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A PROFESSIONAL LAW CORPORATION

CLIENT NEWSLETTER

Published as a service to clients and friends of The Kullman Firm, this newsletter discusses recent labor relations laws, regulations, policies, practices, and employment cases particularly applicable to the labor and employment arena.

New Developments

MILITARY FAMILY LEAVE AND UPDATES TO THE FAMILY AND MEDICAL LEAVE ACT REGULATIONS

On January 28, 2008, President Bush signed into law the first-ever amendments to the Family and Medical Leave Act ("FMLA"). The amendments, enacted as part of the National Defense Authorization Act of 2008, created two new forms of FMLA leave: "Military Caregiver Leave" and "Qualified Exigency Leave." On November 17, 2008, the Department of Labor ("DOL") issued its final rule to implement these amendments and to update the existing FMLA regulations.

The regulations not only address the two new forms of leave but also address employer and employee concerns that have arisen since the first regulations were issued. Although some of the new regulations effect significant changes in how the FMLA is administered, many are simply clarifications of the prior regulations or responses to court opinions. The revised regulations go into effect on January 16, 2009, and selected highlights from the regulations are addressed below.

Military Caregiver Leave

Pursuant to the amendments to the FMLA, covered employers are required to provide eligible employees with up to 26 workweeks of leave during a single 12-month period to care for a servicemember who has a serious injury or illness incurred in the line of active duty. Unlike other FMLA-qualifying leave that allows the employer to designate the manner in which the 12-month period is calculated, the 12-month period for Military Caregiver Leave runs from the first day leave commences. Military Caregiver Leave also differs from other FMLA-qualifying leave in that it expands the family members who may take such leave. Employees may take leave to care for an injured servicemember who is the employee's spouse, parent, child or relative for whom the employee is the "next of kin." The term "next of kin" refers to the servicemember's nearest blood relative.

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Military Caregiver Leave only applies to current members of the Armed Forces, National Guard, or Reserves, or a member on the temporary disability retired list. In any 12-month period in which an eligible employee takes Military Caregiver Leave, the employee is not entitled to more than 26 total workweeks of FMLA leave (Military Caregiver Leave or otherwise) even if the employee qualifies for other FMLA-qualifying leave. When leave could be designated as either Military Caregiver Leave or other FMLA-qualifying leave, an employer must designate the leave as Military Caregiver Leave.

Qualifying Exigency Leave

Under Qualifying Exigency Leave, employers are required to provide eligible employees up to 12 weeks of leave due to a "qualifying exigency" arising out of the fact the employee's spouse, child, or parent has been called up to active duty. Qualifying exigencies include: 1) short-notice deployment, defined as a call/order to active duty seven days or less prior to the date of deployment (limited to seven calendar days of leave beginning on the date the military member is notified of deployment); 2) military events and activities related to a call to active duty; 3) childcare and school activities (e.g., to arrange for alternative childcare, to provide childcare on urgent or immediate need basis; to enroll a child in a new school or day care; to attend meetings with a child's school or day care staff); 4) to make or update financial and legal arrangements; 5) counseling; 6) rest and recuperation (limited to five days per leave, up to 12 weeks in a 12-month period, to spend with a military member on short-term leave); 7) post-deployment activities, defined as up to 90 days following termination of active duty status; and 8) additional activities which must be agreed to by both the employer and employee. The manner in which the 12-month period is calculated can be designated by the employer just as with other FMLA-qualifying leave.

This provision does not apply to military members who are in the Regular Armed Forces or to any retired member of a state Reserve or National Guard unit. Qualified Exigency Leave only applies to retired military members of the Regular Armed Forces, Retired Reserve, Ready Reserve, Select Reserve, Individual Ready Reserve, or the National Guard.

Changes to Existing FMLA Regulations

A. Employee Eligibility

The new regulations clarify that the 12-month employment prerequisite need not be consecutive and that an employer must count up to a seven-year break in service in determining whether the employee has been employed for at least 12 months. An employer may have to count beyond a seven-year break in service in limited circumstances.

