

## In This Issue:

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The much-anticipated revised DOL regulations on the Family and Medical Leave Act have been released. The new regulations do not dramatically change what can be a frustrating law, but they do provide some clarity on employee eligibility issues, notice requirements, and employer obligations. The new regulations are effective January 16, 2009.

## Relief in Sight? DOL Issues Final FMLA Regulations

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More than 15 years after the Family and Medical Leave Act (FMLA) was signed into law, the U.S. Department of Labor (DOL) chose to evaluate and revise regulations that it had promulgated in 1995 during President Clinton's Administration. For much of that period, employers and their Washington, D.C. representatives pressed the case that substantial burdens had been added to the process of leave administration under the FMLA by the DOL rules. Almost from the day that Republican President George W. Bush came into office in 2001, employer hopes grew that some of the more challenging aspects of the DOL regulations would be revised in a manner that would relieve those obligations and constraints. More than seven years later, the Bush Administration proposed revised FMLA rules that promised to provide a variety of changes, while leaving relatively untouched several problematic aspects of the agency's regulations (such as the sometimes difficult challenges posed by the use of intermittent leave by employees without prior notice). The revisions that now have been issued are final, to be effective, as noted above, on January 16, 2009.

Revision of the agency's FMLA rules effectively were compelled by two developments: (1) decisions of the courts, including the U.S. Supreme Court, striking down or seriously questioning certain aspects of the current regulations; and (2) the addition of family military leave provisions to the FMLA. That latter was the result of H.R. 4986, the National Defense Authorization Act, which was signed into law by President Bush in January 2008. Those factors, together with voluminous information and commentary obtained by the Department through a 2006-07 "Request for Information" process, led to 200 pages of revised FMLA regulations.<sup>1</sup> In addition to the revised regulations, the DOL included a lengthy Preamble summarizing the large number of public comments (nearly 5,000) received by the agency.

The DOL's Preamble addresses various concerns with the current regulations that were identified by employers, unions, workers and advocacy groups in the rulemaking process. The changes, however, will disappoint many of these affected parties (at least in some respects). As a general matter, employers should be pleased with many (though not all) of the modifications made to the prior rules, but they may wish that the business-friendly Bush Administration had directly addressed more of the most frustrating aspects of the current regulations. Those who represent employees, advocacy groups and labor

unions generally have been critical of the changes that were proposed, arguing that the agency's revised regulations were unnecessary and will only discourage employees from exercising their statutory rights to leave, and interfere with the job protections codified in the statute. The DOL's treatment of important FMLA issues, and their anticipated practical impact on leave administration, are outlined in detail below with the exception of the regulations regarding leave due to a "military exigency" or leave to care for a servicemember. The new regulations addressing the family military leave requirements are detailed and lengthy, so these regulations are summarized below, but described in detail in a separate Littler ASAP, *Department of Labor Clarifies FMLA Amendments Related to Servicemember Care and Other Military-Related Exigencies*.

## Family Military Leave

The DOL has clarified many of the ambiguities created by the proposed regulations issued on January 28, 2008, covering the new family military leave provisions signed into law by President Bush. Under the new family military leave provisions, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" has been entitled to take up to 26 work weeks of leave during a single 12-month period to care for the service member. For purposes of military caregiver leave, a *covered service member* is defined as "a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty." Thus, military caregiver leave is not limited to members of the National Guard or Reserves who are on active duty or have been called to active duty status, as is the case with the separate concept of "qualifying exigency leave."

With respect to qualifying exigency leave, the January amendments to the FMLA state that an eligible employee may take up to 12 weeks of unpaid leave if the employee's spouse, child or parent is on active duty in the military or is a reservist who faces a recall to active duty if a "qualifying exigency exists." The term "qualifying exigency," however, was not defined and leave for this purpose was not legally available until the DOL promulgated regulations defining the term.

The DOL has now defined the term "qualifying exigency" in the revised regulations by providing a non-exhaustive list of the types of circumstances that will qualify. The new regulations also make clear that to be eligible for this type of leave, the employee's family member must be a member of the military reserves or National Guard when called to active duty and not already on active duty. Leave is not available for a covered service member already on active duty.

The DOL has also answered the hotly debated issue about whether employees who seek leave to care for a seriously injured or ill servicemember are limited to only one 26-week leave period during their entire employment or one per 12-month period by stating that, depending on the circumstances, an employee may take more than one 26-week leave period during his or her employment. An eligible employee is entitled to a combined total of 26 workweeks of leave for military caregiver leave and leave for any other FMLA-qualifying reason during the same "single 12-month period," provided that the employee takes no more than 12 work weeks of leave because of a qualifying exigency or for any other FMLA-qualifying reason. For example, an eligible employee may, during the single 12-month period, take 18 weeks of FMLA leave to care for a covered servicemember and 8 weeks of FMLA leave because of the employee's own serious health condition, so long as the employee does not take more than 12 weeks of leave due to his or her own serious health condition or any other FMLA-qualifying reason. A "single 12-month period" begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 work weeks of leave entitlement for other FMLA-qualifying reasons.

