



Labor and Employment *ALERT*

Current Law Developments and Legal Issues

That May Affect You Or Your Business

Lafayette Shreveport

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[DOL Finally Issues Final Revised FMLA Regulations](#)

Today, the Department of Labor (DOL) issued the final revised regulations for the Family and Medical Leave Act. In an approximately 750 page document, which includes analysis of the numerous comments received from the public, the DOL has made the first major revisions to the regulations since 1993. The regulations will become effective on January 16, 2009.

The regulations address amendments to the FMLA providing leave for military families added to the FMLA earlier this year, and they address areas that have raised concern over the years for employees and employers. Some of the highlights of the revised regulations include the following:

- * Under amendments made to the FMLA, eligible employees who are family members of a service member may take up to 26 weeks of leave to care for a service member with an illness or injury incurred in the line of active duty. The regulations clarify that employers may not use the calendar year as a method of limiting leave as is allowed with other types of leave under the FMLA. The 12-month period within which an employee may take this type of leave begins to run when the employee starts using military caregiver leave. Also for military caregiver leave, 26 weeks of leave is provided for each service member and for each illness or injury.
- * Under amendments made to the FMLA, military family members are also eligible for up to 12 weeks of leave for "any qualifying exigency." Eligible employees must use this leave as part of the regular 12 weeks of leave provided for under the FMLA. In addition, the new regulations defines "any qualifying exigency" as including activities related to short-notice deployment, military events and activities, coordination of child care and school activities, coordination of family and legal arrangements, counseling, rest and recuperation, post-deployment activities and similar activities as agreed upon by the employer and the employee.
- * The final regulations clarify the definition of "serious health condition". An employee may have a serious health condition if he or she has a period of incapacity for three or more consecutive days combined with two visits to a health care provider. The final regulations require the two visits to a health care provider to be within 30 days of the start of the period of incapacity, and the first visit must occur within seven days of the start of the

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period of incapacity. Another way an employee may have a serious health condition is by having three consecutive days of incapacity with a regimen of continuing treatment. The new regulations require that the first visit occur within seven days of the start of the period of incapacity. For chronic health conditions, the employee must make at least two visits to a health care provider each year.

* Employers may require employees to provide medical certification documenting their need for leave. The final regulations allow employers to contact an employee's health care provider directly to obtain information needed for the medical certification form. The representative of the employer contacting the health care provider must be a health care provider, human resource professional, leave administrator, or management official. Based on privacy concerns, the direct supervisor of an employee cannot contact the employee's health care provider.

* Under the final regulations, if an employee returns a medical certification form, but it is incomplete, the employer must notify the employee in writing providing specific information identifying what information is lacking and give the employee seven calendar days to provide the missing information.

* The final regulations state that an employer may require employees to provide a new medical certification every 12-month FMLA period for medical conditions lasting over one year. In addition, employers may now request recertification every six months for absences related to an ongoing condition.

* Under the prior regulations, an employer had to provide an employee with certain notices in writing within two days of receiving information indicating a need for leave. The employer now has five days to provide these notices, which include a general notice about the FMLA, an eligibility notice, a notice of rights, and a notice that the leave is being designated as leave covered by the FMLA.

* Under prior regulations, employees had up to two business days after an absence to provide notice to an employer of the need for leave. Under the new regulations, employees must comply with the employer's usual procedures for reporting absences, unless unusual circumstances exist.

* The new regulations specifically state that an employee who takes medical leave may be required to provide a return to duty certification prior to return to work, and employers can require that this certification specifically address the ability to perform essential job duties. In addition, if safety concerns exist, an employer may require an employee to provide a return to duty certification after taking intermittent leave. Employers should be aware that the Americans with Disabilities Act may also limit the availability and scope of return to duty examinations.

The new regulations can be found on the Department of Labor's website at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>. For more information, please contact Maria Fabre Manuel, a shareholder in our Labor and Employment Law Section.

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