

FAMILY AND MEDICAL LEAVE ACT (FMLA) ADDENDUM

Overview

On November 17, 2008, the United States Department of Labor (DOL) published its final rule to implement the first ever amendments to the FMLA. These new regulations become effective on **January 16, 2009** and address two distinct subjects: 1) the new revisions contain a number of important changes and clarifications to the original FMLA regulations regarding such issues as the definition of “serious health condition,” use of paid leave, employee and employer notice obligations, and the medical certification and recertification process; and 2) they provide clarifications and additional details concerning the new military family leave entitlements adopted by Congress in January 2008.

FMLA Summary of Changes

The following are brief descriptions of some of the revisions/clarifications to the current FMLA regulations:

“CURRENT” FMLA	“REVISED” FMLA 2009
Definition of “Serious Health Condition”	
More than three consecutive, full calendar days of incapacity plus “two visits to a health care provider.”	The two visits must occur within 30 days of the beginning of the period of incapacity.
More than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment.	The first visit to the health care provider must take place within seven days of the first day of incapacity.
Chronic conditions that result in periodic incapacity and that require periodic treatment by a health care provider.	The required “periodic visits” are defined as at least two visits to the health care provider per year.
Substitution of Paid Leave	
Different procedural requirements are applied to the use of vacation or personal leave than to medical or sick leave. Additionally, the DOL has treated family leave differently than vacation and personal leave.	The employer may require use of any form of paid leave during FMLA leave. In addition, an employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave.
Fitness for Duty Certifications	
Employers are allowed to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work.	An employer may require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

Medical Certification Process	
An employer, with the employee's permission, may have its own health care provider contact the employee's health care provider in order to clarify or authenticate a FMLA certification.	The employee's permission is no longer required for the employer's health care provider to contact the employee's health care provider. But the employer's representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, <i>but</i> in no case may it be the employee's direct supervisor.
An employer must give the employee notice of incomplete medical certification and provide the employee with an opportunity to correct it.	If an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to correct the deficiency.
Subsequent recertification of the same serious or chronic health condition may be requested on a reasonable basis.	Employers may request a new medical certification each leave year for medical conditions that last longer than one year.

Additional Changes and Clarifications

- **Intermittent Leave:** Employers may now use whatever minimum increment of time (15 mins, ½ hour, and hour) it uses to account for the use of other forms of leave for purposes of calculating intermittent leave use, provided that the increment is no greater than one hour.
- **Employers Notice Obligations:** Covered employers must provide written notice to each employee of his/her FMLA rights at the time of hire. Employers are obligated to provide notice in the language in which employees are literate, even if that is not English. The new rules also allow electronic notification, if certain requirements are met.
- **Light Duty:** Time spent on light duty does not count toward an employee's FMLA leave entitlement.
- **Bonuses:** Employers may consider FMLA absences in determining bonuses and other incentive rewards, providing that such treatment is the same for non-FMLA leave.
- **Designation Periods:** Employers now have five, rather than two, business days to designate leave as FMLA qualifying.

Military Family Leave

On January 28, President Bush signed into law the National Defense Authorization Act for FY 2008 (NDAA), Public Law 110-181. Section 585(a) of the NDAA which

amended the FMLA to provide eligible employees working for covered employers two important new leave rights related to military service:

1. **Military Caregiver Leave (also known as Covered Servicemember Leave):** Eligible employees (the spouse, son, daughter, parent, or next of kin) of a currently active (i.e. not retired) member serving in the military will be able to take up to 26 workweeks of leave in a “single 12-month period.” The leave is to be taken to care for a covered service member with a serious illness or injury incurred in the line of duty. This 26 workweek entitlement is a one-time entitlement with its own 12-month period, although additional leave for this purpose may be available for subsequent injuries or additional service members in the family. Appropriate documentation including a medical certification substantiating the employee’s need for leave will be required.

2. **Military Exigency Leave:** This new 12-week FMLA leave entitlement helps families of members (spouse, son, daughter, or parent) of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The DOL’s final rule defines qualifying exigency by referring to a number of broad categories for which employees can use FMLA leave: (1) Short-notice deployment; (2) Military events and related activities (such as military ceremonies, events, and similar activities related to the service member’s call to duty or departure); (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling from a chaplain, minister, military service organization, or other non-medical provider; (6) Rest and recuperation while the service member is home on short-term leave; (7) Post-deployment ceremonies and activities associated with the service member’s return home; and (8) Additional activities not encompassed in the other categories, but agreed to by the employer and employee.

New FMLA Forms

The DOL has updated many of its optional forms for requesting and designating FMLA Leave, and created new forms for military caregiver leave. These new forms will be available as soon as the policy is updated. Should you have a qualifying event beginning January 16, 2009, please contact Human Resources for the appropriate form (i.e. Military Family Leave).

For more information about the final rules visit the DOL’s website at:
<http://www.dol.gov/esa/whd/fmla/finalrule.htm>.