Military caregiver leave is to be applied on a per-covered-service member, per-injury basis. In other words, an eligible employee may be entitled to take more than one period of 26 work weeks of leave during his or her employment if the leave is to care for different covered service members or to care for the same service member with a *subsequent* serious injury or illness, except that no more than 26 work weeks of leave may be taken (for any FMLA-qualifying reason) within any "single 12-month period." The regulations also explicitly allow an employee to split the 26 weeks of leave for different reasons.

For additional information on the family military leave provisions in the new DOL regulations see Littler National ASAP, *Department of Labor Clarifies FMLA Amendments Related to Servicemember Care and Other Military-Related Exigencies*

## Clarification of FMLA Eligibility Requirements

As for the traditional FMLA issues, the FMLA has always afforded *eligible* employees the right to take job-protected leave for up to 12 work weeks in a 12-month period. The Act defines the term “eligible employee” as an employee who has been employed for at least 12 months and worked at least 1,250 hours in the past 12 months.<sup>2</sup> The Act excludes from eligibility any employee who is employed at a worksite with fewer than 50 employees if the total number of employees who work within 75 miles of that worksite is also under 50. In most situations, an employer can determine an employee’s eligibility for FMLA leave by answering three basic questions: (1) Was the employee hired more than one year ago? (2) Did he or she work at least 1,250 hours in the past 12 months? (3) Do at least 50 employees work at or within 75 miles of his or her worksite? The revised regulations provide for more complicated situations, such as determining eligibility for workers reemployed after performing military service, or who work remotely rather than at a fixed worksite, etc.). Sections 825.110 and .111 of the revised regulations, discussed below, address these issues.

### **Eligibility Based on Months of Service**

Revised section 825.110(b) expounds on the statement in the prior, proposed regulation that the 12 months of employment need not be *consecutive* months. Any period of prior employment within seven years must be counted. According to the Preamble, this strikes a fair balance between the burden on employers to retain records and the impact that extended leaves from the workforce can have on employees, especially women. The Preamble also notes that, if an employer only retains records for the maximum time prescribed by the FMLA (three years), then it is incumbent on the *employee* to submit sufficient proof of his or her prior employment (e.g., W-2 forms, pay stubs, etc.).

The seven year rule has two exceptions. Periods of employment *older* than seven years are counted: (1) for breaks in service because of National Guard or Reserve military service obligations, and for time served performing military service; and (2) when a written agreement, including a collective bargaining agreement, exists documenting the employer’s obligation to rehire the employee after the break in service.

### **Eligibility Based on Hours of Service**

Revised section 825.100(c) provides that an employee returning from National Guard or Reserve military service must be credited with the hours of service that would have been worked *but for* the period of military service. Specific guidelines for calculating the employee’s pre-service hours of work are not included in revised section 825.100(c). The Preamble merely states “the employee’s pre-service work schedule can generally be used for calculations.”

Revised section 825.100(b) and (c) continue to state that any week where the employee is maintained on the payroll counts as a week of employment, including periods of paid or unpaid leave (sick, vacation). However, only hours of work within the meaning of the Fair Labor Standards Act (FLSA) count towards the 1,250 hour threshold.

### **When is Eligibility Determined**

Revised section 825.100(d) continues to state that the determination of whether the employee has worked 1,250 hours in the past 12 months must be made as of the date the FMLA leave is to *start*, not when leave is requested. Courts have been split on whether an FMLA-ineligible employee may become eligible for FMLA leave while on non-FMLA leave. Revised section 825.110(d) incorporates the more liberal construction of the FMLA, declaring that an employee’s non-FMLA leave may ripen into FMLA leave (meaning the employee may have greater reinstatement and other rights as compared to when the leave started). Time missed from work before the employee attained eligibility is not protected by the FMLA, but it also may not be counted against the employee’s allotment of FMLA leave. In short, the employee given discretionary leave prior to being FMLA-entitled gets a full 12 weeks upon entitlement, even if the discretionary leave morphs into FMLA leave.

## Determining Whether 50 Employees Are Employed Within 75 Miles

Revised section 825.100(e) continues to state that the determination of whether 50 employees are employed within 75 miles must be made as of the date the FMLA is *requested*, not when the leave is to *start*. (As noted above, the determination of whether the employee can satisfy the months and hours in service requirement is made based on the date the leave is to *start*.) An employee's eligibility is still unaffected by fluctuations in staffing *after* the determination has been made (e.g., a reduction-in-force).

