

Long Awaited FMLA Regulations Released

November 17, 2008

The United States Department of Labor has released final revised regulations implementing the Family and Medical Leave Act. The revised regulations are over 750 pages in length and adopt most of the positions the DOL outlined in proposed regulations issued in February 2008. The regulations become effective on January 16, 2009, 60 days from November 17, 2008, the date the regulations will be published in the Federal Register.

The regulations provide employers new tools to administer FMLA leave more efficiently, including improvements in the area employers have identified as the most problematic — potential abuse of intermittent leave rights. However, to leverage those tools, employers must update FMLA policies and forms and communicate more effectively, both verbally and in writing, with employees. “The overarching theme of the regulations,” observed Frank Alvarez, National Coordinator of Jackson Lewis’ Disability, Leave & Health Management Practice Group, “is ‘shared responsibility.’ Employers must do a better job educating employees and employees must do a better job communicating their need for leave and supplying appropriate and timely medical certifications.”

Accomplishing this in the midst of an historic recession may not be easy. Many employers do not have the resources to master complex rules on FMLA leave. Most are cutting staff and slashing training budgets. At the same, they can’t afford to ignore the issue. FMLA is a major compliance obligation and, in the midst of today’s economic uncertainty, attendance and productivity can be the keys to a company’s survival. To make matters even more challenging, companies also are preparing for amendments to the Americans with Disabilities Act, which become effective January 1, 2009.

Alvarez offered the following additional observation, “What is striking is that employers hoping to leverage the revised FMLA regulations will have to centralize leave management processes and deploy improved technologies to track the reasons given by employees for needing leave and the employer’s

designation in response. That won't be easy, but more effective, consistent, and documented communications with employees appear to be crucial.”

The Preamble to the Regulations summarizes major comments received by the DOL on the proposals.

Jackson Lewis' comments are referred to 34 times. “We are pleased many of our suggestions were considered by the DOL and hope we contributed in some measure to the improvements in the final rule,” Alvarez commented. “The FMLA goes to the heart of our clients' business need to ensure a reliable and productive workforce. It was an issue on which employers needed to be heard and, thankfully, the DOL was listening.”

Navigating through these FMLA and ADA developments may prove to be one of the most significant workplace issues for 2009. Jackson Lewis' Disability, Leave & Health Management Practice Group is preparing a comprehensive analysis of the new FMLA rules and will be offering a complimentary webinar, available to all employers interested in understanding the new regulations. The following highlights some of the more notable changes in the regulations:

- **Employers' general notice obligations enhanced:** Under the final revised regulations, covered employers must post a general FMLA notice even when they have no FMLA-eligible employees. Employers that do not have an employee handbook or similar written materials describing benefits and leave must provide the general FMLA notice to each employee when he or she is **hired** (rather than **annually**, as was proposed). Where a workforce is comprised of a significant portion of workers who are not literate in English, the employer continues to be obligated to provide general notice in a language in which the employees are literate. Over the objections of some who sent comments on the proposed rules, posting requirements may be satisfied through an electronic posting, as long as the posting otherwise meets the regulatory requirements. Electronic-only posting is permitted where all employees and applicants have access to electronic information. Paper copies must be posted in locations readily visible to employees who do not have access to company computers, and to applicants who apply via non-electronic means.
- **Employer-specific notice requirements modified:** The individual notice requirements under Section 825.301(b) of the current regulations have been separated into two new notice requirements or phases: “Eligibility/Rights and Responsibilities” notice and “Designation” notice. Consistent with these changes, the current optional Form WH-381 (“Employer Response to Employee Request for FMLA Leave”) will be replaced with two optional forms, one to advise employees of their FMLA eligibility and rights and the other to formally “designate” leave as FMLA leave.

