



Ballard Spahr
Andrews & Ingersoll, LLP

Final FMLA Regulations: *Employer Gains or the Emperor's New Clothes?*

Brian D. Pedrow and Karen D. McCarthy
Ballard Spahr

pedrow@ballardspahr.com
mccarthyk@ballardspahr.com

www.ballardspahr.com

What Happened?

- DOL published final regulations under the FMLA and National Defense Authorization Act (the Military Leave Amendments)
- Changes include:
 - Overall reorganization of the regulations
 - Redefinition of key concepts under FMLA
 - New rules for Military Family Leave entitlement

Important Dates

- January 28, 2008 – National Defense Authorization Act Enacted (caregiver leave took effect)
- February 11, 2008 – Proposed Regulations Issued
- April 11, 2008 – Comment Period Closed
- November 17, 2008 – Final Regulations Published
- January 16, 2009 – Final Regulations Effective

Topics to be Addressed

- Employee Eligibility
- Serious Health Conditions
- Qualifying Reasons for Leave
- Intermittent Leave
- Substitution of Leave
- Perfect Attendance Awards
- Employer Notice Requirements
- Employee Notice Requirements
- Medical Certification
- Military Leave Amendments
- Next Steps



EMPLOYEE ELIGIBILITY

Employee Eligibility: 12 Months of Service

- General rule: Prior service need not count towards the 12 month service requirement if break in service is more than seven years
- Exceptions:
 - A break in service resulting from an employee's fulfillment of military service requirement
 - A written agreement, including a collective bargaining agreement, concerning an employer's intention to rehire the employee after the break in service

Employee Eligibility: Military Service

- Military service must be counted as actual service toward 1,250 hour/12 month requirement
- Employer should use employee's pre-service work schedule to estimate hours worked

Employee Eligibility: Non-FMLA Leave

- If employee on non-FMLA leave meets eligibility requirements while on non-FMLA leave, employee must be deemed eligible for FMLA leave
- Non-FMLA leave cannot be counted towards the employee's FMLA entitlement



SERIOUS HEALTH CONDITION

SHC: Six Categories

- DOL retained the six categories of serious health condition
 - Inpatient care
 - Absence plus treatment*
 - Pregnancy
 - Chronic conditions*
 - Permanent or long-term conditions
 - Conditions requiring multiple treatments

* Definition changes in new regulations

SHC: Absence Plus Treatment

- “Treatment” (e.g. visit to health care provider) must be sought twice within 30 days of first day of incapacity, absent extenuating circumstances
- Treatment means in-person visit
- First visit must occur within 7 days of the first day of incapacity
- Second appointment must be determined by health care provider, not the employee

SHC: Chronic Conditions

- “Periodic visits for treatment” means that employee must seek treatment two or more times within a year
- Determination of need for treatment must be made by health care provider

SHC: Common Ailments

- Common Ailments: cold, flu, ear ache, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease, etc.
- Final regulations still say that common ailments are not serious health conditions, although these ailments might rise to that level in certain circumstances



QUALIFYING REASONS FOR LEAVE

Qualifying Reason for Leave: Inability to Perform Job Functions

- Employee must be unable to perform “one or more essential functions” of the job
- Employer may provide statement of job functions to the health care provider and require health care provider to specify which functions employee cannot perform
- Employer must determine which functions are essential

Qualifying Reason for Leave: To Care for Family Member

- Employee need not be the only family member available to care for the qualifying family member
- DOL declined to eliminate psychological care and comfort



INTERMITTENT LEAVE

Intermittent Leave: Cooperative Scheduling

- “Attempt” has been replaced with “reasonable effort”
- Employees must try to arrange treatment on a schedule that accommodates the employer’s needs
- Scheduling of medical treatment ultimately a medical determination within purview of health care provider

Intermittent Leave: Transfer to Alternative Position

- DOL sought comment on whether transfer to alternative position should be extended to unforeseeable or unscheduled leave
- Concluded that it lacked statutory authority to do so

Intermittent Leave: Leave Increments

- Employers may use the shortest time period used for other forms of leave to account for intermittent leave, even if that increment is greater than the smallest payroll increment
- Can never be greater than one hour

Intermittent Leave: Leave Increments

- “Physical Impossibility” Exception
 - E.g. Flight attendant unable to join crew mid-shift or lab employee unable to enter or leave a sealed clean room during a shift

Intermittent Leave: Mandatory Overtime

- Mandatory overtime may be counted against an employee's FMLA entitlement
- Missed voluntary overtime does not count against the FMLA entitlement



SUBSTITUTION OF PAID LEAVE

Substitution of Paid Leave: Normal Rules for Use of Paid Leave

- DOL reversed its position on this issue
- Employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy
 - Examples
 - Vacation time can be used in full-day increments
 - Completion of sick leave request form
 - Two days advanced notice for personal leave usage

Substitution of Paid Leave: Comp Time

- Another reversal of position
- Public employees may substitute compensatory time for unpaid FMLA leave



PERFECT ATTENDANCE AWARDS

Perfect Attendance Awards

- A bonus based on achievement of a specific goal may be denied to FMLA user
 - E.g. Hours worked, products sold, perfect attendance
- If same bonus is paid to employees on “equivalent leave status,” then must be paid to FMLA user
- Bonuses not premised on the achievement of goal cannot be denied to FMLA users
 - E.g. Holiday bonuses



