



Employment Notes

DOL PUBLISHES FINAL RULE TO IMPLEMENT FIRST-EVER AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT

On November 17, 2008, the United States Department of Labor (“DOL”) finalized a new rule (the “Final Rule”) that implements the January 2008 amendments to the Family and Medical Leave Act (“FMLA”). The Final Rule is responsive to the military family leave requirements of the National Defense Authorization Act of 2008 (“NDAA”) and several court decisions which invalidated portions of the current FMLA regulations. The Final Rule becomes effective on January 16, 2009.

Basic FMLA Requirements. Generally, the FMLA entitles eligible employees to take up to 12 weeks of unpaid leave in a 12-month period for certain family and medical reasons. Upon return from FMLA leave, an employer must restore the employee to his or her original or equivalent job with the same pay, benefits and other conditions of employment.

New Military Family Leave. The Final Rule clarifies employers’ obligations in connection with the NDAA’s provision of military family leave. First, eligible employees shall be able to take up to 26 weeks of leave in a single 12-month period to care for a family member who is a covered service member with a serious illness or injury incurred on active duty. Second, the new military leave makes 12 weeks of leave available to eligible employees with a covered family member serving in the National Guard or Reserves for use during “any qualifying exigency” while the service member is on active duty in support of a contingency operation. The Final Rule broadly defines “qualifying exigency” for which leave may be taken: (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 not specifically provided but agreed upon by the employer and employee.

Clarification of Penalties for Employer’s Failure to Timely Designate FMLA Leave. The U.S. Supreme Court’s decision in *Ragsdale v. Wolverine World Wide* invalidated the provision of a regulation which harshly penalized employers for failing to timely designate FMLA leave. The invalidated provision required an employer to provide a full 12 weeks of additional FMLA leave to an employee if the employer did not designate the initial leave as FMLA in accordance with FMLA notice requirements. The Final Rule removes the categorical penalty and provides that an employer may be liable for additional leave only where an employee can show that he or she suffered specific harm due to the employer’s neglect in following the designation rules.

Paid Leave Substitution Simplified. Although the FMLA provides for unpaid leave, employees may take, or employers may require employees to take, accrued paid leave concurrently with FMLA leave. Under the Final Rule, all paid leave – whether vacation, personal, family or sick leave – will be treated the same with respect to the FMLA’s procedural requirements.

“Serious Health Condition” Definitional Guidance. The FMLA’s existing definitions includes as a “serious health condition” a period of incapacity lasting more than three consecutive, full calendar days, and which requires either (i) two visits to a health care provider, or (ii) continuing treatment. The Final Rule clarifies that the two visits must occur within 30 days of the beginning of the period of incapacity. The Rule also provides that the first of the two visits or the beginning of continuing treatment must occur within seven days of the first day of incapacity.

Employee Notice Requirements Modified. The current regulations allow employees to provide notice to his or her employer of the need to take FMLA leave up to two business days after the leave has begun. The Final Rule provides that, absent exigent circumstances, employees requiring FMLA leave must follow their employer’s usual and customary call-in procedures for reporting absences.

Right to Waive Claims Solidified. The Final Rule explicitly provides that employees may voluntarily release their FMLA claims against an employer without seeking DOL or court approval.

Miscellaneous Additional Clarifications. DOL’s Final Rule provides several additional clarifications concerning (i) the FMLA’s impact on “perfect attendance awards,” (ii) employers’ notice obligations, (iii) HIPAA, (iv) medical and fitness-for-duty certification processes, and (v) the effect of an employee’s “light duty” work while on FMLA leave.

Conclusion. Employers should make sure they are familiar with the new FMLA regulations and that their policies and workplace posters are compliant with the new FMLA regulations.

This is a general summary of recent regulatory action and is not intended to be legal advice rendered in response to a specific set of facts. If you have any questions regarding the FMLA or other issues of employment law please contact any of the following partners in our Employment Law Group:

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