
FMLA Regulatory Update

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In late 2008, the US Department of Labor issued new regulations implementing The Family and Medical Leave Act (FMLA). The new regulations went into effect on January 16, 2009.

The FMLA creates unpaid leave entitlements for eligible employees who work for covered employers. Leave is available in circumstances connected to the birth or adoption of a child, the serious health condition of the employee or family member of the employee, a "qualifying exigency" of a family member in the military, or the care of military service member with a serious injury or illness.

Some highlights among the many changes, updates, and clarifications in the new regulation:

- The new regulations introduce two new types of military family leave -- "qualified exigency" leave and "military caregiver" leave. Qualified exigency leave is available in connection with a call to duty issued to a family member in the Reserves, National Guard, or retired military. Military caregiver leave is an extended grant of leave for the care for a family member suffering from injuries sustained on active duty in the line of duty.
- An employer must take into account the time an employee would have worked, but for service in the National Guard or Reserves, when calculating that employee's "hours of service" for eligibility purposes.
- There is a new notice regimen for employers and employees. Employers are immediately responsible not only for providing general initial notice of FMLA rights to employees but also for three subsequent types of notice: eligibility notice, notice of rights and responsibilities, and designation of leave notice. Employees who need to take FMLA leave are subject to stricter standards in regard to the timing and content of the notice they must give to their employers. Employers have more opportunity to draft policies governing employee notice requirements.
- Forms regarding notice and certification of eligibility for leave have been improved.
- Employees must provide sufficient certification for leave; employers who do not receive sufficient certification may deny FMLA leave.
- Employers may, in certain circumstances, contact an employee's health care provider to authenticate or clarify a medical certification.

Important definitions and clarifications are also comprised in the new regulations:

- The definition of a "serious health condition" now includes specific timelines regarding the healthcare treatments.
- Employers may institute policies requiring paid leave to run concurrently with FMLA leave.
- "Light duty" does not count toward FMLA leave.

Despite the creation of significant new obligations for employers, the regulations are generally considered to incorporate "employer friendly" changes. Maximizing opportunity around the new regulations, however, requires close attention to an employer's policies and practices.

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This paper is not intended to be exhaustive on the subject matter nor to provide legal advice to the reader.