EMPLOYER NOTICE REQUIREMENTS

Employer Notice Requirements

- Final regulations restructure employer notice requirements:
 1. General Notice
 2. Eligibility & Rights and Responsibilities Notice
 3. Designation Notice

Employer Notice Requirements: General Notice

- Workplace posting is still required
- Policy or notice must be distributed to all employees
- Electronic distribution is permitted if accessible to all
- Prototype notice available from DOL
- Civil monetary penalty: increased from \$100 to \$110/day

Employer Notice Requirements: Eligibility and Rights & Responsibility Notice

- Employer must notify employee of his or her eligibility within 5 business days, absent extenuating circumstances
- Must provide at least one reason for non-eligibility
- At same time, employer must provide employees with statement of rights and responsibilities
- DOL has published a prototype eligibility notice

Employer Notice Requirements: Designation Notice

- Employer has 5 business days (increased from 2 days) to designate (or not) leave as FMLA
- Notice must:
 - Inform employee of any substitution of paid leave
 - Address any requirement to present a fitness-for-duty certification upon return to work
- DOL has published a prototype designation notice



EMPLOYEE NOTICE REQUIREMENTS

Employee Notice Requirements: Foreseeable Leave

- 30-days notice is still required
- If employee fails to give 30-days notice, employee must explain why notice was not practicable
- “As soon as practicable” means the same day or the next business day

Employee Notice Requirements: Foreseeable Leave

- Employer may require an employee to comply with usual and customary notice and procedural requirements for leave
- Eliminates the rule that employer cannot impose more stringent notice and procedural requirements
- Failure to follow such procedures will result in delay or denial of FMLA leave

Employee Notice Requirements: Unforeseeable Leave

- “As soon as practicable” remains the standard
- However, “it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave.”
- DOL requires “prompt” notice in instances of non-emergent cases



MEDICAL CERTIFICATION

Medical Certification: General Rule

- Employee must furnish within 15 calendar days of request
- Employer must give employee 7 calendar days to cure any deficiencies
- Failure to return the certification is not subject to cure period
- Employer can require new certification each leave year if the need for leave extends beyond a single leave year

Medical Certification: Content Requirements

- Six categories of SHC are eliminated from certification
- Certification contains series of questions designed to elicit the necessary information
- The new questions are an expansion of the current “state the medical facts” question

Medical Certification: Authentication and Clarification

- Employer may contact HCP, but only to seek authentication and clarification
- Employer contact may only occur after employee has been given opportunity to cure any deficiencies
- Direct supervisor may not contact employee's HCP
- HIPAA must be satisfied

Medical Certification: Recertification

- Employer must allow 15 days for recertification requests
- Three categories:
 - 30 Day Rule: Employer may request recertification no more often than every 30 days, subject to two exceptions:
 - More than 30 days: minimum duration on certification is more than 30 days, OR
 - Less than 30 Days: employee requests an extension, there is significant change in circumstances or employer obtains information that casts doubt on stated reason for absence



MILITARY LEAVE AMENDMENTS

Military Leave: Qualifying Exigency Leave

An employee may take FMLA leave because of any ***qualifying exigency*** arising out of the fact that the employee's ***spouse, son, daughter, or parent*** is a covered military member on ***active duty*** (or has been notified of an impending call or order to active duty) in support of a ***contingency operation***.

Military Leave: Qualifying Exigency Leave

Leave Entitlement:

- Same 12 workweeks per leave year as for non-military FMLA leave
- Any leave taken for qualifying exigency also counts towards the 12 workweeks of non-military FMLA leave
- Same leave year should be applied

Military Leave: Qualifying Exigency Leave

- What is a qualifying exigency?
 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

Military Leave: Qualifying Exigency Leave

- Employee must provide copy of orders upon request of employer
- Employer may contact Department of Defense to verify orders
- DOL has published an optional certification form

Military Leave: Caregiver Leave

An employee may take FMLA leave to care for a ***covered servicemember*** with a ***serious injury or illness*** if the employee is the ***spouse, son, daughter, parent or next of kin*** of the servicemember.

Military Leave: Caregiver Leave

Leave Entitlement:

- 26 workweeks of leave in a single 12 month period
- Leave year begins on first day employee takes caregiver leave
- Leave is calculated on a per-servicemember, per-injury basis
- Leave not used in the 12 month period is forfeited

Military Leave: Caregiver Leave

- Employer is responsible for designating leave and notifying employee of designation
- Must designate as caregiver leave first
- Cannot count as both caregiver leave and non-military FMLA leave

Military Leave: Caregiver Leave

- HCP must be either Department of Defense or Veterans Affairs provider or be approved by those agencies
- DOL has published optional certification form
- Authentication and clarification may be sought



NEXT STEPS

What Steps Should Employers Take Now?

- Revise your FMLA Policy and Other Policies
- Update your FMLA Forms
- Training
- Review Bonus Programs
- Review and Update Job Descriptions

More Information and Forms

- Department of Labor Final Regulations

<http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf>

- New prototype forms are published as part of regulations