Department of Labor Finalizes New FMLA Regulations

On November 17, 2008, the Department of Labor (DOL) issued final revisions to the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). The new rules take effect on January 16, 2009 and, in addition to addressing ambiguities in existing regulations, provide guidance regarding the FMLA's January 2008 amendments granting military service-related family leave. Highlights include:

Leave Related To A Family Member's Military Service

Congress amended the FMLA in January 2008 to grant leave under certain circumstances to employees who have a family member serving in the military. Some of these provisions are already in effect, while others will not become effective until January 16, 2009.

The regulations provide that employees who need to care for a family member with a serious injury or illness incurred "in the line of duty on active duty," may take up to 26 workweeks of leave "during a single 12-month period" to care for the servicemember. Employees covered under this provision are those with family members who are members of the regular armed forces, or of National Guard or Reserve units.

The regulations also provide that employees may take up to 12 workweeks of leave to deal with certain "qualifying exigencies" that may arise when a family member is called to active duty. This qualifying exigency leave is available only to family members of National Guard, Reserve and certain retired military personnel who are called or ordered to active duty in support of certain types of operations. It is not available to families of servicemembers who serve in the regular armed forces. Under specified circumstances, "qualifying exigencies" include a servicemember's deployment on short notice; the need to attend official ceremonies, programs or briefings; childcare responsibilities; making financial or legal arrangements; counseling; attending post-deployment events and briefings; and addressing issues arising from the death of a servicemember on active duty.

Due to the unique circumstances that may entitle an employee to these new military-related leaves, the rules provide separate certification processes tailored to address the specific types of information that may be required for an employee seeking such leave. The rules also discuss how to calculate the "single 12-month period," the interaction of this leave with other FMLA leave, and special rules for school employees who are eligible for these new types of FMLA leave.

Employee Eligibility

The regulations clarify that, when calculating whether an employee has worked the requisite 12 months to qualify for FMLA leave, an employer in most cases need not count any time an individual was employed prior to a *seven-year* break in service.

Employers who provide other types of leave to employees who are not yet eligible for FMLA leave should be aware that, under the new regulations, an employee who has worked 1250 hours before starting *non*-FMLA leave may become eligible for FMLA leave while out of work, because time on non-FMLA leave will count toward the required 12 months of service.

Notices Required Of Employers

Mandatory posting, accessible to all employees and job applicants. The revised regulations clarify that an employer must post FMLA notices even if there are no FMLA-eligible employees. The new rules also address electronic postings (allowed in some circumstances) and postings in languages other than English (which may be required in some workplaces).

Handbook or hiring notice. An employer must explain employee rights and responsibilities under the FMLA either in its handbook or upon hiring.

Eligibility notice. When an employer is put on notice that an employee is seeking leave for what may be an FMLA-qualifying reason, the employer must give notice to the employee seeking leave that he or she is eligible for FMLA leave (or, if ineligible, at least one reason for his or her ineligibility). The employer must also provide other information about the rights and responsibilities associated with FMLA leave, as well as an explanation of the employer's own conditions on the use of paid leave as a substitute for unpaid FMLA leave. Formerly, employers had to give this notice within two business days (absent extenuating circumstances) of the employee's notice; the revisions increase this time to five days.

Designation notice. Employers must give notice to an employee as to whether his or her requested leave has been designated as FMLA leave (and if it has not been so designated, the reasons for that decision). Again, the revisions have extended the time for employers to give this notice from two to five business days of receipt of enough information to determine that the leave qualifies as FMLA leave, but they also require employers to give more specific information, such as *how much* leave will be designated as FMLA leave. Moreover, if the employer intends to require a fitness-for-duty certification when the leave ends, the employer must tell the employee at this designation stage, and provide, if needed, a list of essential job functions. Where the amount of leave needed is not clear at the designation stage, the employee has the right to ask the employer, no more frequently than every 30 days, how much time has been counted against his or her FMLA leave entitlement. An employer must also inform an employee if information in the designation notice changes (for example, if the employee exhausts his or her FMLA leave for the year). The DOL states that any dispute about the designation of FMLA leave should be discussed and documented. The new rules also eliminate the need to provide a "provisional designation" of FMLA leave.

Notices Required Of Employees

In explaining that employees must provide an employer with notice of his or her need for leave "as soon as practicable," the DOL no longer defines "as soon as practicable" to mean "ordinarily... within one or two business days." The DOL notes that that earlier definition had been misconstrued to allow employees two full days, regardless of whether it would have been practicable to give notice sooner. Now, absent unusual circumstances, notice of foreseeable leave less than 30 days in advance should generally be given either the same day or the next business day after the employee learns of the need for leave; in the case of unforeseeable leave, employees will be expected to provide notice within the time prescribed by the employer's usual notice requirements. Moreover, employees will now be expected to follow the employer's procedures for "calling in" (for example, calling a specific person to report an absence, or providing the anticipated duration of the leave) unless there are unusual circumstances. If an employee fails to comply with such procedures and no unusual circumstances excuse the failure, an employer may in some cases delay or deny FMLA leave.

If an employee fails to give 30 days' notice of his or her foreseeable need for leave, the new rules require him or her to explain *why* it was not practicable to give 30 days' notice.

When scheduling medical treatment, employees must make a "reasonable effort," as opposed to a mere "attempt," to schedule leave so as not to unduly disrupt the employer's operations.

Finally, in seeking leave, an employee must provide enough information about the reasons for leave to allow the employer to determine whether FMLA leave may be needed. Simply calling in sick is not sufficient. In addition, where an employer has given an employee FMLA leave in the past for a specific reason, and the employee later seeks leave again for the same reason, the employee should specifically reference either the qualifying reason or the need for FMLA leave.