Revised section 825.111(a) covers the standard for determining an employee's worksite when the employee is *jointly employed* by two or more employers. The worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year (presumably a calendar year, not the primary employer's FMLA leave year) at a facility of a secondary employer, in which case the worksite is that location.

This section continues to state that the standard for determining an employee's worksite when the employee has no fixed worksite (e.g., salespersons) is the home base, from which work is assigned, or to which the employee reports, not the employee's personal residence. Employees who "telecommute" are now expressly encompassed by this section. Revised section 825.111(b) confirms the DOL's prior opinion that the 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed.

## Changes to the Definition of a "Serious Health Condition"

While the revised regulations retain the six individual definitions of a *serious health condition*, they add guidance and clarification on regulatory matters. First, one of the six definitions of a *serious health condition* involves a period of incapacity of more than three consecutive, full calendar days and either: (1) two visits to a health care provider; or (2) treatment by a health care provider with at least one visit that results in a regimen of continuing treatment.<sup>3</sup> Under the previous regulations, the time frame under which these visits must be made was not clear. With the revised regulations, it is now clear that the two visits to a health care provider must occur within 30 days of the start of the period of incapacity, and that the first visit in either the "two visit" situation or the "regimen of continuing treatment" situation must occur within seven days of the start of incapacity.<sup>4</sup>

A second clarification under the revised regulations deals with another one of the six definitions of a serious health condition – the *chronic* serious health condition. Under the previous regulations, treatment for a *chronic* serious health condition required *periodic visits* to a health care provider without further elaboration as to what constitutes such visits. The revised regulations now make clear that *periodic visits* require at least two visits to a health care provider per year. Other sections related to the serious health care definitions remain substantively unchanged.

## Employer Notice Obligations

By way of the revised regulations, the DOL sought to consolidate the somewhat scattered notice requirements placed on employers by the former regulations, and provide detailed substantive guidance about what each notice should include. There are four different notice requirements under the revised regulations, all of which the DOL has made available in a prototype for employer use.<sup>5</sup> See the DOL website at [www.dol.gov/esa/whd/fmla/index.htm](http://www.dol.gov/esa/whd/fmla/index.htm).

(1) *The General Notice*. This general posting requirement remains largely unchanged in the revised regulations, and requires that employee rights under the FMLA be posted conspicuously at the worksite of any covered employer, regardless of whether that employer has any FMLA-eligible employees. This notice must be easily readable by applicants and employees, and must be posted in alternate languages if an employer has a significant portion of its workforce that is not literate in English. The revised regulations now permit this General Notice to be posted electronically, as long as employees have access to information in electronic form. Furthermore, the revised regulations now require that if an employer has even *one* eligible employee at its worksite, this General Notice must be published in the employee handbook or other written benefits communication, or, if such material does not exist, given to each new employee upon hire.

(2) *Eligibility Notice.* The revised regulations continue to place the full burden of communicating employee eligibility for FMLA leave on the employer. However, employers now have an extended period of five (instead of two) business days from the date the employer becomes aware of the need for leave to communicate such eligibility information. The eligibility notice must state whether the employee meets the eligibility requirements (minimum months and hours), and if not at least one reason why not. For example, an employee who has not worked the requisite one year may be deemed ineligible based on that statutory requirement alone, and an employer need not go further to calculate hours worked or determine the existence of a serious health condition.

(3) *Notice of Rights and Responsibilities.* The revised regulations now distinguish the contents of the Notice of Rights and Responsibilities and the Eligibility Notice discussed above, although the contents of this notice do not impose new substantive requirements on employers. Furthermore, because this notice must be provided at the same time employees receive their Eligibility Notice, the DOL's prototype notice in Appendix D (Form WH-381) of the Regulations displays both notices in the same document, allowing employers to streamline the administration of these notice requirements. The purpose of the Notice of Rights and Responsibilities is to inform employees of their obligations and expectations while on FMLA. The revised regulations require this notice to include the following types of information:

- That the leave, if approved, will be counted against an employee's FMLA entitlement, as well as the applicable 12-month period for such entitlement;
- Whether certification of a serious medical condition of the employee or eligible family member by a healthcare provider, or certification of exigent circumstances for military family leave will be required;
- The employee's right to substitute paid leave, or whether the employee will be required to substitute paid leave;
- The employee's right to maintenance of benefits during the leave and restoration to the same benefits upon return from leave;
- Any requirements for the employee to make premium payments for healthcare benefits, the process for making payments, and the consequences if the employee fails to make the payments;
- The employee's potential liability for payments of employer-paid healthcare premiums if the employee fails to return to work at the end of the leave; and
- If the employee is a key employee, the circumstances under which restoration to the employee's job may be denied.

