

Benefits Alert

January 2009

DOL Releases Final FMLA Regs

The Department of Labor (DOL) has released final regulations governing the Family and Medical Leave Act (FMLA). The final regs will become effective on January 16, 2009. Here are the major highlights.

MILITARY PROVISIONS

The regs reflect changes to the FMLA made by the National Defense Authorization Act (NDAA). The NDAA created two new categories of FMLA leave — qualifying exigency leave and military caregiver leave.

Qualifying exigency leave. This leave applies to employees whose spouses, children, or parents are members of the military Reserve or National Guard, or are retired members of the Regular Armed Forces and Reserve, and who are called to active duty. Employees are entitled to

the regular 12 weeks of FMLA leave, including intermittent leave. Employers may request a copy of the deployment orders, and may verify the orders with the military. A new optional form, Form WH-384, Certification of Qualifying Exigency for Military Family Leave, has been created so employees can certify their need for leave.

Qualifying exigency leave includes leave for the following reasons: short-term deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities.

Military caregiver leave. Employees who are the spouse, child, parent, or next of kin of a covered service member are entitled to 26 weeks of leave in

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one 12-month period if the covered service member sustains a serious injury or illness in the line of battle. The 26 weeks apply per service member, per injury. The single 12-month period begins on the first day employees take caregiver leave and ends 12 months after that date, regardless of the method employers use to calculate other FMLA leave. Employees are entitled to a combined total of 26 weeks of caregiver leave and other FMLA leave in one 12-month period.

Because employees can request FMLA leave to care for



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a seriously ill family member, it's conceivable that employees' FMLA leave could qualify as both FMLA leave for a serious health condition and military caregiver leave. In these cases, employers must designate the leave as military caregiver leave. Employers may retroactively designate military caregiver leave under the same circumstances that they can retroactively designate other FMLA leave.

In addition to members of the Reserve and National Guard, this leave applies to employees whose family members are part of the regular military. Employers may request that employees certify the need for leave. Employees may certify the need for leave on new optional Form WH-385, Certification for Serious Injury or Illness of Covered Servicemember.

REVISIONS TO THE FMLA REGS

The final regs clarify key areas that have presented difficulties for employers and employees.

Serious health condition. The regs retain the six definitions of a serious health condition, but make three key clarifications.

- *A serious health condition lasting more than three full consecutive days, involving two visits to a health care provider.* The two visits must occur within 30 days, with the first visit occurring within seven days of the first day of incapacity. The 30-day period begins with the first day of illness. Health care providers, and not employees, must determine whether a

second visit is warranted.

- *Serious health conditions lasting more than three full consecutive days, involving a visit to a health care provider, plus a course of continuing treatment.* The regs require that employees visit the health care provider within seven days of the condition's onset.

- *Chronic health conditions.* The regs define "periodic visits" to a health care provider as at least two visits per year.

Holidays. The regs clarify that if employees take leave in increments of less than a week, and a holiday falls within that partial week, the hours they don't work on the holiday can't be counted against FMLA leave. If employees take a full week of FMLA leave, the holiday hours not worked can be counted against their FMLA leave.

Physical impossibility. Some employees on intermittent or reduced-schedule leave may find that it's physically impossible for them to join (or leave) their work shifts in mid-shift. The regs allow the entire period of absence to count toward FMLA leave. This exception is intended to be applied narrowly, however, and can't be used to prevent employees from working late or leaving early under normal circumstances. Employees, therefore, may end up taking more leave than is necessary, but their entire leave is protected FMLA leave.

Failure to work overtime. The regs clarify that overtime hours not worked due to FMLA leave can be counted against employees' FMLA leave entitlement, if they are normally

required to work overtime.

Substitution of paid leave. The regs clarify that employers may apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave. Employers must make employees aware of any additional requirements for the use of paid leave, and inform them that they remain eligible for unpaid leave.

Awards and raises. Employees on FMLA leave may be disqualified from perfect attendance awards, safety awards, or other payments that are based on attaining a specific goal, unless the award is paid to employees on an equivalent non-FMLA leave. Employees who substitute paid leave for FMLA leave (e.g., employees substitute vacation leave) remain eligible for awards, if other employees who take vacations remain eligible. Bonuses that aren't based on the achievement of a goal, holiday bonuses for example, can't be denied to employees who are out on FMLA leave. Pay increases that are based on seniority or performance need not be granted to employees on FMLA leave unless they're granted to employees on an equivalent leave status for a reason that doesn't qualify as FMLA leave.

Waiving FMLA rights. The regs specify that employees may not waive their FMLA rights on a prospective basis, but employers and employees may settle past FMLA claims.

Employer notice requirements. The regs extend the time for employers to provide notices to five business days,

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from two business days. Notices may be posted electronically, provided employees and job applicants have access to computers. Two optional forms have been created — Form WH-381, Notice of Eligibility and Rights and Responsibilities; and Form WH-382, Designation Notice. A general notice, Form WH-1420, may be provided electronically to employees and job applicants.

If employees aren't eligible for FMLA leave, the notice need only state one reason why they're not eligible. Rights and responsibilities notices must be provided to employees with eligibility notices. A list of employees' essential job responsibilities must be provided to employees with designation notices, if employers will require that fitness-for-duty certifications address employees' ability to perform the essential functions of their jobs. Employers may retroactively designate leave as FMLA leave, provided employees receive their notices and suffer no harm or injury.