- **New “eligibility notice” clarifies employee rights to leave:** When employees request FMLA leave, or when employers acquire knowledge that an employee’s leave may be for an FMLA-qualifying reason, employers must notify employees of their eligibility to take FMLA leave within five business days, absent extenuating circumstances. A new mandatory WH-381 form replaces the existing optional Form WH-381, and combines the written notice of “Rights and Responsibilities” required by the regulations.
- **Eligibility determination maintained for 12 months:** Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave and the employee maintains eligibility as to that reason for leave throughout the applicable 12-month period.
- **New “rights and responsibilities” form clarifies employee expectations:** If employees are eligible for FMLA leave, then at the time of their eligibility notice they also must receive a written notice of “Rights and Responsibilities” detailing the specific expectations and obligations of employees and explaining any consequences of their failure to meet these obligations. Among other things, employers must inform FMLA-eligible employees of any requirement to provide medical certification, the right to substitute paid leave, whether and how to pay premiums for continuing benefits, and job restoration rights upon expiration of FMLA leave. This notice may be accompanied by the FMLA medical certification form if employers request employees to complete such forms. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section. These changes eliminate the need to provide a “preliminary” or “provisional” designation of FMLA leave. Instead, once the “Eligibility Notice” has been provided, employers may delay actual designation until five business days after they receive medical certifications and any other required information.
- **“Designation notice” confirms leave determinations:** Once an employer has obtained sufficient information to determine whether an employee’s leave will be protected by the FMLA, the employer must notify the employee within five business days (a change from the current requirement of two business days) that the leave is designated as FMLA leave, absent extenuating circumstances. Of course, employers may provide the “Eligibility” and “Designation” notices at the same time, if they have sufficient information to do so.
- **Retroactive designation permitted where no harm or injury is caused:** The rule permits retroactive notice if the employer fails to provide timely notice and the delay does not cause employee harm or injury. In all cases where leave would qualify for FMLA leave protection, employees and employer can mutually agree that the leave be retroactively designated as FMLA leave.

- **Increased liability for failure to provide timely and written notice of leave designation:** The final regulations clarify that failure to provide required written notice can be considered “interference” with employee’s FMLA rights. The regulations expand potential damages available for interference claims, including “any other relief tailored to the harm suffered.”
- **New and additional forms issued:** The DOL has updated the optional forms provided to assist employers in administering FMLA. It also has developed forms to implement the new Military Family Leave Amendments. The new list of optional FMLA forms include: 1) WH-380E: New Certification of Health Care Provider for Employee’s Serious Health Condition (Appendix B to the regulations); 2) WH-380F: New Certification of Health Care Provider for Family Member’s Serious Health Condition (Appendix B to the regulations); 3) WH Publication 1420: Notice to Employee of Rights Under FMLA (Appendix C to the regulations); 4) WH-381: Notice of Eligibility and Rights and Responsibilities (Appendix D to the regulations); 5) WH-382: Designation Notice (Appendix E to the regulations); 6) WH-384: Certification of Qualifying Exigency for Military Family Leave (Appendix G to the regulations); and 7) WH-385: Certification of Serious Injury or Illness of Covered Servicemember for Military Family Leave (Appendix H to the regulations).
- **Different medical certifications for employee and family members:** Recognizing that employers could benefit from having greater insight into the reasons why employees could not perform essential job functions, the DOL has created a new medical certification form for use in evaluating the medical need for leave prompted by an employee’s own serious health condition. The DOL also created a separate medical certification form for use when employees request leave to care for a family member with a serious health condition. This form seeks information on the type of care being provided by employees.
- **Employers can consider additional medical information obtained through ADA, paid leave or workers’ compensation procedures:** The regulations recognize an employee’s serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA) and may also trigger requests for paid leave or workers’ compensation benefits. Marking a major shift from the limited medical inquiries permitted by the previous regulations, employers may now follow procedures for requesting medical information under the ADA or paid leave or workers’ compensation programs without violating the FMLA. Moreover, employers may consider any information received pursuant to such procedures or benefit program in determining an employee’s entitlement to FMLA-protected leave.
- **Employers provided more time to request medical certifications:** The regulations increases the time frame for requesting certification from two to five days after employees give notice of need for leave or, in the case of unforeseen leave, the date employees commences leave.

