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FMLA Update: New FMLA and Military Family Leave Regulations Effective January 16, 2009

Revised regulations implementing the Family and Medical Leave Act were issued on November 17, 2008. These regulations, which go into effect January 16, 2009 will certainly redefine the way companies administer FMLA and military leave.

The regulations do not cure all of the practical challenges inherent in administering FMLA. However, they do help clarify many aspects of the FMLA. The regulations moderately increase both employee and employer rights and obligations, address issues of employee abuse of FMLA leave, and include new DOL certification forms that may be used by employees and employers to satisfy the certification requirements. The new notice and certification forms are available on the DOL's website.

The major regulatory changes impact the following areas:

Coverage and eligibility issues, calculation of leave, military caregiver leave, job assignments and reinstatement rights, employee notice requirements, substitution of paid leave, certifications, waiver of rights and obligations, perfect attendance awards, and the

definition of key terms, such as "qualifying exigency," "serious health condition" and "covered servicemember."

Overview of 2008 FMLA Regulations:

A. Coverage and Eligibility

1. Length of Service Requirement. As before, employees are eligible for FMLA after twelve months of employment and 1,250 hours of service in the preceding 12 month period. The regulations establish that employment prior to a continuous break in service of 7 years or more need not be counted, unless the break was due to National Guard or Reserve Military status. The employee bears the burden to prove prior employment if the employer has not retained personnel records beyond the statutorily required time period.

2. If an employee becomes eligible for FMLA leave while on non-FMLA leave, all leave following the eligibility date qualifies as FMLA leave.

3. Joint Employment and Employee Work Location. Whether an employer meets the FMLA coverage test of "50 employees within 75 miles" is determined based upon the work site



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to which the employee reports or from which the employee is assigned work. This rule also is true in joint employment situations, unless the employee has physically worked for at least 1 year at a facility or office of the secondary employer. In such cases, the secondary employer's facility becomes the work site for FMLA purposes.

B. Calculation of Leave

1. **Holidays.** Holidays may be counted as FMLA leave only if the employee is on FMLA leave the entire week in which the holiday falls.

2. **Leave Increments for Intermittent Leave.** FMLA leave may be tracked using an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that the increment for FMLA leave is not greater than one hour and provided the employee's FMLA leave balance is not charged for time while the employee is working or for more than the actual amount of leave taken. For example, if an employer's policy requires that any type of leave may only be taken in one hour increments during the first hour of a shift to discourage tardiness and an employee is a few minutes late to work due to an FMLA reason, the employer may prohibit the employee from working during that first hour until the one hour increment is exhausted and may charge the employee for the full hour of FMLA leave.

However, if the employee needs to leave thirty minutes early due to an FMLA reason, the employer may only charge the employee for thirty minutes of FMLA leave, not the full hour.

Similarly, if the employee is using intermittent or reduced schedule leave and it is physically impossible for the employee to access the worksite after the start of his/her shift

(i.e., flight attendant's scheduled flight has already departed) the employer may charge the employee for the entire period he/she is forced to be absent from the worksite. The employer must allow the employee to resume work as soon as physically possible.

3. **Overtime.** If an employee normally would be required to work overtime, the employer may count as FMLA leave the overtime hours that the employee would have worked but for the FMLA leave. If overtime is voluntary, any overtime declined because the employee is on FMLA leave does not count toward FMLA leave.

4. **Military Caregiver Leave** (also known as the Covered Servicemember Leave). This section of the regulations covers family members caring for a covered servicemember on active duty with a serious injury or illness incurred in the line of duty. These family members are permitted to take up to 26 workweeks of leave in a 12 month period. This leave is available on a per servicemember, per injury basis. For example, if an employee takes military caregiver leave to care for more than one covered servicemember or to care for the same covered servicemember who has incurred a subsequent serious injury or illness, and if the single 12 month periods overlap, the employee is limited to taking only 26 weeks of leave in each 12 month period. Any amount of the 26 weeks of leave that is not taken during a single 12 month period expires at the end of the 12 month period. No carry-over into the next 12 month period is allowed.

5. **Leave for Qualifying Exigencies for Families of National Guard and Reserves.** Families only of National Guard and Reserve personnel on active duty may take 12 weeks of FMLA job-protected leave to manage their affairs (i.e., "qualifying exigencies"). "Qualifying exigencies"



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are defined as: (1) short-notice deployment, (2) military events and related activities, (3) certain temporary childcare and school activities, (4) financial and legal arrangements, (5) counseling by a non-medical counselor, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities where the employer and employee agree to the leave. A qualifying exigency is a non-medical activity.

The regulations include two new DOL certification forms that may be used by employees and employers to satisfy the certification requirements for the use of military family leave.

C. Job Assignments and Reinstatement Rights

1. Light Duty. Under the final regulations, time spent in "light duty" work does not count against an employee's FMLA leave entitlement. The employee's right to job restoration is held in abeyance during the light duty period (or until the end of the applicable 12-month FMLA year). If an employee is voluntarily doing light duty work, he or she is not on FMLA leave.