(4) *Designation Notice.* Finally, employers must continue to notify employees that their leave is being designated as FMLA leave. This notice **must now be in writing**, and, absent extenuating circumstances, the time period for such designation has been extended to within five business days of the employer's knowledge that such leave is FMLA-qualifying. The revised regulations also contain several new substantive requirements for this notice, the most notable of which are described below:

- When leave is not determined to be FMLA-qualifying, employers must now inform the employee of that determination and the reasons for the determination.
- The Designation Notice must also inform the employee, to the extent known at the time, of the amount of leave time that will be counted against his/her FMLA entitlement.
- This Designation Notice must also include any mandatory substitution of paid leave, which will run concurrently with the employee's FMLA entitlement.
- The Revised Regulations also now require that if an employer is going to require a fitness-for-duty certification from a treating physician that the employee is able to perform the essential functions of the job as a condition of returning to work, such Designation Notice must include a list of those essential functions.

## ***Consequences of Employer's Failure to Provide Timely or Accurate Notice***

The revised regulations *delete* controversial provisions "deeming" an FMLA *ineligible* employee as eligible for FMLA leave when the employer provides untimely or incomplete FMLA-related information. This addresses one of the most frequent deficiencies in employer

leave administration, particularly in the first years of operation under the statute, the failure to provide notice that an employee's absence counted towards the individual's FMLA leave entitlement. A common question was and has continued to be, "what happens if a failure to designate leave is discovered "after the fact" – *i.e.*, is it ever appropriate to retroactively classify an absence or period of absence as counting towards an employee's statutory leave rights? The original regulations were clear on their face: such a practice would not be lawful.

Nearly ten years after the statute's enactment, the U.S. Supreme Court issued its first decision under the FMLA in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which dealt with the above questions. In that ruling, the Court struck down the categorical penalty imposed by the original regulations, which effectively prohibited retroactive designation of FMLA leave. That regulation provided – at 29 C.F.R. §825.700 (a) – that if an employee takes paid or unpaid leave and the employer does not designate the leave as counting towards the individual's statutory entitlement, the leave taken does not count against an employee's statutory leave entitlement. The Supreme Court held that this treatment exceeded the authority granted by Congress and was contrary to the statute's remedial requirement that an employee demonstrate individual harm. The Court suggested that if an employee can demonstrate that he or she suffered individualized harm because of the failure to follow the notification rules, the employer may be liable.

In keeping with the Supreme Court's ruling, the revised regulations provide that retroactive designation of leave as counting towards the individual's FMLA entitlement can be appropriate in some circumstances. Section 825.301 (d) and (e) now make clear that if such a retroactive designation is accompanied by notice to the employee (as specified elsewhere in the regulations), and takes place only where it does not cause harm or injury to the individual, or – alternatively – where the employer and the employee mutually agree on the retroactive designation, it is proper. By contrast, if an employer's failure to designate leave in a timely manner causes the employee to suffer harm, it can be construed as an interference with, restraint on or denial of the right to leave provided by the statute. Such a finding can result in an award of compensation and wages lost through that violation, for other actual monetary losses that can be linked to that deficiency, and certain forms of equitable relief (*e.g.*, employment, reinstatement, promotion, etc.)

## Employee Notice Obligations

The revised regulations contain significant changes as to what notice an employee is required to provide his or her employer with respect to the need for foreseeable FMLA leave (section 825.302) and unforeseeable FMLA leave (section 825.303), and the ramifications of the employee's failure to provide notice. The DOL sought to reduce the impact of taking leave and uncertainty in the workplace without negatively impacting those employees who need FMLA leave.

### ***Employee Notice Requirements for Foreseeable FMLA Leave***

*Timing of the Notice.* Employees must provide at least 30-days' notice for foreseeable leave, or if that is not possible, notice must be given "as soon as practicable." The revised regulations add the requirement that in those cases where the employee is required to provide at least 30-days' notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.<sup>6</sup> The DOL Preamble notes that an employee's obligation to provide an explanation for failing to provide 30-days notice was implicit in the prior regulations, but that "making clear that employees may be required to explain why they provided less than 30-days notice of the need for foreseeable leave emphasizes the importance of the notice requirement under the FMLA."

