

# PUBLICATION

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## Summary of Key Provisions of the Revised FMLA Regulations That Take effect January 16

December 9, 2008

On November 17, 2008, the U.S. Department of Labor (DOL) published final regulations implementing the 2008 amendments to the Family and Medical Leave Act (FMLA). Employers should act quickly to update their FMLA policies before these regulations take effect on January 16, 2009. Below is a summary of the most significant changes to the FMLA that will take effect early next year.

### New Military Family Leave Entitlements

#### Military Caregiver Leave

This new leave entitlement allows eligible employees to take up to 26 weeks of job-protected "military caregiver leave" during a single 12 month period. This leave must be used to care for a covered family member with a serious illness or injury that was incurred in the line of duty while on active duty in the armed forces, National Guard or Reserves. In this context, a "covered family member" means a spouse, child, parent or next of kin who is a "covered servicemember." A covered servicemember is a person who is a member of the armed forces, National Guard or Reserves and is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank or rating. Former members of the armed forces, National Guard, or Reserves do not fall within the definition of "covered servicemembers." Only current members of the armed forces, National Guard or Reserves, or individuals who are on the temporary disability retired list, are included. Employers may request that an employee seeking to take military caregiver leave provide an appropriate certification from the Department of Defense that the covered servicemember's serious injury or illness was incurred in the line of duty while on active duty. An employee's entitlement to military caregiver leave is limited to 26 work weeks of leave within each 12 month period, per covered servicemember, per injury. Thus, an eligible employee may take 26 work weeks of military caregiver leave in different 12 month periods to care for multiple servicemembers or to care for the same service member with a subsequent serious injury or illness. 29 C.F.R § 825.127.

#### Qualifying Exigency Leave

The second of the new military family leave entitlements allows eligible employees to take up to 12 weeks of job-protected leave for a "qualifying exigency" arising from the employee's spouse, child, or parent who is in the National Guard or Reserves being notified of an impending federal call or order to active duty in the armed forces in support of a contingency operation. The final regulations provide a list of eight situations when qualifying exigency leave may be taken:

1. In "short-notice deployment" situations, where a covered military member is notified of an impending call or order to active duty seven or fewer days from the date of deployment, in which case an eligible employee may take military exigency leave for a period of seven days beginning on the date when the covered military member is notified of the impending deployment;

2. To attend military events, ceremonies, or programs sponsored by the military that are related to the active duty or the call to active duty of a covered military member, or to attend similarly related family support or assistance programs or informational briefings sponsored or promoted by the military;
3. For certain childcare and school activities necessitated by active duty or the call to active duty status of a covered military member, including to arrange for alternative childcare, to provide childcare on an urgent, emergency need (but not routine, regular or everyday) basis, to enroll or transfer a child in a new school or day care facility, or to attend meetings with school or day care staff;
4. To make or update financial or legal arrangements to address a covered military member's absence while on active duty;
5. To attend certain counseling arising from active duty or the call to active duty status of a covered military member;
6. To spend time with a covered military member who is on a short-term, temporary rest and recuperation leave during a period of deployment;
7. To attend certain post-deployment activities, such as arrival ceremonies and reintegration briefings, and to address issues arising from the death of a covered military member while on active duty status; and
8. For certain additional activities arising out of a covered military member's active duty or call to active duty where the employer and employee both agree on the timing and duration of the leave.

Qualifying exigency military leave is not available to family members of soldiers in the regular armed forces, or in cases where the call to active duty comes from a state rather than the federal government. 29 C.F.R § 825.126.

## **Key Revisions and Additions to Existing FMLA Rules**

### Employer Notice Requirements

The new regulations state that "electronic posting" of the FMLA notices that covered employers are required to post on their premises may be sufficient to satisfy the FMLA posting requirements in certain circumstances. 29 C.F.R § 825.300(a)(1). Additionally, the new regulations require that where an employer's workforce is comprised of a "significant portion" of workers who are not literate in English, the employer must provide the general FMLA notice in a language in which the employees are literate. 29 C.F.R § 825.300(a)(4). Employers will be required to notify employees who request FMLA leave of their eligibility for leave within five business days, absent extenuating circumstances. 29 C.F.R § 825.300(b)(1). Instead of providing a "preliminary" or "provisional" designation of FMLA leave, employers will be required to provide a written "Rights and Responsibilities" notice to each employee taking FMLA leave that details the specific expectations and obligations of the employee and the consequences of not meeting those terms. 29 C.F.R § 825.300(c). The DOL has issued a new prototype "Notice of Eligibility and Rights & Responsibilities" form (Form WH 381) that may be used for this purpose. Once the employer has received a completed certification or other information sufficient for it to determine whether leave is being taken or requested for an FMLA-qualifying reason, the employer will have five business days, instead of two, to "designate" leave as FMLA leave. 29 C.F.R § 825.300(d). The DOL has issued a new prototype "Designation Notice" form (Form WH 381) that may be used for this purpose.