Additionally, an employee who is not eligible for FMLA leave at the start of his/her need for leave (i.e., an employee who takes leave from work after only 11 months of employment) can become eligible for FMLA leave while out as long as certain requirements are met. At the point the employee meets the 12-month requirement, the employee is entitled to 12 weeks of leave and the prior non-FMLA leave cannot be counted against the 12 weeks. To be eligible, the employee must remain on the employer's payroll and be receiving other benefits during the non-FMLA leave period.

B. Serious Health Condition

Although the definition of serious health condition has been a source of much frustration for employers, the regulations do not make changes to the basic definition. The regulations do, however, clarify what constitutes

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"continuing treatment." To satisfy the continuing treatment requirement, an employee: 1) must receive treatment two times within 30 days of the first day of incapacity, unless extenuating circumstances exist; and 2) must see a health care provider in person within seven days of the first day of incapacity. Extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period. Employers should be cautious when making employment decisions regarding an employee's absence prior to the expiration of the 30-day period and should be cognizant of possible extenuating circumstances that might extend the 30-day period.

C. Leave for Pregnancy and Adoption

The regulations make several clarifications with regard to pregnancy and provide a new definition for adoption. First, the regulations clarify that an expectant mother may take FMLA leave before the birth of her child for prenatal care or if her condition makes her unable to work. Second, a husband may take FMLA leave to care for his expectant spouse if she is incapacitated. Third, the regulations clarify that only a spouse may receive FMLA leave to care for a pregnant woman; thus, a boyfriend, fiancé, or even the father of the child are not eligible to take such leave. Lastly, adoption is redefined to mean the legal and permanent assumption of responsibility for the raising of a child as one's own and eligibility for FMLA leave is determined without regard to the source of the adopted child (e.g., whether from a licensed placement agency or otherwise).

D. Caring for a Family Member

The regulations clarify that an employee seeking leave to care for a family member does not have to be the only individual available to care for the covered family member.

E. Definition of Health Care Provider

The revised regulations add physician assistants to the list of recognized health care providers and eliminate the requirement that they operate "without supervision by a doctor or other health care provider."

F. Computing FMLA Leave During a Holiday Week

If an employee is taking a full week of FMLA leave during a week containing a holiday, the employee will have the holiday counted against his or her FMLA allotment. In contrast, if an employee is taking less than a full week of leave during a week containing a holiday, the holiday cannot be counted against the employee's FMLA allotment unless the employee was otherwise scheduled and expected to work the holiday.

G. Intermittent or Reduced Leave

Prior to the revisions to the regulations, employees only had to "attempt" to schedule intermittent leave in a manner that would not unduly disrupt an employer's operations. The revised regulations now require an employee to make a "reasonable effort" to schedule leave in a non-disruptive manner.

The regulations also clarify that an employer must account for leave using increments no greater than the shortest period of time the employer uses to account for other forms of leave, provided that it is not greater than one hour. Previously, the time period was tied to an employer's payroll system.

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H. Substitution of Paid Leave

Under the revised regulations, an employee who elects to take paid leave must now follow the employer's paid leave policies with respect to use of that leave. This change in the substitution of paid leave must be communicated to employees when satisfying an employer's notice requirements. Additionally, an employer may now require employees to comply with FMLA standards even if they are more stringent than the employer's own procedural requirements for taking paid leave.

I. Perfect Attendance/Production Bonuses

Employers are now allowed to exclude an employee who has not achieved a specific goal for which a bonus is paid if the failure to achieve the goal is due to an employee's use of FMLA leave, provided that employees taking non-FMLA leave are treated the same. The revised regulation does not prohibit employers from prorating such bonuses or awards if they so choose.

J. Light Duty

Many employers offer light duty programs to employees suffering from work-related injuries. In response to the fact employees who refuse light duty often are denied worker's compensation benefits and to address conflicting court decisions, the regulations clarify that: 1) light duty is not counted against an employee's FMLA entitlement; 2) the right to restoration is held in abeyance while an employee is on light duty up to the end of the applicable 12-month period; and 3) acceptance of light duty does not waive an employee's prospective rights (including the right to reinstatement in the same/equivalent position).