Medical Certification

The DOL has amended its certification form to require more information regarding an employee's health condition, and has created a separate form for use when the leave request is related to the serious health condition of a family member.

The new rules clarify that the FMLA does not limit the employer's ability to request medical information in accordance with the Americans With Disabilities Act, worker's compensation or paid leave; moreover, any information obtained in connection with those other entitlements or programs may be considered in determining FMLA entitlement.

Currently, employers must request certification from an employee within two business days of receiving the employee's notice of the need for leave (or, if the need for leave was unforeseen, the first day of the leave); the revisions extend the time frame to five business days. The employee will then have 15 calendar days to submit the certification, unless it is impracticable despite the employee's diligent, good faith efforts. In addition, a new certification may be requested annually for conditions that last beyond a single leave year.

The new rules explain how employers should handle incomplete or insufficient medical certifications. The employer must specify in writing the additional information needed, and give the employee seven days to cure the defect (or more, if the employee cannot get the needed information despite diligent, good faith efforts). If an employer never receives a certification at all, however, the employee is not entitled to an opportunity to cure.

The revisions give employers increased latitude, within specified limits, to contact the employee's health care provider to ask clarifying questions about a certification or to verify that the provider did in fact complete the certification (although state and federal laws governing the privacy of an individual's medical information continue to apply).

The new regulations make several adjustments to the timing for employers to require recertifications. For example, where an original certification indicates that an employee's condition will persist for an extended, indefinite or unknown period of time, or for the employee's lifetime (as might be the case in a certification in support of a request for intermittent leave), the employer may require recertification every six months.

Serious Health Condition

The new rules make minor changes to the definition of a "serious health condition" by specifying time frames in which an employee's visit or visits to a health care provider must take place.

Calculating The Amount of Leave Used

The new rules provide guidance for how to calculate an employee's FMLA workweek when an employee's schedule varies greatly from week to week.

Under the revised regulations, missed overtime can be counted against an employee's FMLA entitlement only when he or she would normally be required to work the overtime but for the taking of FMLA leave.

When an employee voluntarily agrees to do light-duty work instead of taking FMLA leave, time spent on that light-duty work cannot be subtracted from the employee's FMLA entitlement. Moreover, the employee's right to reinstatement in his or her usual position continues as long as the employee is doing the light-duty work, or until the end of the applicable 12-month FMLA leave year.

Where it is physically impossible for an employee to recommence work in the middle of a shift (as may be the case with a transportation employee whose work requires him or her to be present for an entire trip on a plane or bus, or a laboratory employee who works in a "clean room" that remains sealed for a set period of time), the employee may be charged with FMLA leave for as long as the impossibility lasts, although the employee may be offered alternative work instead.

If an employee's leave is a block of time of at least one workweek, and a holiday falls within that week, the holiday counts against the employee's FMLA leave entitlement. If, on the other hand, an employee needs leave in increments of less than a full week, holidays do not count toward the employee's FMLA total unless he or she would have been required to work on the holiday.

Intermittent Leave

Employers must provide intermittent leave in increments no greater than the shortest period of time that the employer uses to account for the use of other forms of leave, but that increment may not be greater than one hour, and may not result in charging an employee with FMLA time for time when the employee actually worked.

Paid Leave Substitution

The DOL has clarified that "substitution" means that the employer-provided paid leave runs *concurrently* with FMLA leave, so that the time off is still protected by the FMLA and is applied to reduce the employee's FMLA entitlement. An employer may require FMLA medical certification where an employee is substituting paid leave for FMLA leave, even if the employer's paid leave policy provides for a less stringent documentation procedure.

The revised regulations do away with distinctions between medical or sick leave, vacation, personal or family leave. Employees wishing to substitute *any* employer-provided paid leave for unpaid FMLA leave must comply with the employer's policies regarding the use of that paid leave. For their part, employers must explain such requirements at the time the employer gives the employee notice of FMLA eligibility, and must clarify that even if he or she does not comply with the conditions for use of paid leave, he or she is still entitled to unpaid FMLA leave.

Fitness-For-Duty Certifications

Prior to the revisions, employers could not require fitness-for-duty certification when employees returned from intermittent leave. Now, an employer may require certification every 30 days if an employee used intermittent leave during the 30-day period, if reasonable safety concerns exist.

An employer may also contact the employee's health care provider directly, under certain limited circumstances, to obtain clarification or authentication of such certifications.

Bonuses

The revised regulations allow an employer to disqualify an employee from a bonus or award predicated on a specified goal, if the employee failed to meet the goal due to FMLA leave, as long as the denial does not treat workers using FMLA leave less favorably than those using other types of leave. Under the new rule, employers need not treat "perfect attendance" bonuses differently than safety or production bonuses.

Penalties

Consistent with a Supreme Court case on this subject, the new regulations provide the employee a remedy of additional leave for the employer's failure to keep the correct records or give adequate notices, but *only* if the employee can show individualized harm resulting from such failure. The new rules also generally address remedies for interference with FMLA rights.

Settlement of FMLA Claims

In response to a recent Fourth Circuit case, the revised regulations clarify that, although future FMLA claims may not be waived, it is legal for an employer and employee to settle past claims arising out of FMLA without the participation of the DOL or a court.

What Employers Should Do Now

These final regulations will become effective on January 16, 2009, and employers will need to revise their FMLA policies and procedures accordingly. If you would like to discuss the potential impact on your organization, please contact any member of Ropes & Gray's Labor & Employment Department.