### Employee Notice Requirement

Noting the disruption caused by the lack of advance notice of an employee's absence, the revised regulations place an increased burden on employees to provide notice of their need for FMLA leave. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, the new regulations specify that the employee's obligation to provide the employer with notice "as soon as practicable" will normally require the

employee to provide notice either the same day or the next business day. 29 C.F.R § 825.302. The new regulations also give employers the option of requesting that employees explain why it was not practicable for them to give the full 30 days notice. 29 C.F.R § 825.302(a). When the need for leave is not foreseeable, the new regulations clarify that employees must follow the employer's usual and customary notice and procedural requirements for requesting leave, absent extenuating circumstances. 29 C.F.R § 825.303(a).

### New Medical Certification Requirements

In a significant departure from the current rule, the new regulations will allow certain employer representatives, including human resources professionals, leave administrators and management officials (but not an employee's direct supervisor) to contact an employee's health care provider to clarify and authenticate a medical certification presented in connection with an FMLA leave request. 29 C.F.R § 825.307(a). The new regulations specify that in most cases, if employers want employees to provide a certification from a health care provider of their need for FMLA leave, employers should request such certification within five business days after the employee gives notice of the need for leave, or within five business days after the leave commences. 29 C.F.R § 825.305(b). Once a certification is received, employers must provide written notice of any deficiencies by stating what additional information is necessary and give the employee seven days to supplement the certification. 29 C.F.R § 825.305(b). The new regulations also strengthen employers' rights to obtain medical certifications and recertifications. They clarify that employers may request a new medical certification each leave year for medical conditions that last longer than a single leave year. 29 C.F.R § 825.305(e). In addition, employers will be able to request recertification for ongoing conditions at least every six months in conjunction with an absence, and more frequently in some instances. 29 C.F.R § 825.308(b).

### Fitness-for-Duty Certification

The new regulations make two principal changes to the fitness-for-duty certification process. First, employers may now require that fitness-for-duty certifications specifically address the employee's ability to perform the essential functions of the job, as long as they provide the employee with a list of those essential job functions no later than when they provide the employee with the FMLA designation notice described above. 29 C.F.R § 825.312(b). This will create an added incentive for employers to have well drafted, up to date job descriptions in place. Second, where reasonable job safety concerns exist, up to once every 30 days, employers may now request a fitness-for-duty certification before allowing an employee to return to work from intermittent leave. 29 C.F.R § 825.312(f).

### Clarification of the Definition of "Serious Health Condition"

The new regulations retain the six definitions of "serious health condition" that were already in effect, and they clarify three issues related to those definitions. First, if an employee is taking leave under the "three consecutive calendar days of incapacity plus two visits to a healthcare provider" definition, the two visits must occur within 30 days of the period of initial incapacity, absent extenuating circumstances. Second, if an employee is taking leave under the "three consecutive calendar days of incapacity plus a regimen of continuing treatment" definition, then the first visit to a health care professional must occur within 7 days of the initial incapacity. 29 C.F.R. § 825.115(a). Finally, the new regulations clarify that "periodic visits to a healthcare provider" for chronic serious health conditions means at least two visits to a healthcare provider per year. 29 C.F.R. § 825.115(c)(1).

### Intermittent Leave

The new regulations clarify that employees who take intermittent leave for planned medical treatment that is medically necessary have a statutory obligation to make a "reasonable effort" to schedule the treatment so that

it will not unduly disrupt the employer's operations unnecessarily. 29 C.F.R. § 825.203. They also clarify the rule requiring employers to account for intermittent or reduced schedule leave under the FMLA using an increment no greater than the shortest period of time the employer uses to account for other forms of leave, provided it is not greater than one hour. Specifically, the new regulations clarify that, while an employer may account for FMLA leave using shorter time increments than it uses to account for other forms of leave, it may not account for FMLA leave using longer increments than it uses to record other forms of leave. 29 C.F.R. § 825.205(a).

### Breaks in Service and FMLA Eligibility

To be eligible for FMLA leave, employees must have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12 month period preceding the leave. The new regulations clarify that, although the 12 months of employment do not have to be consecutive, employers are not required to count employment prior to a continuous break in service of seven years or more, unless the break in service was occasioned by the employee's fulfillment of military service obligations in the National Guard or Reserves, or unless a collective bargaining agreement affirmed the employer's intention to rehire the employee after the break in service. 29 C.F.R. § 825.110(b).