- **Employers must notify employees of certification deficiencies:** The final rule adopts the proposed rule’s definitions of incomplete and insufficient certifications and procedure for curing these deficiencies. The rule requires employers to notify employees in writing of the additional information that is necessary to complete the medical certification and allow employees seven calendar days to provide the additional information. If employees fail to submit a complete and sufficient certification despite the opportunity to cure the deficiency, the employer may deny FMLA leave.
- **Upon request, employees must provide FMLA medical certification even when substituting paid leave:** The current FMLA regulations permit employees to comply with a less stringent medical certification standard under the employer’s sick leave plan when the employee substitutes any form of paid leave for FMLA leave. The proposed rule deleted this provision because it conflicted with the employer’s statutory right (under 29 U.S.C. 2613) to require, as a prerequisite to FMLA leave for a serious health condition, that the employee provide a medical certification to substantiate the serious health condition. The final rule adopts the proposed rule.
- **Employers can require new medical certification every new leave year:** With the exception of certifications to support a request for injured servicemember leave, the final rule allows for annual medical certifications in cases where a serious health condition extends beyond a single leave year.
- **Medical recertifications permitted every six months:** The final rule allows employers to request medical recertifications for continuing, open-ended conditions every 6 months, rather than after passage of the specified minimum duration of the condition. Medical recertifications may be requested on a more frequent basis if there were other change circumstances or other reasons outlined in the regulation.
- **Fitness for duty certifications:** Employers may demand more than a “simple statement” of the ability to return to work. Employers also may now ask for fitness for duty certifications for intermittent leave if reasonable safety concerns exist.
- **Minimum increment of intermittent leave:** The employer must account for the intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour. The final regulations clarify that employers are not required to account for FMLA leave in increments of six minutes or even fifteen minutes simply because their payroll systems are capable of doing so.
- **Exception to minimum increment of intermittent leave rules for “physical impossibility:”** Where the nature of the workplaces makes it physically impossible for employees to start work mid-way through the shift, the entire shift may be designated as FMLA leave. The DOL,

however, intends the exception to be applied narrowly and gives examples such as a flight attendant, train conductor, or a laboratory technician whose workplace is inside a “clean room” that must remain sealed for a certain period of time.

- **Calculation of leave when employee’s schedule varies:** The rule for calculating an employee’s leave entitlement when an employee works a schedule that varies from week-to-week will now use a weekly average over the 12 months preceding the leave period (rather than just the prior 12 weeks as required under the current rule).
- **Inability to work overtime protected by FMLA:** The DOL has clarified that missed overtime must be counted against the employee’s FMLA leave entitlement if the employee would otherwise have been required to report for duty but for the taking of FMLA leave.
- **Settlement of past FMLA claims now permitted:** Resolving a split in the United States Court of Appeals, the final rule states that the FMLA’s waiver provisions apply only to prospective FMLA rights; they do not prevent employees from settling past FMLA claims without Department or court approval. Employers should modify general releases to include waiver of FMLA claims.
- **Fuller explanation required of employees to trigger FMLA protections:** Employees must explain sufficiently the reasons for leave so as to allow the employer to determine whether the leave qualifies under the Act. Calling in sick is not considered a sufficient notice to trigger an employer’s FMLA obligations. If employee fails to explain the reasons, leave may be denied.
- **Employees must specifically reference previously designated FMLA leave:** When employees seek leave due to an FMLA-qualifying reason for which employers have previously provided FMLA-protected leave, employees must specifically reference the qualifying reason for leave or the need for FMLA leave.
- **Employees must comply with usual and customary procedures:** Employers may require that employees comply with usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Requirements may include providing written notice of the reasons and anticipated start and duration of the leave or requirement that employees contact a specific individual to request leave. Examples of “unusual circumstances” referenced in the regulations include: a) no one answered telephone number employee called; b) company voice mail box is full; c) employees are unable to use telephone because they are seeking emergency medical treatment.
- **FMLA’s application to professional employer organizations addressed:** Recognizing PEOs provide services to employers that may not include directing the work of their client’s employees directly or jointly, the regulations clarify the test under which PEOs will be considered joint employers. Referencing comments prepared by Jackson Lewis, the regulation clarifies that the decision will turn on the economic realities of the relationship and will be

based upon all the facts and circumstances. A PEO is not a joint employer, the regulation continues, if it simply performs administrative functions, such as those related to payroll and benefits and updating employment policies. Recognizing that some state laws require PEO's to reserve the right to hire and fire, but that the PEO's do not actually exercise that right, the final rule states that "such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances." The final rule also notes that unlike the case of traditional employment agencies, a PEO's client employer usually would be considered the primary employer in a joint employment relationship with the PEO. The final rule also adds a new sentence in § 825.106(d) to describe how employees are counted toward FMLA coverage in the PEO context.