K. Waiver of Rights

The regulations clarify that an employee may voluntarily settle or release FMLA claims based on *past* employer conduct without first obtaining Department of Labor or court approval for such settlement or release.

L. Employer Notice Requirements

Under the revised regulations, there are now three employer notices: 1) a new FMLA poster; 2) a new Notice of Eligibility and Rights and Responsibilities form; and 3) a new form called a Designation Notice form.

Additionally, with regard to notice, an employer now has up to five business days (absent extenuating circumstances) after an employee requests FMLA leave, or after the employer acquires knowledge an employee's leave may be FMLA qualifying, to provide an employee with an eligibility notice. If the employee is not eligible for FMLA leave, the employer has to provide at least one reason why the employee is not eligible.

An employer also has five business days to provide the employee with a notice stating whether the leave is FMLA qualifying or additional information is needed to make such a determination. If more information is needed, an employer must specify the additional information it requires. The designation form must also include, among other things, a statement that the employer requires the substitution of paid leave if such is the practice, a notification that the employee may request the amount of FMLA leave that will be counted against the FMLA entitlement, and, if the employer requires a fitness-for-duty certification, a statement that the employee must provide the certification upon return from leave. If a fitness-for-duty certification is required, a list of the employee's essential job functions must be provided to the physician responsible for completing the certification.

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Failure to comply with the notice requirements can result in an employer being held liable for compensation, benefits, or other monetary losses sustained as a direct result of the failure. An employee may also be entitled to equitable relief including employment, reinstatement, and other relief.

M. Designation of Leave

An employer may retroactively designate leave as FMLA qualifying unless the employee is able to demonstrate harm or injury from the employer's failure to designate the leave timely.

N. Employee Notice Requirements

When the need for leave is not foreseeable, an employee must give notice as soon as practicable under the facts and circumstances. For such leave, an employee now may be required to provide written notice of the need for leave, to notify a specific individual of the need for leave, or to comply with an employer's other usual and customary notice and procedural requirements. Failure to comply with an employer's leave procedures can be grounds for delaying or denying an employee's request for FMLA-qualifying leave.

O. Medical Certification

An employer may require an employee to provide information about a health care provider's specialization, the employee's or family member's diagnosis, certification from a health care provider that intermittent or reduced leave is medically necessary, and a statement describing which essential job functions an employee cannot perform.

If an employee provides an incomplete or insufficient medical certification form, the employer must advise the employee in writing as to what additional information is needed and give the employee at least seven calendar days to complete and return the form.

An employer is allowed to consider information received pursuant to worker's compensation and Americans with Disabilities Act requests and procedures.

P. Clarification and Authentication of Certifications

An employer may now contact an employee's health care provider for purposes of *authenticating* information provided on a medical certification form. "Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document. The regulation specifies that only an employer's health care provider, leave administrator, HR professional, or management official can contact an employee's health care provider on behalf of the employer. Such contact may not be made by an employee's direct supervisor.

An employer may directly contact an employee's health care provider for purposes of *clarifying* information provided on the medical certification form. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. The employee must authorize such contact first but failure of the employee to authorize the contact or to otherwise clarify information will allow an employer to deny FMLA leave. The same restrictions listed above with regard to the individuals that may contact an employee's health care provider apply in this instance as well.

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Whether contact is made for authentication or clarification, employers may not ask for additional information beyond that required by the certification form and HIPAA requirements must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider.

Employer FMLA Policies

As noted in the beginning, the regulations are effective January 16, 2009. ***The Military Caregiver Leave and Qualified Exigency Leave regulations, as well as the numerous revisions to the prior FMLA regulations, will require employers to update their FMLA policies and practices.***

If you have any questions with respect to these new FMLA developments and the required changes to employer FMLA policies, please contact the Kullman Firm attorney with whom you regularly work.



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