2. Transfer to an Alternative Job. The employee may be transferred to an alternative job that better accommodates recurring periods of FMLA leave only if the leave is foreseeable based on planned medical treatment for the employee or family member. An employee on unforeseeable intermittent leave cannot be transferred to an alternative job.

D. Employee Notice Requirements

1. Timing of Employee Notice. According to the regulations, when an employee becomes aware of a need for foreseeable FMLA leave less than 30 days in advance, the employee should provide notice of the need for leave to the employer either the same day or the next business day. When the need for leave is not

foreseeable, an employee must give notice as soon as practicable and must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. If the employee fails to provide timely notice, the employer may count any absences during the delay as non-FMLA absences and apply the employer's attendance policy to those absences.

2. Method of Notice. A request for FMLA leave generally may be verbal. However, an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements absent any unusual circumstances. No written notice may be required in emergency situations or for unforeseeable leave. In other situations, the employer may require the employee to provide written notice for foreseeable leave, or may require the employee to call a designated phone number and request leave from a designated person. If an employee fails to comply with these requirements, any absences during the delay may count as non-FMLA leave and the employer may apply the regular attendance policy to those absences.

3. Content of Notice. Initially, the employee need not specify or mention that the request is for "FMLA" leave. The employee's responsibility is to provide sufficient information for the employer to reasonably determine that the FMLA may apply to the leave request. Calling in "sick" is insufficient to meet FMLA notice requirements. In subsequent requests for leave for a condition underlying previously periods of FMLA leave, the employee must specifically reference either the qualifying reason for the leave request or mention the need for "FMLA leave."

4. General Notice. The existing poster and written FMLA policy requirements have been combined



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into one general notice requirement. The DOL has drafted a sample poster that must be posted in conspicuous places accessible to both employees and applicants. The employer also must distribute the general notice via the company handbook and must provide the notice to all new hires. Electronic posting and distribution is permissible.

5. Eligibility Notice. Employers must provide an eligibility notice to any employee who applies for FMLA leave. The notice must be provided within five (5) business days after the first time in the employer's FMLA leave year that the employee requests FMLA for a particular reason. New notice is required during the same FMLA year only if the employee's eligibility status changes. The DOL has drafted a sample eligibility notice. If the employee is ineligible, the notice must state at least one reason why the employee is not eligible.

6. Rights and Responsibility Notice. An employer must provide a Rights and Responsibility Notice each time an eligibility notice is required. The DOL has created a sample Rights and Responsibility Notice that is combined with the eligibility notice mentioned above.

7. Designation Notice. Once an employer has sufficient information to determine whether the leave requested is being taken for a FMLA qualifying reason, the employer must provide written notice to the requesting employee either designating the leave as FMLA-qualifying leave or notifying the employee that the leave does not qualify. The designation notice must be provided within 5 business days after the employer determines whether the leave is FMLA-qualifying (notice may be given later so long as the employee suffers no harm). If the leave qualifies, the notice must specify the amount of leave that will be counted as FMLA leave if known. The notice also must state whether a

fitness-for-duty certification will be required. If the length of leave is not known at that time, a designation notice must be provided upon the employee's request but no more often than every 30 days (if leave was taken during the previous 30 days). The DOL has issued a multi-purpose sample designation notice.

E. Substitution of Paid Leave

The regulations clarify that the terms and conditions applicable to any form of paid leave offered by an employer may apply when paid leave runs concurrently with FMLA leave. Therefore, an employer may require an employee using paid leave while on FMLA leave to comply with the same conditions applicable to other employees using such leave. The employee remains entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave. In addition, the employer has full discretion and may wish to waive any procedural requirements for using paid leave so as to encourage concurrent running of all types of leave.

For example, if an employer's sick leave policy requires use of sick leave in full-day increments, the employer does not have to allow an employee with a two-hour FMLA leave absence to use only two hours of the paid time off benefit concurrently with FMLA. Rather, the employer may give the employee the option of taking the entire sick day off and charging the employee with the full day of paid FMLA leave or the employee could choose to take two hours of unpaid time off and use only two hours of his/her FMLA entitlement.

F. Intermittent Leave

The regulations now clearly require employees who take intermittent FMLA leave have a statutory obligation to make a "reasonable effort" to schedule such leave so as not to unduly disrupt the employer's operations.



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G. Certifications

1. Medical Certification. The revised regulations allow employers to contact an employee's healthcare provider directly. However, an employer may contact the employee's healthcare provider for only two purposes: a) clarification and b) authentication of the medical certification. The employer may request no additional information beyond that included in the certification form. Prior to contacting a healthcare provider, the employer must provide the employee an opportunity to resolve any deficiencies in the certification. The employer representative contacting the healthcare provider must be a human resource professional, a leave administrator, or a management official. The employee's direct supervisor may not contact his healthcare provider.