- **Parties must discuss and document FMLA disputes:** If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. The discussions and decision must be documented.
- **Mutual agreement to supplement disability benefits through use of paid leave:** Even though provisions covering the substitution of paid leave for unpaid leave are not applicable when employees receive disability benefits during FMLA leave, the employer and employee may agree to run paid leave concurrently with FMLA leave to supplement disability benefits. This also applies to supplementing workers' compensation benefits.
- **Employers may require FMLA medical certification even when paid leave is substituted:** Under current FMLA regulations, when an employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with higher FMLA standards. The DOL eliminated this provision. Employers may require sufficient FMLA certification in support of any request for FMLA leave for either the employee's own or a covered family member's serious health condition.
- **Employers may consider FMLA absences in determining bonuses and other incentive rewards:** The final regulations modify the rules for perfect attendance awards to allow employers to disqualify employees from bonuses or other payments based on achievement of a specified job-related performance goal (such as attendance) where the employee has not met the goal due to FMLA leave, so long as this is done in a nondiscriminatory manner.
- **Time spent performing light duty does not count toward FMLA entitlement:** Under the current regulations, job restoration rights arguably were available until 12 weeks have passed within the 12-month period, including all FMLA leave taken *and any periods of light duty*. The final FMLA regulations clarify this issue, stating that an employee's right to FMLA leave and job restoration are not affected by light duty assignments. Thus, the employee's right to job restoration is essentially on hold during the period of time an employee performs a light duty

assignment. At the conclusion of the voluntary light duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave commenced or the employee may use the remainder of his or her FMLA leave entitlement.

- **Increased damages available for harm caused by interference with FMLA rights:** The final FMLA regulations contain the remedy for interfering with an employee's rights under the FMLA. Employers may be liable "for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered."

Regulations Implementing Military Family Leave Amendments

The regulations also interpret and implement the Military Family Leave Amendments enacted earlier this year. Among the points clarified are:

- **"Qualifying exigency":** The DOL defined this term to include the following 8 situations: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities to address other events which arise out of the covered military member's active duty or call to active duty status, provided the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave. A new optional WH384 form has been adopted to allow employees to self-certify the reasons support their claims of qualifying exigencies.
- **"Single 12 month period":** The DOL determined that the most appropriate method for establishing the "single 12-month period" for purposes of military caregiver leave is a period that commences on the date an employee first takes leave to care for a covered servicemember with a serious injury or illness.
- **"Next of kin":** The DOL prioritized the nearest blood relatives who may be considered "next of kin of a covered servicemember" and excluded the covered servicemember's spouse, parent, son, or daughter, as they already are entitled to leave for this purpose. The regulations permit covered servicemembers specifically to designate in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously.

- **Number of leaves to care for covered servicemembers:** The DOL ruled that eligible employees could take more than one period leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any “single 12-month period.”
- **No overlapping of servicemember and family/medical leaves:** Leave that qualifies both as leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the “single 12-month period” cannot be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition.
- **Employee notice of qualifying exigency leave:** Employees are not obligated to provide notice to employers when they first become aware of a covered family member’s active duty or call to active duty status. The DOL believed this was an unnecessary requirement because many employees with a covered military member may never need to use qualifying exigency leave. As a result, an employee’s obligation to provide notice of leave due to a qualifying exigency is triggered when the employee first seeks to take such leave. Where this leave is foreseeable, eligible employees must provide notice to the employer that is “reasonable and practicable.”
- **Medical certification for military caregiver leave established:** The DOL concluded that the certification requirements for taking leave to care for a covered servicemember necessarily must be different from those for taking leave to care for a family member with a serious health condition because the “triggers” for taking each type of leave are different. The military family leave amendment’s definitions of “serious injury or illness” and “covered servicemember” contain specific components that are unique to military servicemembers that would not adequately be addressed if the certification requirements for a serious health condition were adopted for purposes of military caregiver leave. Moreover, adopting the existing FMLA certification requirements for purposes of military caregiver leave would permit an employer, in some instances, to obtain medical and other information that is not relevant to support a request to take FMLA leave to care for a covered servicemember. At the same time, citing to comments submitted by Jackson Lewis, the DOL also agreed that a certification for military caregiver leave should contain certain information about the need for leave that is also required of individuals requesting FMLA leave to care for a family member with a serious health condition, such as the probable duration or the injury/illness and the frequency and duration of the leave. Accordingly, the final rule creates a new regulatory section, § 825.310, which sets forth separate certification requirements for military caregiver leave. The DOL also created a new optional WH385 Form for use in obtaining medical certifications of Military Caregiver Leave.