*Definition of "as soon as practicable."* The prior regulations defined *as soon as practicable* as one or two business days from when the need for leave became known to the employee. The revised regulations state "[w]hen an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances."<sup>7</sup>

*Content of the Notice.* An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and also must advise the employer of the anticipated timing and duration of the leave.<sup>8</sup> Although an employee

need not expressly assert rights under the FMLA, or even mention the FMLA, the first time he or she seeks leave for a particular FMLA-qualifying reason, if the employee makes subsequent leave requests for the same FMLA-qualifying reason for which the employer had previously provided FMLA leave, the employee must specifically reference the qualifying reason for the leave or the need for FMLA leave. In all cases, if the employer needs more information to determine whether the reason for the leave is FMLA-qualifying, the employer should inquire further and may request medical certification. If the employee fails to respond, and the employer is unable to determine if the reason for the leave is FMLA-qualifying, the employer may deny FMLA protection.

*Compliance with the Employer's Policy.* The revised regulations specify that “[a]n employer may require an employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances,” *unless the timing requirements are more stringent than the timing for FMLA notice.* The DOL further warned that where an employee does not comply with the employer’s “usual notice and procedural requirements” and “no unusual circumstances justify the failure to comply,” FMLA-protected leave may be delayed or denied. This change was also added to the regulation regarding the employee’s notice obligation for unforeseeable FMLA leave.<sup>9</sup>

## **Employee Notice Requirements for Unforeseeable FMLA Leave**

*Timing of Notice in an Unforeseeable Leave Situation.* Notice must be provided “as soon as practicable.” The revised regulations state that it “generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer’s usual and customary notice requirements.”<sup>10</sup> The DOL deleted the requirement that notice should be provided within no more than one or two working days of learning of the need for leave.

*Content of Notice and Compliance with the Employer's Policy.* These requirements are essentially the same for both foreseeable and unforeseeable leave.

## **Consequences of Employee's Failure to Provide Timely Notice**

If the employee fails to give timely advance notice with no reasonable excuse when 30-days’ notice is required for foreseeable leave, the employer may delay FMLA coverage until 30 days after the employee provides notice. If the employee fails to give notice as practicable under the circumstances for unforeseeable leave or when less than 30-days notice is required for foreseeable leave, the extent to which the employer may delay the FMLA-protected leave depends on the facts and circumstances. For example, if the employee could reasonably have given two weeks notice but gave only one week, the employer may delay the leave for a week. In all cases, if the employee nevertheless takes the leave despite the employer’s notice to the employee delaying the approved start of the leave, the time taken will not be FMLA-protected. This, of course, is a mixed blessing to employers – the employee can be disciplined if the unprotected absence otherwise would lead to discipline, but the total amount of leave could also be extended as the FMLA does not apply to the uncovered leave period.

## **Clarifications to the Medical Certification Process**

As a general rule, employers may require employees to provide a certification from their health care provider to support the need for leave due to a serious health condition.<sup>11</sup> The revised regulations address several issues raised by employees and employers regarding the certification process, timing, content, authentication and clarification of the certification and recertification. Some of the more significant changes are discussed below.

*Timing.* The revised regulations increase the time frame within which an employer may request a certification from two business days to five business days after the employee provides notice of the need for FMLA leave. The request must be in writing. The employee must provide a complete and sufficient certification within 15 calendar days after the employer’s request.

*Complete and Sufficient Certification.* The revised regulations define *incomplete certification* as one in which one or more entries have not been completed. An *insufficient certification* is one in which the information is vague, ambiguous, or nonresponsive. If a certification is incomplete or insufficient, an employer must notify its employee in writing of what information is necessary to complete the medical

certification and provide the employee at least seven calendar days to furnish the additional information. Failure to cure the deficiencies identified by the employer may result in the denial of the FMLA leave. In a worst case scenario for employers, of course, this provision could cause a discharge or discipline decision to be pending for up to 22 days.

*Annual Medical Certifications.* If a serious health condition of an employee or employee's covered family member lasts beyond a single leave year, an employer may require a new certification in each subsequent leave year in which the employee takes FMLA leave. This revision codified a 2005 DOL opinion letter.

*Content of the Medical Certification.* The revised regulations list the information that can be requested in a medical certification and provide new certification forms that satisfy the regulatory requirements. For purposes of the FMLA, an employer may not request information beyond what is specified in the regulations and the DOL-sanctioned certification forms. However, an employer may request additional information pursuant to the Americans with Disabilities Act (ADA), workers' compensation statutes, or to assess qualification for the company's paid leave or disability plans or policies that run concurrent with the FMLA.

The DOL also codified its long-standing position that it is an employee's responsibility to provide complete and sufficient certification upon request. An employer may not require an employee to sign a release to allow the company to obtain medical information as a condition of taking FMLA leave. However, if the employee fails to provide the required certification, the employer may deny the leave.

