

FINAL FMLA REGULATIONS RELEASED

On November 17, 2008, the Department of Labor's ("DOL") Employment Standards Administration, Wage and Hour Division, released its final regulations implementing the Family and Medical Leave Act ("FMLA"). These final regulations are the first revisions to the DOL's regulations under the FMLA since it was enacted and are the result of an extended rule making process in which the DOL received thousands of public comments. In addition to addressing the recently enacted family military leave entitlements under the FMLA, these regulations also make substantive changes to employer and employee obligations connected to the original reasons for which FMLA leave could be taken.

Some of the major changes to the regulations under the FMLA that will impact employers include the following:

- Eligibility Determinations – Clarifies that an employee's 12 months of employment need not be consecutive to qualify for FMLA leave, but that employment prior to a continuous break in service of seven years or more need not be counted.
- Tracking of Intermittent or Reduced Schedule Leave – States that an employer must account for intermittent or reduced schedule leave under the FMLA using an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided it is not greater than one hour. This is a change from the current requirement that employers account for such leave in the smallest increment used by their payroll systems to account for absences or use of leave.
- Normal Leave Policies – Changes the DOL's position on the substitution of paid vacation and personal leave and allows employers to apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave. For instance, if an employer's paid leave policy requires the use of such leave in an increment of time larger than the amount of FMLA leave requested by an employee, and the employee wishes to substitute paid leave for unpaid FMLA leave, the employee now must take the larger increment of leave required under the paid leave policy unless the employer chooses to waive that requirement. If the employee chooses to take a larger increment of leave in order to be able to substitute paid leave for unpaid FMLA leave, the entire amount of leave taken shall count against the employee's FMLA entitlement. Employers must include information about these requirements in notices to assist employees with understanding and complying with any limitations on the use of paid leave.
- Bonus Entitlement – Allows an employer to disqualify an employee from a bonus or other payment based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, where the employee has not met the goal due to FMLA leave, unless the bonus or payment is otherwise paid to employees on an equivalent non-FMLA leave status.
- Light Duty – Modifies current language to clarify that an employee who voluntarily returns to a light duty position retains the right to job restoration to the same or equivalent position until the end of the 12-month period that the employer uses to calculate FMLA leave. Therefore, when an employee voluntarily accepts a light duty assignment, the employee does not waive his or her restoration right while working in the light duty assignment. Likewise, the time the employee works in the light duty assignment does not count as FMLA leave.
- Employer Notice Requirements – Consolidates all employer notice requirements into a single section and extends the time in which employers must provide notices and designate FMLA leave to five days from the present two days.
- Employee Notice Requirements – Requires employees seeking leave for a previously certified FMLA reason to inform their employer that the leave is for a reason that was previously certified or for which the

employee has previously taken FMLA leave. Clarifies that calling in “sick” is not sufficient notice of the need for FMLA leave.

- Contact with Health Care Provider – Permits an employer to contact a health care provider directly for the purpose of clarification and authentication of the medical certification after the employer has given the employee the opportunity to cure any deficiencies. The employer representatives that may make this contact include a health care provider, a human resources professional, a leave administrator, or a management official; under no circumstances may the employee’s immediate supervisor contact the health care professional.
- Retroactive Designation of Leave – Allows an employer to retroactively designate leave as FMLA leave by providing notice, so long as the employer’s failure to timely designate leave does not cause harm or injury to the employee or the employer and an employee mutually agree to the retroactive designation.
- Settlement of FMLA Claims – Explicitly states that employees and employers are permitted to agree voluntarily to the settlement of past claims without having to first obtain the permission or approval of the DOL or a court.

In addition, several formatting changes were made to the regulations, including rewording of sections headings from a question into the more common format of a descriptive title and restructuring and reorganization of certain portions of the regulations to improve the accessibility of the information.

With respect to the family military leave provisions, the DOL provided guidance on how these new provisions will be implemented. Of particular importance to employers is the definition of “qualifying exigency,” which provides the following specific and exclusive list of reasons for which an eligible employee may take leave: short-notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities agreed to by the employer and employee. Guidelines for military caregiver leave are also established; the 26-workweek entitlement is to be applied as a per servicemember, per injury entitlement and the single 12-month period for military caregiver leave begins on the first day the eligible employee takes leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons. The certification process for family military leave provisions is outlined and documents sufficient to establish the need for leave are specified. New definitions of son or daughter that remove any age cap are also included for use with family military leave.

The final regulations are effective January 16, 2009, so we recommend that employers become familiar with their provisions and anticipated impact on FMLA leave administration. In addition, since the FMLA mandates that employers comply with certain disclosure and reporting obligations, all FMLA policies should be updated to reflect the changes included in the final regulations and incorporate the family military leave guidelines. Lastly, in connection with the final regulations, the DOL released new forms for use with the FMLA. These forms and the final regulations can be accessed online at <http://edocket.access.gpo.gov/2008/pdf/E8-26577>. If you have questions about the final regulations or would like to have your policy and forms reviewed or updated, please contact a member of Koley Jessen’s Employment, Labor and Benefits Group. Also, watch for additional information on webinars Koley Jessen’s Employment, Labor and Benefits Group will be offering to assist employers in understanding and complying with the new FMLA requirements.

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