### Light Duty

The new regulations clarify that employees who accept "light duty" assignments while recovering from a serious health condition are not considered to be on FMLA leave. Thus, the time eligible employees spend working light duty assignments may not be counted against their 12 weeks of annual job protected FMLA leave or their FMLA reinstatement rights. In a modification of the previous rule, the new regulations state that employees who voluntarily accept light duty assignments that are offered by their employers in lieu of taking FMLA leave will lose their FMLA-based right to reinstatement to their original or an equivalent job if they remain in a light duty assignment at the end of the 12-month leave year period that the employer uses to calculate FMLA leave. 29 C.F.R. § 825.220(d). In its summary of comments on the new regulations, the DOL presents the following example: Where an employer uses a calendar year to calculate FMLA leave, and an employee takes four weeks of FMLA leave and returns in September to a light duty assignment that is not limited in duration and that neither the employer nor the employee chooses to end, the employee has a right to restoration that extends through the end of that calendar year, but no further.

### Substitution of Paid Leave

The new regulations allow employers to apply their normal policies for taking paid leave when an employee substitutes paid leave for unpaid FMLA, regardless of the type of paid leave being substituted. Employees who seek to substitute accrued paid leave of any kind for unpaid FMLA leave must comply with the terms and conditions of the employer's normal leave policies. While employers must allow substitution of paid vacation, personal leave, or "paid time off" for any situation covered by the FMLA, employees can be required to follow normal procedures. 29 C.F.R. § 825.207. In its summary of comments on the new regulations, the DOL presents the following example: If an employer's paid personal leave policy requires two days notice for the use of paid personal leave, an employee seeking to substitute paid personal leave for unpaid FMLA leave would need to provide two days notice. This differs significantly from the current regulations, which prohibit employers from imposing any limits on the substitution of paid vacation or personal leave for unpaid FMLA leave.

### Relief for Employers Who Fail to Properly Designate FMLA Leave

The new regulations eliminate the previous rule that had required employers who failed to designate FMLA leave properly to offer affected employees an additional 12 weeks of FMLA-protected leave. In the wake of the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which found the regulation to be inconsistent with the FMLA's statutory intent, the new regulations eliminate this categorical penalty and clarify that where an employee suffers individualized harm because the employer failed to follow the FMLA notice requirements, the employer may be liable. 29 C.F.R. § 825.300(e).

### Perfect Attendance Awards

The new regulations change how perfect attendance awards are treated. Employers will now be allowed to deny a "perfect attendance" bonus or other award to an employee who does not have perfect attendance because he or she took FMLA leave. However, for this rule to apply, the employer must treat employees who take non-FMLA leave in the same manner. 29 C.F.R. § 825.215(c)(2).

### Rules Specific to Professional Employer Organizations (PEOs)

The regulation discussing the application of the FMLA to joint employers has been modified include a specific reference to Professional Employer Organizations (PEOs), which are companies that contract with employers to perform administrative functions such as payroll, benefits and maintaining employment policies. The revised regulations recognize that PEOs do not enter into joint employment relationships with the employees of client companies when they merely perform administrative functions. However, when PEOs have the right to hire, fire, assign, direct and control their client's employees, depending on the circumstances, this can lead to a determination that the PEO and the client employer are joint employers. The average PEO client has just 17 employees, which is well below the threshold for FMLA coverage, so this new regulation ensures that small companies are not automatically covered by the FMLA simply because they partner with a PEO. 29 C.F.R. § 825.106(b)(2).

### New FMLA Forms

The DOL also issued several new "prototype" forms that employers may use to comply with the FMLA, including a "Certification of Serious Health Condition – Employee's Own Condition" (Form WH-380-E), a "Certification of Serious Health Condition – Employee's Family Member's Condition" (Form WH-380-F), a "Certification of Qualifying Exigency" (Form WH-384), a "Certification for Serious Injury or Illness of Covered Servicemember" (Form WH-385), a Notice of FMLA Eligibility and Rights and Responsibilities (Form WH-381), and a "Notice to Employee of FMLA Designation" (Form WH-382).

In addition to these highlighted provisions, the new FMLA regulations contain numerous technical revisions aimed at clarifying current policy. To assist employers with this transition, Baker Donelson's Labor & Employment Department will be presenting a series of informative seminars on this and other topics throughout our footprint.

12/10/08	EFCA and RESPECT	Bristol, VA
12/11/08	Managing an Aging Workforce	Nashville, TN
12/11/08	EFCA	New Orleans, LA
12/17/08	ADA	Rogersville, TN

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1/7/09	FMLA	Vonore, TN
1/8/09	FMLA	Knoxville, TN
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1/9/09	FMLA	Maryville, TN
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