*Authentication and Clarification of the Medical Certification.* As a general rule, after providing the employee seven days to cure any deficiencies in the certification, if the employer still has questions about the information provided, the employer may contact the employee's healthcare provider to clarify or authenticate an FMLA certification. Under the prior regulations, the employer could only use a health care provider to contact the employee's health care provider. The most significant change to the revised regulations is that an employer may now also use a human resources professional, a leave administrator, or a management official to directly contact the employee's health care provider for authentication or clarification of information on the certification form. However, the revised regulations expressly prohibit the employee's direct supervisor from contacting the employee's healthcare provider. The revised regulations also continue to prohibit employers from seeking additional information beyond what is permitted in the certification form.

The revised regulations also mandate that the privacy rules of the Health Insurance Portability and Accountability Act (HIPAA) apply when a HIPAA-covered healthcare provider shares an employee's individually-identifiable health information with an employer. If an employee chooses not to provide authorization that would allow the employer to clarify the certification and does not otherwise clarify the certification, the employer may deny the designation of the FMLA leave.

*Recertification.* The general rule is that an employer may not request recertification more often than every 30 days unless:

- an employee requests an extension of FMLA leave;
- the circumstances described in the previous certification have changed; or
- the employer receives information casting doubt upon the reason for the absence or the validity of the certification

In addition, if a medical certification provides that the minimum duration of the medical condition is more than 30 days, the employer must wait until the end of that period to request recertification, except that the revised regulations now provide that in all cases an employer may request recertification of a medical condition every six months.

## **Fitness for Duty Certification**

The revised regulations provide additional guidance, and an additional degree of flexibility for employers, when employees return to work following FMLA leave. Under the new rules, restoring an employee whose leave was triggered by his or her own serious health condition can be subject to a uniformly-applied requirement that all similarly-situated employees submit a healthcare provider's certification that the individual is able to resume work. That type of authorization can relate only to the condition that was the basis for the leave. An important change is the ability of employers to require that the certification must address specifically the employee's ability to perform the essential functions of his or her job. To facilitate that process, employers must notify employees of that requirement at the same time they provide

the “designation notice” required under the regulations, at which time they also should be supplying a list of the employee’s essential job functions. Certain employer representatives now will have the opportunity to directly check with the healthcare provider for purposes of clarifying and authenticating such certifications, but they cannot delay the employee’s return to work while that contact is being made.

With respect to leave taken on an intermittent or reduced schedule basis, an employer cannot require a fitness-for-duty certification in connection with each absence of that type. However, the employer can seek such certification once every 30 days (or less frequently) if “reasonable safety concerns” exist regarding the performance of the individual’s job duties, based on the condition that triggered his or her leave. For these purposes, the term *reasonable safety concerns* means a reasonable belief that there is a significant risk of harm to the individual employee or to others. State or local law, or collective bargaining agreements may govern return-to-work processes, and if so, those provisions will apply.

FMLA fitness-for-duty exams are at the expense of the employee. An employer will remain free to delay restoration following leave until satisfaction of a fitness-for-duty requirement that had been properly communicated. After a return from FMLA-protected leave, if there is a need for further medical inquiry regarding the performance of essential job functions, those likely would be governed by the ADA, which permits only those exams that are job-related and consistent with business necessity, which are at the employer’s expense.

## Charging FMLA Entitlement Time for Light-Duty Work

The revised regulations clarify that the time employees spend in a voluntary, light-duty assignment does *not* count toward their FMLA leave allotment and that their right to job restoration is held in abeyance while performing light duty or until the end of the applicable 12-month period.<sup>12</sup>

Under the previous regulations, an employee’s right to restoration to the same or equivalent position was available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of light duty. At least two court decisions had interpreted the old regulation language to mean that an employee completely uses his or her 12-week FMLA entitlement while performing in a light-duty assignment. As those holdings differed from the DOL’s interpretation of the previous regulations, the DOL Preamble clarifies that the time spent in a voluntary light-duty position does not count against the employee’s FMLA entitlement. While the DOL recognized that allowing an employee to work in a light-duty position may cause a burden to the employer, the FMLA does not require an employer to offer a light-duty position, and the employer only does so on a voluntary basis.

In addition, the revised regulations state that an employee’s right to restoration is protected while in a light-duty assignment. Again, the DOL Preamble focuses on the fact that an offer of light-duty assignment is not required, but is only a voluntary agreement between the employer and employee. By way of example, if an employee has FMLA leave remaining when he or she begins a light-duty assignment, upon the end of the assignment the employee has a right to be restored to the same or equivalent position the employee held at the time the FMLA leave commenced, assuming the employee can perform the essential functions of the position. If the light-duty assignment ends before the employee can perform the essential functions, the employee may use the remaining FMLA leave available.

