

CLIENT ALERT

Revised FMLA Regulations Clarify Employer Obligations

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The Department of Labor (DOL) has published its much anticipated Final Rule, revising existing regulations interpreting the Family and Medical Leave Act of 1993 (FMLA). The revised regulations also interpret the National Defense Authorization Act for FY 2008 (NDAA), which earlier this year extended FMLA protections to "military caregivers" and "qualifying exigency leaves." The Final Rule, which spans 750 pages, is effective January 16, 2009.

Some of the significant changes are summarized below. The Final Rule, on whole, fails to simplify in a meaningful way the difficult task of administering FMLA leave. While the Final Rule contains some simplifications that will be easy to apply, HR professionals and employment lawyers will continue to need to consult the regulations on a regular basis when handling anything other than the routine FMLA leave request.

Regulations Interpreting the NDAA

Military Caregiver Leave: The NDAA, signed into law on January 28, 2008, amended the FMLA to provide protected leave of up to 26 weeks during a 12-month period to "military caregivers." Military caregivers were, in turn, defined as a servicemember's spouse, son, daughter, parent, or next of kin who cares for the servicemember. Under the statute, such leave is available only if the servicemember has a "serious injury or illness" incurred in the line of duty for which he or she (a) is undergoing treatment, recuperation, or therapy, in outpatient status, or (b) is on the temporary disability retired list.

The Final Rule provides the following clarifications as to military caregiver leave:

- The law covers only "current" servicemembers, except for those on the temporary disability retired list. As such, it does not cover those whose injuries do not manifest themselves until after they leave the military.
- The care need not be provided by a Defense Department health care provider.
- Resolves ambiguity regarding the term "active duty" as used in the NDAA, by expressly including Regular Armed Forces, National Guard and Reserves in the definition.
- The 26 workweek entitlement during a 12-month period may be used once per servicemember, per injury. This leave is in addition to the caregiver's 12 weeks of traditional FMLA leave. Leave that qualifies for both must first be designated as military caregiver leave.

Qualifying Exigency Leave: The Final Rule provides guidance as to what constitutes a leave due to a "qualifying exigency" for purposes of the NDAA. An employee may qualify for this leave when his or her spouse, son, daughter, or parent is notified of an impending call to active duty in the Armed Forces. The Final Rule makes it clear that only a federal call to duty qualifies, and provides a list of seven exclusive categories of "qualifying exigencies": (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, and (7) post-deployment activities. An eighth "additional activities" category allows employers and employees to agree that a non-listed reason qualifies.

The regulations also provide that, although the 12 months of employment required for an employee's FMLA eligibility need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted toward that 12 months, unless (1) the break is due to National Guard or Reserve service or (2) "a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service."

An employee returning from National Guard or Reserve obligations must be credited with the elapsed months of employment and hours of service that would have accrued but for the military service.

Other Notable Changes And Clarifications To The FMLA

Leave Prior to 12-Month Eligibility Point: An employee taking non-FMLA leave because he is not yet eligible under the 12 month requirement, may reach his or her twelfth month of service, and become eligible, during that leave period. The Final Rule specifies that, after that point, any remaining portion of the leave taken for a qualifying reason is eligible to be FMLA protected. The earlier, non-FMLA portion of any such leave, though, may not be counted toward the employee's 12-week FMLA entitlement. For instance, if an employee two weeks shy of reaching 12 months of service, who otherwise meets FMLA eligibility requirements, takes four weeks of leave for a serious medical condition, the first two weeks of that leave are not FMLA protected and may not later be counted against the employee's 12-week entitlement. But after the employee reaches the 12 month mark, the remaining two weeks of leave are FMLA protected and do count toward the 12 week entitlement.

Continuing and Periodic Treatment: When an employee seeks to establish the "continuing treatment" element of "serious health condition" by showing at least three consecutive days of incapacity plus two doctor visits, those visits must now occur within 30 days of the first day of incapacity. In addition, to qualify as "periodic treatment" for purposes of establishing a "chronic serious health condition," the treatment must happen "at least twice a year."

Paid Leave: The Final Rule permits employers to apply their normal paid leave policies to the substitution of *all types* of accrued paid leave, eliminating distinctions between sick leave and vacation or personal leave. But when an employee receives paid disability leave or workers' compensation for an FMLA-qualifying condition -- at only a portion of regular pay -- the substitution rules covering most FMLA leave do not apply. While such leave still counts against the employee's 12 week FMLA entitlement, neither the employer nor the employee may require the substitution of accrued paid leave for the disability or workers' compensation payments. The employee and employer remain free to agree, where state law and the leave policy permit, to supplement these disability or workers' compensation payments using accrued paid leave.

Notice and Designation: The revised regulations also address employer notice issues, allowing employers to use electronic postings under certain conditions and extending to five days (from two days), absent extenuating circumstances, the time employers have to notify an employee whether his or her leave qualifies for FMLA protection. Additionally, the regulations eliminate certain penalties for employers' failure to comply with notice and designation requirements in response to the Supreme Court's decision in *Ragsdale*. Employees who do not provide notice of foreseeable FMLA leave 30 days in advance may now be required by employers to explain why it was not practicable to give 30 days notice. Employees must comply with employers' customary notice and procedural requirements, "absent unusual circumstances," although employers cannot enforce reporting requirements that are more strict than those in the regulations. Notably, the regulations delete language from

the prior regulations that had barred employers from denying or delaying FMLA leave if an employee fails to follow employers' customary requirements for reporting foreseeable leave.

Spouses Working For Same Employers: When spouses work for the same employer, they may each take 12 weeks of FMLA leave to care for a child with a serious health condition, but are entitled to only a combined 12 weeks for bonding with a healthy child after birth, adoption, or commencement of foster care, or for caring for an employee's parent with a serious health condition.

Waiver Of Past Claims: Although employees may not waive FMLA rights prospectively, they may settle past FMLA claims without DOL or court approval.

Intermittent Leave: The Final Rule clarifies the requirement that employers account for intermittent FMLA leave in the shortest increment of time they use to account for other forms of leave - provided the increment is no greater than one hour. The Rule does not mean, however, that employers must account for FMLA time in the shortest increments that their payroll systems are technically capable of counting. That is, even if the employer's payroll system is capable of accounting for leave in six minute increments, if it is not the employer's practice to calculate regular leave in such short increments, the employer need not calculate FMLA leave that way.

Light Duty: If an employee on FMLA leave voluntarily accepts a light duty assignment with the employer, the employee does not thereby waive his or her right to be restored to a position equivalent to his or her previous job. That right extends until the end of the 12-month period. The revised regulations also note that time spent in such a light duty position is not counted against the employee's 12 week FMLA entitlement.

Bonuses and Awards: In determining bonuses and awards, employers may consider FMLA absences so long as non-FMLA absences are considered in the same way.

Contact With Health Care Providers: Employers may still contact employees' health care providers to authenticate or clarify an FMLA certification, but under no circumstances may an employee's direct supervisor contact the provider. Further, any contact with the health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule.

Medical Certification Forms: The Final Rule includes revised medical certification forms for use by employers.

[Click to download a PDF of the Final Rule and Summary of Comments on Changes.](#) Companies responsible for complying with the FMLA should become familiar with the new regulations and ensure compliance, including ensuring changes they make comply with state leave laws as well as the FMLA, before mid-January 2009.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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