Employee notices. The regs require that, absent unusual circumstances, employees needing FMLA leave must follow their employers' usual and customary call-in procedures for reporting absences. FMLA leave may be delayed or denied for those who don't.

Employees must still give at least 30 days' notice if leave is foreseeable, and if they can't, they must give as much notice as practicable. It should be practicable for employees to provide notice either the same day or the next business day.

The provision that seemed to give employees two full business days to call in is specifically abandoned.

Employees still don't have to mention that they need FMLA leave, but they must explain their need for leave in a way that puts employers on notice that FMLA leave is at issue. For example, calling in sick would not suffice. Employees who have already taken FMLA leave must mention their need for additional FMLA leave if leave is needed for the same condition.

Medical certifications. Two new optional forms have been created — Form WH-380E, Certification of Health Care Provider for Employee's Serious Health Condition, and Form WH-380F, Certification of Health Care Provider for Family Member's Serious Health Condition.

Employers may request a new medical certification each leave year for medical conditions that last longer than one year. The final regs also clarify that employers may request recertification of an ongoing health condition every six months in conjunction with an FMLA absence.

Fitness-for-duty certification. The final regs make two changes to the fitness-for-duty certification process. First, employers may require that the certification specifically address employees' ability to perform the essential functions of their jobs. Employers that require fitness-for-duty certifications to address employees' ability to perform the essential functions of their jobs must provide

a list of employees' essential job responsibilities to them with the designation notice. Second, when employees take intermittent leave and a reasonable safety concern exists, employers may require a fitness-for-duty certification before employees return to work. ❖

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College Students To Maintain Group Health Benefits Through Serious Illnesses

Under newly enacted federal legislation, group health plans that provide dependent coverage will not be able to kick off dependent college students whose severe illnesses or injuries require them to take medically necessary leaves of absence from school or limit them to part-time student status. The new law, called Michelle's Law, will become effective with the first plan year commencing after October 9, 2009 — January 1, 2010, for calendar-year plans.

MEDICALLY NECESSARY LEAVES OF ABSENCE

Michelle's Law applies to insured and self-insured plans. However, it doesn't mandate that group health plans provide dependent health insurance. Further, more protective state laws (i.e., state laws that gen-

Final Regs Implement Newborns' And Mothers' Health Protection Act

Under the 1996 Newborns' and Mothers' Health Protection Act, group health plans must allow 48 hours of hospitalization to a mother who delivers her baby vaginally, and 96 hours if the delivery is by cesarean section. Final regulations clarify the law. For group health plans, the final regs are effective for plan years beginning January 1, 2009.

WHAT TO EXPECT WHEN AN EMPLOYEE IS EXPECTING

The regs clarify that the 48-hour or 96-hour clock starts ticking with the delivery, rather than when the mother is admitted to the hospital or the onset of labor. In cases of multiple births, the clock starts with the last baby's birth. If a baby is born outside a hospital, say, at a birthing center, the clock starts when the mother or baby is admitted to the hospital for a birth-related medical condition. The mandatory coverage periods

aren't violated if health care providers and mothers agree on earlier discharge times.

Plans can't penalize providers who stick to the time periods, or require providers to get authorization for 48-hour or 96-hour hospital stays. In addition, the regs prohibit plans from wielding influence through the use of monetary incentives or disincentives.

- Plans can't reduce providers' compensation or provide monetary or other incentives that would induce them to violate the law.

- Plans can't provide incentives to mothers to cut short their hospital stays (e.g., by waiving the co-payment if a mother agrees to be discharged within 24 hours of giving birth).

- Plans can't restrict benefits for any portion of a 48-hour or 96-hour hospital stay in a manner that's less favorable than the benefits provided for any preceding portion of the stay

(e.g., by paying for the first 48 hours of a hospital stay related to a cesarean section, but requiring pre-certification for the remaining two 24-hour periods).

Plans remain free to negotiate the level and type of compensation with providers. Plans can require pre-certification when a stay exceeds the mandatory time periods. Plans can continue to impose cost-sharing mechanisms on mothers, and can use monetary incentives (e.g., lower co-insurance) to steer mothers and babies to certain hospitals, provided the incentives are the same for all hours of the mandatory time periods.

ERISA-covered plans must comply with ERISA's notice provisions, including summary plan description (SPD) disclosure requirements. Notice may be provided to employees electronically, provided plans comply with ERISA's electronic disclosure rules. This notification requirement, however, shouldn't be onerous. Since 2000, plans have been required to include a description of this law or its state equivalent in their SPDs. ❖

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College Students To Maintain Group Health Benefits Through Serious... (cont.)

erally require coverage until dependents turn 22 years old or older for other reasons) continue to remain in effect. Finally, employers with fewer than two participants are exempt from this requirement.

The law amends ERISA to require that employer-provided health plans continue to cover full-time college students who are on medically necessary

leaves of absence. Coverage must continue for the earlier of up to one year after the first day of the leave of absence, or the date on which dependent coverage would otherwise terminate under the terms of the plan.

The student's doctor must certify to the plan that the leave is medically necessary because the student is suffering from a severe illness or injury. If the

group health plan changes while the student is on a medically necessary leave of absence, and the new plan covers dependents, the new plan will be subject to these provisions in the same manner as the old plan.

All the usual ERISA notification duties apply. Therefore, plan sponsors must update their plan documents and employee notices. ❖