Some commentators, on behalf of employers, noted that an open-ended light-duty assignment could potentially lead to an indefinite period for job restoration rights if the job restoration is held in abeyance while the employee is on light duty. In order to address that administrative difficulty, the revised regulations provide that an employee’s restoration right while in a light-duty assignment expires at the end of the 12-month leave period the employer uses to calculate FMLA leave.

## Lack of Major Changes to Intermittent Leave/Reduced Leave Schedule

The revised regulations provide few substantive changes to the sections addressing intermittent leave or reduced scheduled leave. One change is that military caregiver leave and leave for a qualifying exigency are specifically included as bases for intermittent leave/reduced scheduled leave.<sup>13</sup>

The DOL has also clarified that employees who take intermittent leave for planned medical treatments have an obligation to make a

“reasonable effort” to schedule treatment so as to not unduly disrupt the employer’s obligations. Despite comments seeking further clarification of what constitutes a “reasonable effort,” the revised regulations do not provide any definition.

The final substantive change related to intermittent/reduced leave schedule is that the revised regulations create a “physical impossibility exception.” Under the exception, where it is physically impossible for an employee using intermittent/reduced leave schedule to start or end work mid-way through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee’s FMLA entitlement. For instance, if a flight attendant’s need for three hours of intermittent leave caused her to miss her normal flight assignment that would last eight hours, the entire eight hours would count as FMLA leave.

## Substitution of Paid Leave

The FMLA was enacted to address the need for employees to take certain types of leave without the fear of losing their jobs. However, while the FMLA gives employees the right to take such leave, it does not provide for any type of compensation during that time away from work. Both the former and revised regulations address this gap in compensation by permitting employees to elect, or employers to require, that employees substitute paid leave for unpaid FMLA leave. The revised regulations also finally clarify that the paid leave time runs concurrently, and not in addition to, unpaid FMLA time.

However, unlike the former regulations, the revised regulations now permit employers to require compliance with *all* of their normal paid time off policies and procedures applicable to the type of paid leave being used in conjunction with FMLA leave.<sup>14</sup> For example, an employer that has a policy requiring paid personal time to be taken in full day increments may now require employees to either utilize a full day of personal time, or continue on unpaid FMLA leave. Similarly, an employer’s vacation policy requiring two days’ notice for paid vacation leave would equally apply to an employee who is using FMLA leave. While employers may waive these requirements, the change allows employers to uniformly apply their paid time off policies consistently for employees who are on leave for both FMLA-qualifying and non-qualifying reasons, which as the DOL notes, have always included restrictions on use.

The revised regulations also include a significant change for public employers who permit the accrual of compensatory time in lieu of paying cash to employees who work overtime under the Fair Labor Standards Act. These public employers may now permit or *require* employees to substitute such compensatory time for unpaid FMLA leave, and count the time against an employee’s overall FMLA entitlement, as with any other type of accrued, paid leave.<sup>15</sup>

## Use of Paid Time for Employees Receiving Disability or Workers’ Compensation Benefits

The revised regulations further seek to remedy some of the confusion regarding the use of accrued, paid leave by employees who are currently receiving disability or workers’ compensation benefits, while also out of work for an FMLA-qualifying reason. The DOL noted that because those employees are not on “unpaid” leave – they are receiving a portion of their regular pay via disability or workers’ compensation benefits – the provisions regarding substitution of paid leave are inapplicable.<sup>16</sup> In other words, neither employees nor employers may *require* the use of accrued, paid leave to supplement an employee’s disability or workers’ compensation income. Such a result may only be reached through a voluntary agreement between the employer and the employee. Thus, for administrative purposes, an employee’s 12-week FMLA leave entitlement is calculated without regard to whether an employee and employer agree to supplement the employee’s pay with accrued, paid leave – again separating the issue of unpaid FMLA leave from the potential for compensation while out on such leave. Therefore, as a practical matter, while such disability or workers’ compensation-related absences may run concurrently with an employee’s FMLA leave entitlement, that employee may return to work with his or her entire bank of accrued, paid leave fully intact.

