee provides the necessary information, the employer must determine whether the employee qualifies for leave.

The new regulations retain the six individual definitions of "serious health condition." However, they clarify that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a health care

1. For example, CFMLA only requires 1,000 hours of actual work for employee leave eligibility as opposed to the 1,250 hour requirement under FMLA. CFMLA provides 16 weeks of leave in a 24-month period, and does not permit a "key employee" exception in contrast to FMLA, which provides for 12 weeks of unpaid leave in a 12 month period.

provider, the two visits must occur within 30 days of the period of incapacity. [2] When the employee provides the completed medical certification, if there is a need to call a health care provider directly for the purposes of authenticating or clarifying the information, the federal regulations permit such direct contact. The contact should be by a human resource person or manager, but cannot be by the employee's direct supervisor. However, CFMLA does not allow these contacts and instead an employer can have only its own medical consultant contact the employee's health care provider to get the clarification and only with the employee's permission.

The new federal regulations make clear that both mother and father are entitled to FMLA leave for the birth of a child and for care of the newborn during the 12-month period beginning after birth of the child. Also, a "husband" may take leave to care for pregnant spouse with a serious health condition. Connecticut law is more expansive. It is not limited to a mother and husband, but instead provides for leave for non-traditional families with two mothers or two fathers in a same-sex relationship. Also, in CFMLA the term "spouse" is used instead of "husband." CFMLA is not exclusive to a male/female marriage and includes both same-sex civil unions and same-sex marriages.

Once employee eligibility is fully established the employer must inform him/her that leave has been approved and designated as FMLA leave. This is done in a Designation Notice. Again, the new FMLA regulations allow 5 business days for this, but if there is CFMLA coverage only 2 days is allowed.

The Designation Notice must include how much leave time she/he is eligible. If a fitness for duty certification is required before an employee can return to work, that requirement must be spelled out in advance and the employer must provide a list of essential job duties so that the treating doctor will know what the job entails. Employers may require a fitness for duty certificate prior to the employee's return and the employee is required to cooperate in this process.

The new regulations continue to provide for substitution of available accrued paid leave for otherwise unpaid FMLA, but now remove the prohibition on the use of accrued paid leave when an employee is out under FMLA due to a Workers' Compensation injury. Supplemental use of increments of accrued paid leave during a Workers' Compensation absence is now allowed, so long as the employer and the employee mutually agree to this arrangement. If they do agree, then FMLA and Workers' Compensation can continue to run concurrently and the employer can apply this form of substitution of paid leave without concern.

When there is a question of the employee's continuing eligibility for FMLA, the federal regulations allow the employer to request a recertification of the condition and to have the employee be responsible for the expense associated with that recertification. CFMLA does not permit that cost shifting. Under CFMLA, whatever expense is not covered by an employee's health insurance must be paid for by the employer.

Time spent in "light duty" work will not count against an employee's FMLA leave entitlement. Further, the employee's job restoration rights are held in abeyance during the period of light duty. If an employee is voluntarily doing light duty work, he or she is not on FMLA leave. Under federal law, when an employee accepts a light duty assignment, the employee has a right to have his/her job restored only until the expiration of the applicable FMLA 12-month leave period even though working in a light duty position cannot be counted as FMLA leave time. CFMLA does not allow for the cut off of job restoration rights after 12 months, but instead extends the time to 24 months.

Employers may now deny so-called "perfect attendance awards" for any employee who does not have perfect attendance because he or she took FMLA leave. However, employers may do this only if they treat employees taking non-FMLA leave in an identical way. Further, CFMLA prohibits such a denial where the employee is being penalized for taking an approved leave.

As a practical matter, consider using all of the new forms that the federal DOL will be making available to support the new FMLA regulations (again, keeping in mind that if there is CFMLA coverage parts of these federal form must be masked or redacted as discussed above). At least at the outset this will alleviate the need to produce new employer-specific forms, although employers can certainly create such forms at a later time if they wish (being sure never to exceed the limits that the regulations set for, e.g. permissible questions in a medical certification). It is also likely to reduce the potential for arguments with employees or their advisors, since the forms will be DOL produced.

Finally, employers should take a look at their current FMLA provisions within their employee handbooks. While many of the changes in the new regulations are aimed at employer practices, and so may not necessarily be mentioned in an employee

2. The new regulations define "periodic visits to a health care provider" for chronic serious health conditions as at least two visits to a health care provider per year. These provisions should help employers to decide whether or not an employee has a qualifying serious health condition, and will also help employees establish such a condition through appropriate medical certification.

handbook, employers should be sure they have amended their policies to account for certain specific parts of the new regulations. In particular the military leave provisions, including the list of eight "qualifying exigencies," and also provisions regarding substitution of paid leave should be reviewed and amended as necessary.

Gary Starr provides practical advice to a wide range of clients in the private and public sector, bringing over 20 years of experience to counseling clients in traditional labor relations matters as well as human relations problems. His experience helps clients avoid the "big mistakes" as well as the day-to-day hassles.

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