The employee seeking FMLA is not required to permit his healthcare provider to communicate with the employer for clarification purposes. However, if the employee denies the employer permission and does not otherwise clarify an unclear certification, the employer may decline to designate the absences as FMLA leave.

The final regulation updates the form WH-380 and creates separate forms for the employee and the covered family members. The forms now allow, but do not require, health care providers to provide a diagnosis of the patient's health condition as part of the certification.

2. Fitness for Duty Certification. The final regulation clarifies that employers may require a fitness-for-duty certification to establish an employee's ability to perform essential job functions. However, if this certification is required, the employer must provide the employee with a list of these essential job functions no later than the designation notice and must specify in the designation notice the requirements for completion of the fitness-for-duty certification.

3. Military Caregiver Leave-Automatic Emergency Certification. The DOL has developed a sample health care provider certification for military caregiver leave. Absent any unusual circumstances, an employee seeking this type leave must provide this certification within 15 days.

4. Serious Health Condition ("SHC") Certification. The DOL has developed two sample forms, one for an employee's SHC and one for a family member's SHC. The employee must submit a complete and sufficient medical certification within 15 days (although the employee has a longer period to comply, if the employee has made diligent, good faith efforts to obtain the certification). Leave generally may be denied if the employee fails to submit the certification at all within 15 days. An employer has no obligation to notify the employee that the certification has not been received. If the employee timely submits the certification but it is incomplete, the employer must inform the employee of the list of what information is needed and provide him with seven (7) days to cure the deficiencies. If the employee fails to cure the deficiencies within the cure period, FMLA leave can be denied.

Once the employer receives a complete and sufficient certification, the employer may authenticate the certification (without the employee's consent and by direct contact with the employee's health care provider) and may obtain clarification as needed from the provider (but only with the employee's consent). The medical certification is effective as to a particular condition for the stated duration of the leave (if less than one year) or for the remainder of the employer's designated FMLA leave year, whichever is less.

5. Recertifications. An employer may require recertification every six months in all cases, if absences occur due to that medical condition. Recertification also may be required if



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the employee seeks an extension to the leave and/or if circumstances described in the last certification change (e.g., the employee develops a pattern of taking time off consecutive with his/her scheduled days off – weekends, etc.)

H. Waiver of Rights and Employee and Employer Obligations

Employees may waive their rights to bring an action for a past claim but may not waive their rights for any future claim. Accordingly, severance or separation pay provided in exchange for a release of liability may only include FMLA claims up to the date the release is signed. This regulation overturns the 4th Circuit case that had invalidated contractual releases of FMLA claims.

I. Obligations of Employers and Employees

Employees' obligations under the revised regulations include: a) responding to employer questions to determine whether an absence is potentially FMLA-qualifying; b) consulting with the employer in advance and making a "reasonable effort" to schedule foreseeable leave for planned medical treatment (whether continuous, intermittent, or reduced schedule) so as to cause the least amount of disruption to the employer's operations; and c) discussing and resolving with the employer any dispute about whether leave qualifies as FMLA leave.

Employers' obligations under the regulations include: a) providing responsive answers to employee questions about employee rights and responsibilities; b) discussing and resolving with an employee any dispute about whether leave qualifies as FMLA leave; and c) documenting any such discussions and resolution and retaining the documentation for 3 years pursuant to FMLA record retention rules.

J. Perfect Attendance Awards

The final regulations change how perfect attendance awards are treated. Employers now may deny a "perfect attendance" award to an employee who does not have perfect attendance due to an FMLA absence. This rule applies only if the employer treats identically employees taking non-FMLA leave and FMLA leave.

K. Key Definitions

The following terms also were defined (or their definitions were revised) by the final regulations:

- Serious Health Condition Continuing Treatment (825.115)
- Serious Health Condition Chronic Conditions (825.115)
- Prenatal Care (825.120)
- Needed to Care For (825.124)
- Health Care Provider (825.125)
- Definitions Related to Family Relationships under Military Leave (825.122)
- Qualifying Exigency under Military Leave (825.126)
- Active Duty or Call to Active Duty Status (825.126)
- Covered Servicemember (825.800)

What Actions Should Employers Take Now?

It is important that employers review existing FMLA policies and revise these policies and the related forms to comply with the final regulations. The sample notices and forms issued by the Department of Labor should be reviewed and incorporated into the company's FMLA process. These include the following forms: Employee's Serious Health Condition (WH-380E), Family Member's Serious Health Condition (WH-380F), Notice of Eligibility and Rights and Responsibilities (WH-381), Designation Notice to Employee of FMLA Leave (WH-382), Certification of Qualifying Exigency for Military Family Leave (WH-384), and Certification for Serious



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Injury or Illness of Covered Servicemember for Military Family Leave (WH-385). The relevant FMLA regulations can be found at 29 C.F.R. § 825.100 through 825.800 and Appendices B through H.

For more information on the FMLA or other employment law issues, please contact any member of the Employment Law Team at Hancock, Daniel, Johnson & Nagle, P.C.: Kimberly W. Daniel, B. Page Gravely,

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