## The Effect of FMLA-Covered Absences on Perfect Attendance Awards

As a general rule, an employee who returns from FMLA leave is entitled to be reinstated to the same position he or she held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.<sup>17</sup> What

constitutes an *equivalent position* as described in section 825.215 has not changed. The revised regulations, however, make one substantive change to this section. Now, an employer is permitted to disqualify an employee from a bonus or other payment based on achievement of a specified goal such as hours worked, products sold, or perfect attendance, where the employee has not met the goal due to taking an FMLA leave, unless the bonus or payment is otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

The DOL Preamble indicates that this new change provides a win-win situation for the employer and employee. It encourages employers to offer productivity or attendance awards, and save costs by deterring absences. Employees benefit from the potential increase in income and an increase in employee morale and incentives. Although employee advocacy groups assert that this change will discourage employees from taking FMLA leave, the DOL highlighted several comments from employers that the prior regulatory requirements, which required an employer to provide perfect attendance awards to individuals with less than perfect attendance, are “illogical and unfair, and have caused many companies to modify, or eliminate altogether, perfect attendance reward programs.”

This regulation benefits employers who want to design a bonus plan without violating the FMLA. As a practice tip, employers should evaluate their policies to make sure they are not disqualifying individuals on FMLA-qualified leave while allowing employees on non-FMLA leave (for example, paid vacation or sick leave unrelated to FMLA leave) to receive such awards. Employers also should discuss with counsel the effect of such attendance bonuses on the payment of overtime under the FLSA.

## Waiver of Rights Applies Only to Prospective Not Retrospective FMLA Rights

The revised regulations confirm the DOL’s longstanding position that employees may voluntarily settle their FMLA claims without court or DOL approval, and clarify that only prospective, not retrospective, waivers of FMLA rights are prohibited. Previously, the regulations stated that: “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” Now, the revised regulations explicitly state that this waiver provision applies only to “prospective rights” and that “[t]his does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.”<sup>18</sup>

The DOL modified the waiver language to help promote voluntary and efficient resolution of claims, and to reduce unnecessary litigation. This clarification also was necessary given court disagreement as to whether the prior waiver language prohibited the retrospective settlement or release of FMLA claims based on past employer conduct without DOL or court approval.

## Practical Steps for Employers

The revised regulations are effective January 16, 2009. They will require employers covered by the FMLA to make changes to their policies and practices. We recommend that employers, at a minimum, take the following steps:

- Review their FMLA policies and forms to make sure they comply with the new regulations. Discuss changes with counsel to ensure compliance with the law. Any handbook changes should be communicated clearly to all employees.
- Review other policies and procedures that may be affected by the FMLA regulations, such as bonus policies, perfect attendance policies, and call-in procedures.
- Educate and train human resources and other employer representatives responsible for ensuring compliance with the FMLA about the changes in the FMLA, especially given that this is the first time that there are regulations regarding the FMLA amendments pertaining to military caregiver leave and leave for qualifying exigencies for families of National Guard and Reserves. Further, the changes to the employer notice obligations, employee notice obligations, medical certification process, and non-application of “light duty” work toward an FMLA-leave entitlement, are of particular importance in administering FMLA leaves. These individuals need to understand the implications of the changes.

- Employers may wish to create forms to deal with the notice provisions of the regulations. Talk with counsel about whether and how to use or create such forms.
- To the extent the employer uses specific health care providers for second opinions or medical certifications, make sure those providers are knowledgeable of the revised regulations. Fitness for duty analyses will have to be specific and focused on essential job functions.
- Discuss the effects of these legal changes with legal departments and/or outside counsel.

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<sup>1</sup> 73 Fed. Reg. 67934 (Nov. 17, 2008).

<sup>2</sup> 29 U.S.C. § 2611(2)(A).

<sup>3</sup> DOL Preamble notes that the revised regulations added the word "full" to clarify that the test cannot be met by partial days. DOL Preamble at 67,947.

<sup>4</sup> 29 C.F.R. §§ 825.115(a)(1)-(3).

<sup>5</sup> 29 C.F.R. § 825.300.

<sup>6</sup> 29 C.F.R. § 825.302(a).

<sup>7</sup> 29 C.F.R. § 825.302(b).

<sup>8</sup> The DOL added examples of the type of information that may be provided, such as that the employee is pregnant or has been hospitalized overnight. 29 C.F.R. § 825.302(c).

<sup>9</sup> 29 C.F.R. § 825.303(c).

<sup>10</sup> 29 C.F.R. § 825.303(a).

<sup>11</sup> 29 U.S.C. § 2613.

<sup>12</sup> 29 C.F.R. § 825.220.

<sup>13</sup> 29 C.F.R. §§ 825.202(b) and (d).

<sup>14</sup> The former regulations did not permit employers to restrict the use of paid vacation or personal leave in any manner.

<sup>15</sup> 29 C.F.R. § 825.207(f).

<sup>16</sup> 29 C.F.R. §§ 825.207(d), (e); *see also* DOL Preamble, at 191-94.

<sup>17</sup> 29 C.F.R. § 825.214.

<sup>18</sup> 29 C.F.R. § 825.220(d).